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A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS; TOGETHER WITH THEIR DUTIES, RIGHTS AND LIABILITIES AS CARRIERS

INCLUDING BOTH

STREET AND INTERURBAN RAILWAYS

By BYRON K. ELLIOTT
AND
WILLIAM F. ELLIOTT

Authors of ROADS AND STREETS, GENERAL PRACTICE, EVIDENCE

Third Edition
VOLUME I

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PREFACE TO THE THIRD EDITION.

It is an interesting fact that no other book on the law of railroads in America has been published since the second edition of this work appeared in 1907. Whatever that fact may be taken to indicate, it places upon the author responsibilities in the preparation of a new edition, which he acknowledges with full appreciation of the significance of the present undertaking to the bench and bar of the country by reason of its being the only legal treatise in its important and extensive field.

Many changes in the law relating to railroads have been made since that date, both by statute and by judicial decision, and many new questions have arisen. The law of master and servant has been greatly altered, in cases of interstate commerce, by the Federal Employers' Liability Act, Safety Appliance Act, and Hours of Service Act and other federal statutes, and in cases of intrastate commerce by State Workmen's Compensation Acts and other state statutes. The Interstate Commerce Act has been amended in many important respects and new laws, both state and federal, have been adopted relative to bills of lading and other subjects often involved in railroad litigation. New questions were and are presented by conditions arising out of the late war and under the Federal Control Act and the Transportation Act, 1920. So too, much new litigation has arisen in regard to railroad and street railway regulation by public service or state railroad commissions and in regard to taxation of such companies.

The new subjects mentioned are treated and covered in this edition. Several hundred new sections and many new chapters have been added; several thousand new cases have been cited; and the text has been carefully revised.

If the standing and worth of a legal text book are accurately shown by the number of times the work is cited in the opinions of the courts then the author acknowledges with gratitude an extremely favorable verdict upon the original work and expresses the hope that the present edition may prove so generally serviceable.

WILLIAM F. ELLIOTT.

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ELLIOTT ON RAILROADS

CHAPTER I.

DEFINITIONS.

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§ 1. Railroad Companies—Definition and characteristics.—Railroad companies may be defined or described as companies or associations organized for the purpose of constructing, maintaining and operating railroads. The general railroad statutes usually provide for incorporation for all of these purposes, and railroad companies are usually organized for all of such purposes, but a company engaged in any one of these things may be a railroad company. Railroad companies are frequently engaged in operating railroads as lessees or the like, although they had nothing to do with the construction of the roads. So, while mere construction companies are not railroad companies, a construction company may be as to certain matters within a statute or rule of law applicable to railroad companies. Thus, a company running gravel trains in the construction of a railroad has been held to be "operating a railroad" within the meaning of a certain statute.[1]

[1] Mace v. Boedker, 127 Iowa 721, 104 N. W. 475; McKnight v. Iowa, &c. R. Co., 43 Iowa 406. See also Coughlin v. Cambridge, 166 Mass. 268, 44 N. E. 218; Roe v. Winston, 86 Minn. 77, 90 N. W. 122; Parris v. Tennessee Power Co., 136 Tenn. 198, 188 S. W. 1154; Doughty v.

So, a trust company, operating a railroad for the benefit of the bondholders, has been held liable for killing stock under a statute applying in terms to "railroad corporations."[2] And the interest coupons of a corporation authorized to condemn land and to construct and operate a railroad in addition to carrying on a mining and manufacturing business have been held taxable under an act of congress providing for the taxation of the interest coupons of railroads.[3] But it has been held, on the other hand, although there is sharp conflict among the cases, that the fact that the charter of a lumber company authorized it to build a railroad as an incident to its business did not make it a railroad company within a statute making railroad companies liable for injuries to employes;[4] and that contractors engaged in constructing a rail-

Firbank, 10 Q. B. Div. 358, 48 J. P. 55. But compare Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48, 10 L. R. A. 839; McKivergan v. Alexander, &c. Co., 124 Wis. 60, 102 N. W. 332; Bradford &c. Co. v. Helfin, 88 Miss. 314, 42 So. 174, 12 L. R. A. (N. S.) 1040. A railroad company may construct its own road, under most of the statutes, at least, but as a matter of fact the work is usually done in whole or in part by contractors or construction companies not in a strict sense railroad companies.

[2] Union Trust Co. v. Kendall, 20 Kans. 515. See also Solomon R. Co. v. Jones, 30 Kans. 601, 2 Pac. 657.

[3] Kentucky Imp. Co. v. Slack, 100 U. S. 648, 25 L. ed. 609. See also Randolph v. Post, 93 U. S. 502, 23 L. ed. 957; United States v. Louisiana &c. R. Co., 234 U. S. 1, 34 Sup. Ct. 741, 58 L. ed. 1185; Vicksburg &c. R. Co. v. Louisiana &c. R. Co., 136 La. 691, 67 So. 553; International Coal Co. v. Cape Breton County, 22 Canada S. C. 305; State v. Eleventh Judicial Court, 54 Minn. 34, 55 N. W. 816. In the last case just cited it is said that "it can make no difference, as respects the applicability of the statute, whether the railroad is three miles in extent or three hundred." See also Idalia Realty &c. Co. v. Normans S. E. Ry. Co. (Mo.), 219 S. W. 923. But compare North Texas Transfer &c. Co. v. State, 108 Tex. 235, 191 S. W. 550.

[4] Ellington v. Beaver Dam Lumber Co., 93 Ga. 53, 19 S. E. 21. And see Ingram-Dekle Lumber Co. v. Geiger, 71 Fla. 390, 71 So. 552, Ann. Cas. 1918A, 971, where a similar ruling was made as to a company engaged in operating a sawmill and a short logging railroad as an incident thereto. See also McKivergan v. Alexander &c. Co., 124 Wis. 60, 102 N. W. 332 (disapproving Roe v. Winston, 86 Minn. 77, 90 N. W. 122, in which the supreme court of Minnesota gave the statute of Wisconsin a different construction); Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48, 10

road are not within the meaning of a statute requiring "railroad companies" to sound a whistle.[5] Again, railroad companies often construct and own, or own and maintain, railroads without operating them. Authority is often, although not always, given to lease the road to some other company to operate or maintain and operate. Originally, it seems, when railroads as commercial roads first came into being they were treated largely as canals or highways on which cars or vehicles were to be run by others for a fixed toll or charge, and the idea was that those who so

L. R. A. 839. So, it has been held that the North Carolina fellow-servant act giving the servant of any railroad company operating in the state a right of action against the company for injuries sustained through the negligence of a fellow servant, is not applicable where an injury is sustained by a servant assisting in the construction of a railroad at a point five or six miles from the completed track and still further from the track on which trains were being operated. Nicholson v. Transylvania R. Co., 138 N. Car. 516, 51 S. E. 40. But it has been held in Texas that the word "railroad," as used in the Texas statute (Sayles' Ann Civ. St. 1897, art. 4560f), making every corporation operating a railroad liable for damages to its servants by negligence of other servants, is used in the same sense as in art. 3017, making the proprietor of any railroad liable for death caused by its negligence, and includes a logging railroad operated by a corporation solely for the purpose of carrying its own lumber from the woods to its sawmill, and from the sawmill to a railroad station near by. Lodwick Lumber Co. v. Taylor, 39 Tex. Civ. App. 302, 87 S. W. 358, citing text. See also Kibbe v. Stevenson Iron Min. Co., 136 Fed. 147; Schus v. Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68, 69 L. R. A. 887; Roe v. Winston, 86 Minn. 77, 90 N. W. 122; Kline v. Minnesota Iron Co., 93 Minn. 63, 100 N. W. 681; Idalia Realty &c. Co. v. Normans S. E. Ry. Co. (Mo.), 219 S. W. 923; Hemphill v. Buck Creek Lumber Co., 141 N. Car. 487, 54 S. E. 420; Goodman v. Tallahassee Power Co., 174 N. Car. 661, 94 S. E. 408; Frisco Lumber v. Spivey, 40 Okla. 633, 140 Pac. 157; Cunningham &c. Co. v. Neal, 101 Tex. 338, 107 S. W. 539, 15 L. R. A. (N. S.) 479n; Philip A. Ryan Lumber Co. v. Ball (Tex. Civ. App.), 197 S. W. 1037; Wilson v. Virginia Portland R. Co., 122 Va. 160, 94 S. E. 347. For further consideration of this subject as to employer's liability statutes see Vol. III, Ch. LVII.

[5] Griggs v. Houston, 104 U. S. 553, 26 L. ed. 840. It has also been held that a "union depot and railroad company" is not an ordinary railroad company and that it need not be incorporated under the statute providing for the incorporation of railroad companies, but might be incorporated under the general law providing for the in-

used the road would furnish and operate their own vehicles. In other words, the railroad companies, as originally intended, were, primarily at least, the companies that constructed and owned the roads rather than the companies or persons that operated and carried on the transportation business.[6] As already intimated, however, most of the special charters, and the general laws under which railroad companies are now almost universally required to be incorporated, usually grant the power in express terms to locate, construct and maintain the railroad, with proper equipment, and to operate it and transport goods and passengers.[7] Indeed, the great body of "railroad law" now has to do very largely with such companies as common carriers and with rights and liabilities growing out of the operation of the road.

corporation of ordinary private corporations. People v. Cheeseman, 7 Colo. 376, 3 Pac. 716, 16 Am. & Eng. R. Cas. 400. But see Union Depot Co. v. Morton, 83 Mich. 265, 47 N. W. 228. See also Detroit &c. Co. v. Detroit, 88 Mich. 347, 50 N. W. 302; State v. St. Paul &c. Co., 42 Minn. 142, 43 N. W. 840, 6 L. R. A. 234; Union Depot &c. Co. v. Chicago &c. R. Co., 113 Mo. 213, 20 S. W. 792.

[6] Thus Simon Sterne says, in 3 Cyc. of Political Science, etc. (edited by John Laylor) 500: "It was supposed that, like the canal, the railway would be built by one class of capitalists, but that also, in the same manner as over canals, the traffic over the railway would be carried on by another class of individuals or corporations, of forwarders or common carriers, who, under regulations and charges for toll established by the railroad company, would do the transportation business over the line." Thus, in the earliest charters in this country as for instance, in that of the Ithaca, &c. R. Co. in 1827, the following provision is found: "All persons paying the toll aforesaid may, with suitable and proper carriages, use and travel upon said railroad, subject to such rules and regulations as the said corporations are authorized to make." This theory and the history of railroads practically controlled the majority decision of the Supreme Court of the United States in the important case of Lake Superior &c. R. Co. v. United States, 93 U. S. 442. The opinion in this case contains an interesting discussion of the nature, history and development of railroads.

[7] It may be a railroad company and entitled to condemn land under a statute although carries only freight and not passengers. Vicksburg &c. R. Co. v. Louisiana &c. R. Co., 136 La. 691, 67 So. 553; Farnsworth v. Lime Rock R. Co., 83 Main 440, 22 Atl. 373; Brown v. Chicago &c. R. Co., 137 Mo. 529, 38 S. W. 1099; Oswego D. &c. R. Co. v. Cobb, 66 Ore. 587, 135 Pac. 191

§ 2 (1a). Usually but not always corporations—Other characteristics.—An individual or a partnership may own and operate a railroad,[8] except, perhaps, where the statute requires that all railroads shall be owned or operated by corporations.[9] And it seems that an individual, as well as a corporation, may, with legislative authority, exercise the right of eminent domain.[10] But individ-

[8] Kerr, In re, 42 Barb. (N. Y.) 119; Phoenix v. Gannon, 195 N. Y. 471, 88 N. E. 1066; Stewart's Appeal, 56 Pa. St. 413; Parris v. Tennessee Power Co., 136 Tenn. 198, 188 S. W. 1154; Henderson v. Ogden City R. Co., 7 Utah 199, 26 Pac. 286, 46 Am. & Eng. R. Cas. 95; Bank of Middlebury v. Edgerton, 30 Vt. 182; David v. Kingscote, 6 M. & W. 174. See also Southern Pac. R. Co. v. Orton, 32 Fed. 457; Parnell v. Southern R. Co. (Ala.), 74 So. 437; Pittsburgh &c. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627; Lawrence v. Morgan's &c. R. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; People v. Brooklyn &c. Co., 89 N. Y. 75; People v. Erie R. Co., 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. 828, 19 Ann. Cas. 811; Budd v. Multnomah &c. Co., 15 Ore. 404, 15 Pac. 654. If he holds himself out to the public as a common carrier he will be subject, it seems, to the law governing common carriers. Bank of Middlebury v. Edgerton, 30 Vt. 182. And it seems that even a married woman may purchase on execution or judicial sale under the Texas statute. Texas Southern R. Co. v. Harle, 101 Tex. 170, 105 S. W. 1107.

[9] In the case of Commonwealth v. Vrooman, 164 Pa. St. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. 603, it was held that the legislature might rightfully require all persons desiring to conduct the business of insurance "to obtain a charter of incorporation." See also Jack v. Williams, 113 Fed. 823. If the doctrine of the case from which we have quoted be sound, which we confess we doubt, then there can be no doubt that the legislature may require that the business of owning and operating railroads be conducted by corporations. The business of operating a railroad is unquestionably "affected with a public interest," and there is reason for the conclusion that where an association undertakes to conduct such business the legislature may require it to be incorporated. Wilder v. Aurora &c. Co., 216 Ill. 493, 75 N. E. 194, 203, and cases there cited. But the mere fact that the right to construct and operate railroads and to condemn and obtain the right of way therefor is given by statute to railroad corporations does not prevent an individual from constructing and operating a railroad on his own land or the land of another from whom he has purchased the right of way. Moran v. Ross, 79 Cal. 159, 21 Pac. 457, 39 Am. & Eng. R. Cas. 1. See also Wilson v. Cunningham, 3 Cal. 241, 58 Am. Dec. 407; Hall v. Brown, 54 N. H. 495.

[10] Moran v. Ross, 79 Cal. 159, 21

uals usually have no power to acquire land for a railroad by condemnation under the eminent domain.[11] If he does undertake to maintain and operate a railroad without legislative authority it will be at the risk of being held liable for maintaining a nuisance or for injuries caused by the operation of the road,[12] and he will, at least in the absence of legislative authority, have none of the special powers and immunities granted only to corporations. Although, as we have seen, an individual may construct and operate a railroad, yet, with few exceptions, railroad companies are corporations created either by special charter or organized under general laws.[13] They are now usually organized under general laws. They are given certain prerogative franchises and privileges for public purposes, in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or quasi public trust.[14] Although

Pac. 547, 39 Am. & Eng. R. Cas. 1; Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, 529.

[11] Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530; People v. Erie R. Co., 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 246, 139 Am. St. 828, 19 Ann. Cas. 811. And so it is held that an individual may not take by transfer from a railroad corporation the charter right to build a railroad and to invade the premises of others. Stewart' Appeal, 56 Pa. St. 413. See also Finney v. Sommerville, 80 Pa. St. 59; Barker v. Hartman Steele Co., 6 Pa. Co. Ct. 183.

[12] Wilson v. Cunningham, 3 Cal. 241, 58 Am. Dec. 407; Regina v. Train, 3 F. & F. 22. See also Lodwick Lumber Co. v. Taylor, 39 Tex. Civ. App. 302, 87 S. W. 358, 360, citing text. But compare Austin v. Augusta &c. R. Co., 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, 764, where the text is criticized, but seems to be misunderstood.

[13] As to whether the word "company" imports a corporation, see note to State v. Hotel McCreery Co. (68 W. Va. 130, 69 S. E. 472), in Ann. Cas. 1912A, 966, 969, and compare Pittsburgh &c. R. Co. v. Chappell, 183 Ind. 141, 106 N. E. 403, Ann. Cas. 1918A, 627 (holding a partnership within a statute relating to railroad "companies").

[14] Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457, 463, affirmed in 37 N. J. L. 531, 18 Am. Rep. 754, 759. See also Chesapeake &c. R. Co. v. Public Service Com., 242 U. S. 603, 37 Sup. Ct. 235, 236, 61 L. ed. 520, and authorities there cited. State v.

the stockholders may derive a private benefit and gain therefrom, yet railroads are for the use of the public, and municipal aid may be authorized and granted to such corporations for the purpose of constructing their roads as in the case of any other public work.[15] This outline will serve to show in a general way the peculiar nature of railroad corporations, but their legal status will be more fully considered in a subsequent chapter.

§ 3 (2). **Dual nature of railroad corporations.**—A railroad company or corporation is usually regarded as a private corporation, and justly so, as contrasted with a strictly public corporation, such as a city, county, township or the like governmental subdivision, but it is not a private corporation in the strict sense that an ordinary business corporation is, for it is charged with duties of a public nature that distinguish it from a purely and strictly private corporation. In many respects a railroad corporation is a private corporation in all that the term implies, but in other respects it differs from a corporation upon which no public duties are imposed. The property of a railroad

Dodge City &c. R. Co., 53 Kans. 377, 36 Pac. 747, 42 Am. St. 295; Bentler v. Cincinnati &c. R. Co., 180 Ky. 407, 203 S. W. 199, L. R. A. 1918E, 315, 319; National Docks R. Co. v. Railroad Co., 32 N. J. Eq. 755; Logan v. North Carolina R. Co., 116 N. Car. 940, 945, 21 S. E. 959; Moore v. Columbia &c. R. Co., 38 S. Car. 1, 16 S. E. 781. But see Pierce v. Commonwealth, 104 Pa. St. 155.

[15] Gelpcke v. Dubuque, 1 Wall. (U. S.) 175, 16 L. ed. 520; Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666, 22 L. ed. 227; Northern Pac. R. Co. v. Roberts, 42 Fed. 734, 31 Am. & Eng. Corp. Cas. 642, and authorities there cited; Chicago &c. R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Lafayette &c. R. Co. v. Geiger, 34 Ind. 185; Brocaw v. Board, 73 Ind. 543; Pittsburgh &c. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324, 15 Am. & Eng. Ency. of Law 1242; Leavenworth County v. Miller, 7 Kans. 479, 12 Am. Rep. 425; Davidson v. County Commissioners, 18 Minn. 482; Rome v. Rome, 18 N. Y. 38; People v. Mitchell, 35 N. Y. 551; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Sharpless v. Mayer, 21 Pa. St. 147, 159 Am. Dec. 759, and note; Crawford County v. Louisville R. Co., 39 Ind. 192; 1 Thomp. Corp. (2d ed.), § 662. But see People v. Salem, 20 Mich. 542, 4 Am. Rep. 400; Morrill v. Smith Co., 89 Tex. 529, 36 S. W. 56; Ellis v. Northern Pac. R. Co., 77 Wis. 114, 31 Am. & Eng. Corp. Cas. 661. See also Brown v. Chicago &c. R. Co., 137 Mo. 529, 38 S. W. 1099.

company used for the transportation of passengers and articles of commerce is devoted to a public use. The doctrine of Chief Justice Hale that, "when private property is affected with a public interest it ceases to be juris privati only," applies to a railroad corporation.[16] It is not to be understood, however, from the fact that the property of a railroad company is devoted to a public use or "affected with a public interest," that it can be treated as

[16] Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77; Chicago &c. Co. v. Iowa, 94 U. S. 155, 24 L. ed. 94; Peik v. Chicago &c. Co., 94 U. S. 164, 24 L. ed. 97; Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; Georgia &c. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; Chicago &c. R. Co. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. ed. 948; Olcott v. Supervisors, 16 Wall. (U. S.) 678, 21 L. ed. 382; McCoy v. Cincinnati, &c. Co., 13 Fed. 3, 6 Am. & Eng. R. Cas. 621; Mayor v. Baltimore &c. Co., 21 Md. 50; Newburyport &c. Co. v. Eastern R. Co., 23 Pick. (Mass.) 326; Ohio v. Black Diamond Co. (Ohio St.), 119 N. E. 195, L. R. A. 1918E, 352; Chicago &c. R. Co. v. Oklahoma (Okla.), 168 Pac. 239, L. R. A. 1918C, 492, 495; Holladay v. Patterson, 5 Ore. 177; State v. McIver, 2 S. Car. 25; State v. Boston &c. Co., 25 Vt. 433; Whiting v. Sheboygan &c. Co., 25 Wis. 167. See also Illinois Cent. R. Co. v. People, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; People v. Boston &c. R. Co., 70 N. Y. 569. The principle stated in the text applies, as is well known, to many other kinds of corporations, Hockett v. State, 105 Ind. 250, 5 N. E. 178, 55 Am. Rep. 201; Rushville v. Rushville &c. Co., 132 Ind. 575, 584, 28 N. E. 853; State v. Ironton, &c. Co., 37 Ohio St. 45; Zanesville v. Zanesville Gas Light Co., 47 Ohio St. 1, 23 N. E. 55; 1 Thomp. Corp. (2nd ed.), Ch. 14. Some of the later decisions of the Supreme Court of the United States to some extent modify the doctrine asserted in Munn v. Illinois, 94 U. S. 113, but we do not understand that they deny the rule that railroads are affected with a public interest and are subject to legislative regulation and control. Chicago &c. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757; Reagan v. Farmers &c. Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; Covington &c. Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962. See also United States v. Trans-Missouri &c. Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; Lake Shore &c. R. Co. v. Ohio, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702; Missouri &c. R. Co. v. May, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. ed. 971; Seaboard Air Line Ry. v. Seegers, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. ed. 108.

a public corporation; on the contrary, a railroad corporation is classed as a private corporation and its strictly private rights are as much beyond legislative control as are the rights of a purely private corporation.[17] While a railroad corporation may for most purposes be regarded as a private corporation there is, nevertheless, as we have seen, a side to it, as one may say, that is public. As will hereafter appear, the element of public interest which enters into all railroad corporations distinguishes them from purely private corporations to such an extent as to lead to important results.

§ 4 (3). **"Railroad" or "railway."**—The words "railroad" and "railway" are practically synonymous, and are ordinarily to be treated as without distinction or meaning.[18] Thus, in one of the

[17] Pierce v. Commonwealth, 104 Pa. St. 150; Sweatt v. Boston &c. R. Co., 3 Cliff. (U. S.) 339, Fed. Cas. No. 13684; Ohio &c. R. Co. v. Ridge, 5 Blackf. (Ind.) 78; Sloan v. Pacific R. Co., 61 Mo. 24, 21 Am. Rep. 397; Tinsman v. Belvidere &c. R. Co., 26 N. J. L. 148, 69 Am. Dec. 565; Thorpe v. Rutland &c. Co., 27 Vt. 140, 62 Am. Dec. 625. See also Detroit v. Detroit Citizens St. R. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; Missouri Pac. R. Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727; Lake Erie &c. R. Co. v. Witham, 155 Ill. 514, 40 N. E. 1014, 28 L. R. A. 612, 46 Am. St. 355; Candless v. Richmond &c. R. Co., 38 S. Car. 103, 16 S. E. 429, 18 L. R. A. 440. And the fact that the state owns some of the shares of a particular corporation does not make it a public corporation. Marshall v. Western R. Co., 92 N. Car. 322; Moore v. Schoppert, 22 W. Va. 282.

[18] Massachusetts &c. Co. v. Hamilton, 88 Fed. 588; Mobile &c. R. Co. v. Yeates, 67 Ala. 164; Georgia &c. R. Co. v. Propst, 83 Ala. 518, 3 So. 764; Mobile Light &c. Co. v. Mackay, 158 Ala. 51, 48 So. 509; Devon v. Cincinnati &c. R. Co., 128 Ky. 768, 109 S. W. 361; State v. Brin, 30 Minn. 522; Black v. St. Louis &c. R. Co., 110 Mo. App. 198, 85 S. W. 96; Atchison &c. R. Co. v. Citizens Trac. &c. Co., 16 N. Mex. 154, 113 Pac. 810; Hestonville &c. R. Co. v. Philadelphia, 89 Pa. St. 210; Borough of Millvale v. Evergreen R. Co., 131 Pa. St. 1, 18 Atl. 993, 46 Am. & Eng. R. Cas. 219; Gyger v. Philadelphia &c. R. Co., 136 Pa. St. 96, 46 Am. & Eng. R. Cas. 229n. Contra Munkers v. Kansas City &c. R. Co., 60 Mo. 334, in which it is held that a "railroad" is the graded right of way and the "railway" consists of the rails and ties laid thereon.

cases cited, it is said: "'Railroad' and 'railway' are used interchangeably. They are as nearly synonymous as any two words in the language. Though the latter name was, in strict accuracy, the corporate name of the company intended, there can be no doubt that the other name is used as designating the same company."[19] So, in many other cases, a variance or an alleged variance, caused by using the term "railroad" instead of "railway" in stating the corporate name in a pleading or writ, has been held immaterial or curable by amendment.[20]

§ 5 (4). **What are railroads.**—A railroad has been defined as "a road graded and having rails of iron or other material for the wheels of carriages to run upon."[21] This definition is no longer as accurate as it was when the patrons of the railroad company

[19] State v. Brin, 30 Minn. 522. In this case the variance was in an indictment.

[20] Where a petition is filed against the "C Rail*road* Co." and the summons or citation is issued against the "C Rail*way* Co.," the variance is immaterial. Galveston &c. R. Co. v. Donahoe, 56 Tex. 162; Central &c. R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457, 28 Am. & Eng. R. Cas. 50. See also Alabama &c. R. Co. v. Bolding, 69 Miss. 255, 13 So. 844, 30 Am. St. 541. But compare Vickery v. Omaha &c. R. Co., 93 Mo. App. 1. The use of the word "railroad" instead of "railway" in a writ may be cured by amendment after default. Chicago &c. R. Co. v. Johnson, 89 Ind. 88, 13 Am. & Eng. R. Cas. 181. See also Houston &c. R. Co. v. Weaver (Tex. Civ. App.), 41 S. W. 848 (action against Houston & Texas Central Railway Company and judgment against Houston and Texas Central Railroad Company). A declaration may be similarly amended after the trial. East Tennessee &c. R. Co. v. Mahoney, 89 Tenn. 311, 15 S. W. 652.

[21] Commonwealth v. Fitchburg R. Co., 12 Gray (Mass.) 180; Turnick v. Smith, 63 Pa. St. 18. See also Muskogee E. T. Co. v. Doering (Okla.), 172 Pac. 793, 2 A. L. R. 94; State v. Wiggins Ferry Co., 208 Mo. 622; 106 S. W. 1005, 1010. The term is said to embrace "any road operated by steam or electricity on rails." Carter v. Coharie Lumber Co., 160 N. Car. 8, 75 S. E. 1074; Goodman v. Tallahassee Power Co., 174 N. Car. 661, 94 S. E. 408, 410. It is also said that where a railroad is spoken of as a "public highway" it means "the immovable structure extending across the country, graded and railed for the use of the locomotive and its train of cars." Lake Superior &c. R. Co. v. United States, 93 U. S. 442, 451, and see further as to what is meant by the term railroad, the same opinion on pages 446, 449.

furnished or were supposed to furnish, the vehicles, yet it is, perhaps, as accurate as any brief definition that can be given.[22] It is impossible to formulate an exact or precise definition giving the term "railroad" an inflexible meaning. The truth is, it has no one settled and invariable meaning, and what it includes in any particular case depends largely on the connection in which it is used.[23] In one case it is held to mean the roadbed, tracks, and necessary appurtenances,[24] and in its broadest sense it includes far more than the track and right of way, and may include all structures and appurtenances necessary to operation;[25] yet, in another case, as used in a pleading, it was held to mean merely the track.[26] Again, it is said to include the main line over which

[22] For other definitions, see Lake Shore &c. R. Co. v. Kaste, 11 Ill. App. 536; Vicksburg &c. R. Co. v. Louisiana &c. R. Co., 136 La. 691, 67 So. 554, 555; Hall v. Brown, 54 N. H. 495; Seymour v. Canandaigua &c. R. Co., 25 Barb. (N. Y.) 284; Tracy v. Troy &c. R. Co., 38 N. Y. 433; Sharpless v. Mayor &c., 21 Pa. St. 147, 59 Am. Dec. 759. In Gibbs v. Drew, 16 Fla. 147, 26 Am. Rep. 700, 701, 702, it is said: "The legal signification of the term 'railroad' is not only a road or way on which iron rails are laid, but a road as incident to the possession or ownership of which important franchises and rights affecting the public are attached. * * * Our conclusion is that a railroad is a public work, the possession of which is attended with the right and duty to use and employ the franchises granted by the sovereign in connection with and as appurtenant to it." For a discussion of the history of railways see 10 Ency. Americana 478. The words "railroad" and "railway" are synonymous, Philadelphia v. Philadelphia Trac. Co., 206 Pa. 35, 55 Atl. 762.

[23] Neither the kind of motive power used nor its location necessarily determines the character of the road. Central &c. R. Co. v. Twenty-third St. R. Co., 54 How. Pr. (N. Y.) 168. See also State v. Burr (La.), 84 So. 60, 73; Arends v. Grand Rapids R. Co., 172 Mich. 448, 138 N. W. 125; Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Carli v. Stillwater &c. R. Co., 28 Minn. 373, 41 Am. Rep. 290.

[24] State v. Hudson Terminal R. Co., 46 N. J. L. 289. So in United States v. Denver &c. R. Co., 150 U. S. 1, 12, 14 Sup. Ct. 11, 37 L. ed. 975.

[25] United States Trust Co. v. Atlantic &c. R. Co., 8 N. Mex. 689, 47 Pac. 725, 729. See also United States v. Denver &c. R. Co., 150 U. S. 12, 14 Sup. Ct. 11, 37 L. ed. 975. And not merely the track but also the operation of cars on the track. Duluth v. Duluth St. R. Co., 137 Minn. 286, 163 N. W. 659. Compare also United States v. Brooklyn &c. Terminal (U. S.), 39 Sup. Ct. 283.

[26] E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206, 37 So. 445.

cars are run, together with all switches, sidings, and branch roads,[27] but not to include depot buildings offices and warehouses.[28] Where the reference is to a permanent structure designated as a public highway, the word includes the graded and railed way ready for the train of locomotive and cars, which, together with other personal property, are not included.[29] While railroads are often called highways, they are not included in the phrase "public roads, streets and highways," in a statute designating the places where telegraph companies are authorized to erect their lines.[30] In a statute providing for the assessment of the "entire railway," it is defined as including "all property, real and personal, exclusively used in the operation of such railway."[31] A line for the private use of the controlling stockholder in conveying materials to his mill, though built by a company organized under the general law providing for the formation and regulation of public railroad companies, has been held not to be such a railroad as may exercise the right of eminent domain,[32] for one of the essential characteristics of a railroad authorized to

[27] St. John v. Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743; Lake Superior &c. R. Co. v. United States, 12 Ct. Cl. 35, 93 U. S. 442, 23 L. ed. 965; Hartzell v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1081 (citing text); Cleveland &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84; Black v. Philadelphia &c. R. Co., 58 Pa. St. 249. See also Roby v. Farmers' Grain &c. Co., 76 Nebr. 450, 107 N. W. 766; Oregon-Washington R. &c. Co. v. Spokane &c. R. Co., 83 Ore. 528, 163 Pac. 600, Ann. Cas. 1918C, 991. But see Terre Haute R. Co. v. Peoria Co., 61 Ill. App. 405; Richter v. Penn Co., 104 Pa. St. 511.

[28] South Wales R. Co. v. Local Board of Health, 4 E. & B. 189, 82 E. C. L. 188. But see Esch-Cummins Act, 1921 Supp. Barnes' Fed. Code, § 7884. Pennsylvania R. Co. v. United States, 236 U. S. 351, 35 Sup. Ct. 370, 373, 59 L. ed. 616.

[29] Lake Superior &c. R. Co. v. United States, 12 Ct. Cl. 35, 93 U. S. 442, 23 L. ed. 965.

[30] New York City &c. R. Co. v. Central Union Tel. Co., 21 Hun (N. Y.) 261, 1 Am. Elec. Cas. 315.

[31] Atlantic &c. R. Co. v. Yavapai County (Ariz.), 21 Pac. 768.

[32] Weidenfeld v. Sugar Run R. Co., 48 Fed. 615. See also Split Rock Cable Co., In re, 128 N. Y. 408, 28 N. E. 506; Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680n. But see Bacot, Ex parte, 36 S. Car. 125, 15 S. E. 204, 16 L. R. A. 586, 50 Am. & Eng. R. Cas. 597.

exercise that right is said to be its readiness to render, without discrimination, the services which all citizens alike may claim.[33] But, as will hereafter be seen, roads and side-tracks to mills, manufacturing establishments and the like may constitute a public as well as a private use for which the exercise of the power of eminent domain may be invoked.[34] The word "railroad" is sometimes applied, also, to the corporation owning the road and running trains thereon for the carriage of freight and passengers.[35] Ordinarily, however, the corporation is designated as a "railroad company"[36] or "railroad corporation;"[37] and the fact that it is authorized to do other kinds of business besides that of transporting freight and passengers is held not to render these terms inapplicable;[38] nor does their applicability necessarily depend on the possession of rolling stock or on the control of the road's

[33] Colorado &c. R. Co. v. Union &c. R. Co., 44 Am. & Eng. R. Cas. 10, and note on page 25.

[34] South Chicago R. Co. v. Dix, 109 Ill. 237; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461; Harvey v. Thomas, 10 Watts (Pa.) 63; Philadelphia &c. R. Co. v. Williams, 54 Pa. St. 103; Qetz's Appeal, 65 Pa. St. 1, 3 Am. & Eng. R. Cas. 186. But compare Cozardo v. Kanawha Hardwood Co., 139 N. Car. 283, 51 S. E. 932, 1 L. R. A. (N. S.) 969n, 111 Am. St. 779, reviewing authorities on both sides as to right to condemn for such and somewhat similar uses: also Riley v. Louisville &c. R. Co., 142 Ky. 67, 133 S. W. 971, 35 L. R. A. (N. S.) 636n, Ann. Cas. 1912D, 231, 234, and note. The subject is treated in §§ 1206, 1207, post.

[35] Calhoun v. Paducah &c. R. Co., 2 Flip. (U. S.) 442, 9 Cent. L. Jour. 75. In the Standard Dictionary it is said that the term "railroad" may have any of the following meanings: A graded road having one or or more tracks, usually of metal rails supported by sleepers and designed for the passage of rolling-stock. 2. The whole system of tracks, stations, rolling-stock and machinery used in transportation by rail. 3. The corporation or persons owning or operating such a system.

[36] Griggs v. Houston, 104 U. S. 533, 26 L. ed. 840; Great Western R. Co. v. Central Wales R. Co., 52 L. J. Q. B. 211, L. R. 10 Q. B. Div. 231.

[37] Union Trust Co. v. Kendall, 20 Kans. 515.

[38] Randolph v. Post, 93 U. S. 502, 23 L. ed. 957; Kentucky Imp. Co. v. Slack, 100 U. S 648, 25 L ed. 609. The right to construct a railroad and to erect a ferry may be granted to one corporation, but "a ferry is not a railroad, nor is a railroad a ferry." Aiken v. Western R. Co., 20 N. Y. 370, 376.

operation, for a railroad company or corporation can exist without either.[39]

§ 6 (5). "Railroad track"—"Right of way"—"Roadbed" and "roadway."—The term "railroad track" is often used to designate the right of way with its grades and superstructure of iron rails.[40] But, in a narrower sense, it has been defined as "the two continuous lines of rails on which the railway cars run,"[41] and it does not necessarily include the whole right of way.[42] It may, however, be so used as to include depot buildings, roundhouses, machine shops, coal or wood-sheds and watertanks, if they are on the right of way.[43] The latter term has been defined as meaning the way over which the company has the right to pass in the operation of its trains;[44] and as including all of the strip of land appropriated by the company for its use and upon which its roadbed has been built.[45] Primarily it would seem to mean the right,

[39] Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83, 24 Am. & Eng. R. Cas. 58, in which one of the parties was such a company. See also Lake Superior &c. Co. v. United States, 12 Ct. Cl. 35, 93 U. S. 442, 23 L. ed. 965; State v. Wiggins Ferry Co., 208 Mo. 622, 106 S. W. 1005, 1010 (citing text); Tracy v. Troy &c. R. Co., 38 N. Y. 433, 98 Am. Dec. 54; International &c. Co. v. Anderson Co., 59 Tex. 654, 663.

[40] Delaware &c. Co. v. Whitehall, 90 N. Y. 21, 10 Am. & Eng. R. Cas. 227.

[41] Atchison &c. R. Co. v. Kansas City &c. R. Co., 67 Kans. 569, 70 Pac. 939, 73 Pac. 899. But see Gates v. Chicago &c. R. Co., 82 Iowa 527, 48 N. W. 1040, 1041.

[42] Drainage Com'rs v. Illinois Cent. R. Co., 158 Ill. 361, 41 N. E. 1073.

[43] Pfaff v. Terre Haute &c. R. Co., 108 Ind. 144, 9 N. E. 93; construing § 6410, R. S. Ind. 1881 But not necessarily, nor perhaps ordinarily. Portland &c. R. Co. v. Saco, 60 Maine 198. See also Ann. Cas. 1918E, 229, 233n.

[44] Postal &c. Co. v. Southern R. Co., 90 Fed. 30; Pfaff v. Terre Haute &c. R. Co. 108 Ind. 144, 9 N. E. 93; Williams v. Western &c. R. Co., 50 Wis. 71, 5 N. W. 482, 5 Am. & Eng. R. Cas. 290. As will hereafter be shown, however, it is usually in the nature of an easement, although a peculiar one, rather than an estate in fee. See Cincinnati &c. R. Co. v. Geisel, 119 Ind. 77, 78, 21 N. E. 470, and authorities cited; Williams v. Western &c. R. Co., 50 Wis. 71, 5 N. W. 482, 42 Cent. L. J. 156.

[45] Keener v. Union Pacific R. Co., 31 Fed. 126. In the statute, Gen. Stat. Colo. § 2847, which this case construes, the "entire railway" is defined as including the right of way.

interest, or tenure, but the term has a "twofold signification," and may also be used as meaning the strip of land itself.[46] The roadbed is the foundation[47] upon which the superstructure rests· while the term "roadway" is said to include all the ground upon which the company is authorized to construct and lay its bed and track.[48]

[46] New Mexico v. United States Trust Co., 172 U. S. 182, 19 Sup. Ct. 128, 132, 43 L. ed. 407; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 546; Atlantic &c. R. Co. v. Lesueur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244n (tenure); Maysville &c. R. Co. v. Ball, 108 Ky. 241, 56 S. W. 188; Uhl v. Ohio River R. Co., 51 W. Va. 106, 41 S. E. 340. See also Western Union Tel. Co. v. Pennyslvania R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. ed. 312. In Nashville &c. R. Co. v. State, 129 Ala. 142, 30 So. 619, it is held to mean only the easement and not to include structures on the land. In Boyce v. Missouri Pac. R. Co., 168 Mo. 583, 68 S. W. 920, 58 L. R. A. 442, it is said to be, in strictness, neither an easement nor a fee, but merely an interest in land. In Northern Pac. R. Co. v. North Am. Tel. Co., 230 Fed. 347, it is said to be more than an easement. But compare Lousiville &c. R. Co. v. Postal Tel. Cable Co., 143 Ga. 331, 85 S. E. 110. As to whether it includes side tracks, switches, and the like, see Chicago &c. R. Co. v. People, 98 Ill. 350; Chicago &c. R. Co. v. People, 99 Ill. 464; Chicago &c. R. Co. v. Richardson County, 61 Nebr. 519, 85 N. W. 532; Akers v. United N. J. R. &c. Co., 43 N. J. L. 110; Chicago &c. R. Co. v. Cass County, 8 N. Dak. 18, 76 N. W. 239; Sante Fe &c. R. Co. v. Laune (Okla.), 168 Pac. 1022; Missouri &c. R. Co. v. Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781. See also generally as to its meaning in various connections: Wilson v. Pacific Elec. R. Co., 176 Cal. 248, 168 Pac. 128; Northern Mass. St. R. Co. v. Westminster, 227 Mass. 547, 116 N. E. 896, 898.

[47] Text quoted with approval in Shreveport v. Shreveport Belt R. Co., 107 La. Ann. 785, 32 So. 189, 190. See also Dunn v. Burlington &c. R. Co., 35 Minn. 73, 27 N. W. 448; Mobile &c. R. Co. v. Alabama &c. Co., 87 Ala. 520, 6 So. 407, 408, holding that it may include the track.

[48] North Beach &c. Co., Appeal of, 32 Cal. 499; San Francisco R. Co. v. State Board, 60 Cal. 12, 34; San Francisco v. Central Pac. R. Co., 63 Cal. 467, 49 Am. Rep. 98. See also Minneapolis &c. R. Co. v. Oppegard, 18 N. Dak. 1, 118 N. W. 830. Fences, however, are not part of the roadway to be assessed as such for purposes of taxation, but are to be assessed as improvements under the California statute. Santa Clara County v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 1142, 30 L. ed. 118. See also San Francisco &c. R. Co. v. Stockton, 149 Cal. 83, 84 Pac. 771.

§ 7 (6). **Street railways.**—A street railway has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers."[49] A distinctive feature or characteristic of such a railway, considered in relation to ordinary commercial railroads, is, or has been, that it is intended and used for the transportation of passengers and not of freight.[50] This, and the character of the use of the street, rather than the motive power, distinguish it from the ordinary commercial railroad;[51] and such a railway, laid in a street for the purpose of carrying passengers and facilitating its use by the public, is a street railway, no mat-

[49] Elliott Roads and Streets (3rd ed.), § 926, quoted in Montgomery v. Santa Ana &c. R. Co., 104 Cal. 186, 37 Pac. 786, 25 L. R. A. 654, 43 Am. St. 89; Louisville &c. R. Co. v. Louisville City R. Co., 2 Duv. (Ky.) 175. Text cited with approval in Hannah v. Metropolitan St. R. Co., 81 Mo. App. 78. See definition in Harvey v. Aurora &c. R. Co., 174 Ill. 295, 51 N. E. 163, 167, and cases there cited. As to whether this definition is not too narrow or restrictive, see chapter on street railways.

[50] Elliott Roads and Streets (3rd ed.), § 926; Booth Street Railw., § 1; Carli v. Stillwater St. R. Co., 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290, 3 Am. & Eng. R. Cas. 226. See also Wiggins Ferry Co. v. East St. Louis R. Co., 107 Ill. 450; Attorney General v. Chicago &c. R. Co., 112 Ill. 611; Spaulding v. Macomb &c. R. Co., 225 Ill. 585, 80 N. E. 327; Funk v. St. Paul &c. R. Co., 61 Minn. 435, 63 N W. 1099, 1101, 29 L. R. A. 208, 52 Am. St. 608; Potts v. Quaker City &c. R. Co., 12 Pa. Co. Ct. 593, 31 W. N. Cas. 290. Text cited in Rische v. Texas Transp. Co., 27 Tex. Civ. App. 33, 66 S. W. 324, 327. But the mere fact that some kind of freight is carried may not always be a conclusive test under recent developments.

[51] Williams v. City Electric St. R. Co., 41 Fed. 556, 43 Am. & Eng. R. Cas. 215; Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303. See also note to O'Malley v. Board County Comrs., (86 Kans. 752, 121 Pac. 1108), in Ann. Cas. 1913C, 577, 579; annotation in 2 Am. Law Reg. & Rev., N. S. (Jan. 1895) 43; Massachusetts &c. R. Co. v. Hamilton, 88 Fed. 588, Wilder v. Aurora &c. Traction Co., 216 Ill. 493, 75 N. E. 194, 206, 207; Linden Land Co. v. Milwaukee R. Co., 107 Wis. 511, 83 N. W. 851. It might be better, however, to say that the character of the use, that is, the fact that street railways are to accomodate local convenience and street travel, is the main test. See Harvey v. Aurora &c. R. Co., 174 Ill. 295, 307, 51 N. E. 163; Hartzell v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1081 (citing text); Sparks v. Philadelphia &c. R. Co., 212 Pa. 105, 61 Atl. 881, 882.

ter what motive power may be used to propel the cars.[52] So, indeed, the fact that freight of some character, such as small parcels, is carried may not always be an invariable test under present conditions and future developments. But street railways are not always included when the term "railroads" is used in a statute. The exact meaning of that term, as already stated, depends upon the connection in which it is used.[53] Thus, it has been held under some statutes though not under others, to include street railroads operated by horse power, in statutes giving certain powers to "railroads;"[54] making the proprietors of any "railroad"

[52] Massachusets &c. Co. v. Hamilton, 88 Fed. 588; Sinconeau v. Pacific Elec. R. Co., 159 Cal. 494, 115 Pac. 320; McCleary v. Babcock, 169 Ind. 228, 82 N. E. 453; Briggs v. Lewiston &c. R. Co., 79 Maine 363, 367, 10 Atl. 47, 1 Am. St. 316, 32 Am. & Eng. R. Cas. 167; Nichols v. Ann Arbor &c. St. R. Co., 87 Mich. 361, 49 N. W. 538, 16 L. R. A. 371. See also Newell v. Minneapolis &c. R. Co., 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303; Peoples Rapid Transit Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728; Clement v. Cincinnati, 16 Weekly Law Bul. (Ohio) 355. But see East End St. R. Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. St. 933; Stanley v. Davenport, 54 Iowa 463, 2 N. W. 164, 6 N. W. 706, 37 Am. Rep. 216. And an underground railway may be a street railway. New York District R. Co., In re, 107 N. Y. 42, 14 N. E. 187, 32 Am. & Eng. R. Cas. 202. See also Barsaloux v. Chicago, 245 Ill. 598, 92 N. E. 525, 19 Ann. Cas. 255. But see Sparks v. Phiadelphia &c. R. Co., 212 Pa. 105, 61 Atl. 881, and the mere fact that the track is to be elevated does not necessarily change the character of the road. Freiday v. Sioux City Rapid Transit Co., 92 Iowa 191, 60 N. W. 656, 26 L. R. A. 246.

[53] Massachusetts &c. Co. v. Hamilton, 88 Fed. 588; Hartzell v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1081 (citing text). See also Fidelity &c. Co. v. Douglass, 104 Iowa 532, 73 N. W. 1039; O'Malley v. Board of Co. Comrs., 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576, and note. State v. Burr (Fla.), 84 So. 61, 73. Some courts hold that the word "railroad" includes street railroad unless the contrary is required by the context, and others hold that it does not unless required by the context. Omaha &c. St. R. Co. v. Interstate Commerce Com., 230 U. S. 324, 335, 33 Sup. Ct. 890, 57 L. ed. 1501, 46 L. R. A. (N. S.) 385.

[54] Chicago v. Evans, 24 Ill. 52. But see O'Malley v. Board, 86 Kans. 752, 121 Pac. 1108, Ann. Cas. 1913C, 576. Statutes authorizing the incorporation of railroad companies are often comprehensive enough to authorize the incorporation of street railway companies. In Sparks v. Philadelphia &c. R. Co., 212 Pa. St. 105,

liable for injuries caused by the negligence of its servants;[55] and prohibiting the obstruction of "railroad tracks."[56] So, a statute authorizing the consolidation of "railroads" has been held to include street railways,[57] and an act taxing the property of "any railroad company" has been held to include the property of a street railway.[58] But a statute prohibiting the location within a certain territory of railroads other than that of a designated company, is held not to authorize an injunction restraining a street railway company from building its road across such territory.[59] A penalty denounced against railroad companies demanding fares in excess of the lawful rate has been held not to apply to street railroads;[60] nor, according to one decision, does a statute author-

61 Atl. 881, a statute for the incorporation of railroad companies was held to authorize the construction of the road underground in a tunnel for a short distance, and it was also held that it was not a street passenger railroad. See also Bridwell v. Gate City Terminal Co., 127 Ga. 520, 56 S. E. 624, 10 L. R. A. (N. S.) 909n.

[55] Johnson v. Louisville City R. Co., 10 Bush (Ky.) 231. See also Patton v. Los Angles Pac. Co., 18 Cal. App. 552, 123 Pac. 613; Savannah &c. R. Co. v. Williams, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249. But see Indianapolis &c. Transit Co. v. Andes, 33 Ind. App. 625, 72 N. E. 145; Hughes v. Indiana Union Trac. Co., 57 Ind. App. 202, 105 N. E. 537; Funk v. St. Paul &c. R. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. 608; Sams v. St. Louis &c. R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475, 17 L. R. A. (N. S.) 117, and note; Lax v. Forty-second St. &c. R. Co., 46 N. Y. Super. Ct. 448; Norfolk &c. Trac. Co. v. Ellington, 108 Va. 245, 61 S. E. 779, 17 L. R. A. (N. S.) 117, and note.

[56] Price v. State, 74 Ga. 378. See also Evans v. Utica &c. R. Co., 44 Misc. 345, 89 N. Y. S. 1089; Cheatham v. McCormick, 178 Pa. St. 187, 35 Atl. 631. But see State v. Cain, 69 Kans. 186, 76 Pac. 443.

[57] Washington St. R. Co., In re, 115 N. Y. 442, 22 N. E. 356, 40 Am. & Eng. R. Cas. 588; Hestonville &c. R. Co. v. Philadelphia, 89 Pa. St. 210. But see Gyger v. Philadelphia, &c. R. Co., 136 Pa. St. 96, 20 Atl. 399, 9 L. R. A. 369; Shipley v. Continental &c. R. Co., 13 Phila. (Pa.) 128.

[58] Citizens' R. Co. v. Pittsburg, 104 Pa. St. 522, 17 Am. & Eng. R. Cas. 438. See ante, § 1, note 1. But see San Francisco &c. R. Co. v. Scott, 142 Cal. 222, 75 Pac. 575; State v. Omaha &c. R. Co., 96 Nebr. 725, 148 N. W. 946, and cases there cited. North Texas Transfer &c. Co. v. State, 108 Tex. 235, 191 S. W. 550.

[59] Louisville &c. R. Co. v. Louisville &c. R. Co., 2 Duv. (Ky.) 175.

[60] Moneypenny v. Sixth Avenue R. Co., 4 Abb. Pr. (N. S.) (N. Y.)

izing a laborer's lien on a railroad apply to a street cable railroad.[61] A "dummy line," operated over the county roads between two cities, along whose streets its track extends to termini in their centers, is a "railroad" within the meaning of a statute requiring all trains to stop within one hundred feet of where two railroads cross each other; the court holding, however, that it is "not a street railway" because not located within and dependent on any municipality.[62] Such a line, engaged in the streets of a city exclusively in carrying passengers, is also held to be a "railroad" within a statute requiring some person on the locomotive to keep a lookout, and requiring the whistle to be sounded to prevent accidents;[63] but not a "railroad" within a statute prohibiting the occupation of streets at crossings.[64] It is not easy to reconcile all of the decisions and about all that can be said is that the question as to whether a street railway is included in the term railroad in any particular case is determined largely by the context or connection in which the term is used.[65]

357. See also Funk v. St. Paul &c. R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. 608; Lincoln St. R. Co. v. McClellan, 54 Nebr. 672, 74 N. W. 1074, 69 Am. St. 736.

[61] Front St. Cable R. Co. v. Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693. See also Manhattan Trust Co. v. Sioux Cable R. Co., 68 Fed. 82; Central Trust Co. v. Warren, 121 Fed. 323; Massillon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192. Contra St. Louis &c. Co. v. Donohoe, 3 Mo. App. 559; New England Engineering Co. v. Oakwood St. R. Co., 75 Fed. 162. See also Egan v. Cheshire St. R. Co., 78 Conn. 291, 61 Atl. 950; Koken Iron Works v. Robberson Ave. R. Co., 141 Mo. 228, 44 S. W. 269. In the first case, however, the statutory lien extended to the land, and, as the street railway company did not own the fee, this was the principal reason for holding the statute inapplicable.

[62] Birmingham R. Co. v. Jacobs, 92 Ala. 187, 9 So. 320, 12 L. R. A. 830, 49 Am. & Eng. R. Cas. 263.

[63] Katzenberger v. Lawo, 90 Tenn. 238, 16 S. W. 611, construing Tenn. code, § 1298.

[64] Howard v. Union &c. Co., 156 Mass. 159, 30 N. E. 479. See also Byrne v. Kansas City &c. R. Co., 61 Fed. 605, 24 L. R. A. 693.

[65] Massachusetts &c. Co. v. Hamilton, 88 Fed. 588; Hartzell v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1081 (citing text); Bloxham v. Consumers &c. Co., 36 Fla. 519, 18 So. 444, 29 L. R. A. 507, 51 Am. St. 44; Louisville &c. R. Co. v. Louisville City R. Co., 63 Ky. 175; Sams v. St. Louis &c. R. Co., 174 Mo. 53, 73 S. W. 686, 690, 61 L. R. A. 475, 479. See also Cedar Rapids &c. R. Co. v. Cedar Rapids, 106

§ 8 (6a). **Street railways further considered.**[66]—As street railways are usually constructed on streets and do not, ordinarily, constitute an additional burden, there is seldom any necessity for the exercise of power of eminent domain in order to obtain a right of way; but, like commercial railroads, they are of a quasi public nature and may be authorized to condemn property for a right of way as for a public use.[67] But it has been held that a statute authorizing the condemnation of a right of way by corporations "organized for the construction of any railway" did not apply to street railways.[68] And it has also been held that although a

Iowa 476, 76 N. W. 728; Kansas City &c. R. Co. v. Board of Railroad Comrs., 73 Kans. 168, 84 Pac. 755. In the following cases street railways were held to be included: Savannah &c. R. Co. v. Williams, 117 Ga. 414, 43 S. E. 751, 61 L. R. A. 249; Bloxham v. Consumers &c. Co., 36 Fla. 519, 18 So. 444, 29 L. R. A. 507, 51 Am. St. 44; Funk v. St. Paul &c. R. Co., 61 Minn. 435, 63 N. W. 1099, 52 Am. St. 608; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. 736. See also Omaha &c. St. R. Co. v. Interstate Commerce Com., 191 Fed. 40; Denver v. Mercantile Trust Co., 201 Fed. 790; Arends v. Grand Rapids R. Co., 172 Mich. 448, 138 N. W. 195. In the following cases they were held not to be included: Commissioners v. Market St. R. Co., 132 Cal. 677, 64 Pac. 1065; State v. Duluth &c. Co., 76 Minn. 96, 78 N. W. 1032, 57 L. R. A. 63; Scott v. Farmers &c. Bank, 97 Tex. 31, 75 S. W. 7, 16. See also Ecorse v. Jackson &c. R. Co., 153 Mich. 393, 117 N. W. 89; Omaha &c. R. Co. v. Interstate Commerce Com., 230 U. S. 324, 33 Sup. Ct. 890, 57 L. ed. 1501, 46 L. R. A. (N. S) 385n; Gould v Merrill R. &c. Co., 139 Wis. 433, 121 N. W. 161, note in Ann. Cas. 1913C, 582, 584.

[66] Part of this section was part of § 6 in the original edition.

[67] Moran v. Ross, 79 Cal. 159, 21 Pac. 547, 39 Am. & Eng. R Cas. 1; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 16 S. W. 920; St. Louis R. Co. v. Southern R. Co., 105 Mo. 577, 16 S. W. 960, 46 Am. & Eng. R. Cas. 1; Kerr, In re, 42 Barb. (N. Y.) 119.

[68] Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86, 47 Am. & Eng. R. Cas. 57. While such statutes should be strictly construed, yet the soundness of the decision in the case just cited seems to us to admit of some doubt. See Ogden City R. Co. v. Ogden City, 7 Utah 207, 26 Pac. 288. But, there are usually such material differences between commercial railroads and street railways, both in respects already indicated and also in the need for the exercise of the power in the one case and not in the other, that a statute might well be held to give the power to a commercial railroad and not to a street rail-

street car company is organized under the general railroad law, and has claimed to exercise the right of eminent domain, this does not bring it within the terms of a statute making railroad companies "owning and operating a railroad" liable for injuries to a servant "injured in the work of operating such railroad" by the negligence of a fellow servant, where the company is in fact operating only a street railway.[69] Street railway companies are common carriers of passengers,[70] and, while not usually common carriers of freight, may become liable as common carriers of goods by assuming to act as such.[71] It has been held under the Wisconsin statute, that a city cannot grant to a commercial railroad, and that the latter cannot accept, a street railway franchise.[72]

§ 9 (7). **Elevated railroads.**—Elevated railroads are so far "railroads" that it has been held that they may be organized under general statutes authorizing the incorporation of railroad companies.[73] But it has been held that a company incorporated and

way; Piedmont Cotton Mills v. Georgia R. &c. Co., 131 Ga. 129, 62 S. E. 52. See also F. W. Cook Inv. Co. v. Evansville Terminal R. Co., 175 Ind. 3, 93 N. E. 279.

[69] Sams v. St. Louis &c. R. Co., 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475.

[70] Citizens' St. R. Co. v. Twiname, 111 Ind. 587, 13 N. E. 55; Nelson v. Metropolitan St. R. Co., 113 Mo. App. 703, 88 S. W. 1119, 1121; Spellman v. Lincoln Rapid Transit Co., 36 Nebr. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. 753; Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86; State v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. 739.

[71] Levi v. Lynn &c. R. Co., 93 Mass. 300, 87 Am. Dec. 713. See also Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86. So, of course, they may be so under a statute.

[72] State v. Milwaukee &c. R. Co. 116 Wis. 142, 92 N. W. 546.

[73] Lieberman v. Chicago &c. R. Co., 141 Ill. 140, 30 N. E. 544, 51 Am. & Eng. R. Cas. 581. See also Fulton v. Short Route R. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. 619, 32 Am. & Eng. R. Cas. 256, where it is held that a street railroad may elevate its tracks if the character of the country requires it. Compare Potts v. Quaker City El. R. Co., 12 Pa. Co. Ct. 593, 2 Pa. Dist. 200, 161 Pa. St. 396, 29 Atl. 108. And in Potts v. Quaker City El. R. Co., 12 Pa. Co. Ct. 593, 161 Pa. St. 396, 29 Atl. 108, it was held that an elevated railroad through the streets of a city for the carriage of passengers exclusively cannot be

organized as a street railway company has no authority or right to build and operate an elevated railroad.[74] Such roads are generally intended and used merely for the carriage of passengers along the streets, and, where such is the case, it seems to us that, upon principle, they should be regarded as street railways rather than as ordinary commercial railroads,[75] or at least more in the nature of the former in the respect indicated, although it would be still better, perhaps, to put them in a class by themselves. But whether a street railway company has authority to construct an elevated road or not must depend largely upon the particular charter or law under which it is organized, and the construction and use of the road may be such as to constitute an additional burden and entitle the abutting owners to damages, where they would not be entitled to compensation if it were an ordinary surface street railroad.[76] Thus, it has been held that an elevated railroad supported by posts, with an overhead roadbed at the

organized under the general railroad law of Pennsylvania. See also Schaper v. Brooklyn &c. R. Co., 124 N. Y. 630, 26 N. E. 311; Peoples &c. Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728, 46 Am. & Eng. R. Cas. 114.

[74] Commonwealth v. Northeastern El. R. Co., 161 Pa. St. 409, 29 Atl. 112.

[75] See New York El. R. Co. v. Fifth Nat. Bank, 135 U. S. 432, 440, 10 Sup. Ct. 743, 34 L. ed. 231; Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. 265; Barsaloux v. Chicago, 245 Ill. 598, 92 N. E. 525, 19 Ann. Cas. 255; Hartzell v. Alton &c. Trac. Co., 263 Ill. 205, 104 N. E. 1080, 1081 (citing text). Compare however Commonwealth v. Northeastern El. R. Co., 3 Pa. 104; Potts v. Quaker City El. R. Co., 12 Pa. Co. Ct. 593, 2 Pa. Dist. 200, 161 Pa. St. 396, 29 Atl. 108. "There is no doubt that a railway under, or elevated above, the surface of a street, is still a street railway in that street." Per Peckham, J., Peoples &c. Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728, 729, 46 Am. & Eng. R. Cas. 114 See also Booth Street Railways, §1.

[76] Story v. New York El. R. Co., 90 N. Y. 122, 43 Am. Rep. 146; Lahr v. Metropolitan El. R. Co., 104 N. Y. 268, 10 N. E. 528; Abendroth v. Manhattan R. Co., 122 N. Y. 1, 25, N. E. 496, 11 L. R. A. 634n, 19 Am. St. 461; Kane v. New York El. R. Co., 125 N. Y. 164, 26 N. E. 278, 11 L. R. A. 640, 46 Am. & Eng. R. Cas. 137; American Bank Note Co. v. New York El. R. Co., 129 N. Y. 252, 29 N. E. 302; Egerer v. New York Cent. &c. R. Co., 130 N. Y. 108, 29 N. E. 95, 14 L. R. A. 381, and note. See also DeGeofroy v. Merchant's

sides, is a "railway" and not a "street railway" within the meaning of a statute allowing the municipal authorities to authorize the construction of either in a street, but requiring compensation to the abutters where a "railway" is placed in the street.[77]

§ 10 (8). Electric railroads.—Railroads operated by electricity and engaged in carrying passengers along the streets of a city are classed with street railways rather than with ordinary commercial railroads.[78] Their use being in furtherance of travel upon the streets may be said to be within the original purposes for which the streets were dedicated and laid out, and they do not, therefore, when properly constructed, constitute a new servitude or additional burden for which abutting property-owners are entitled to compensation.[79] In this respect, as in most re-

Bridge &c. Co., 179 Mo. 698, 79 S. W. 386, 64 L. R. A. 959, 101 Am. St. 524; State v. Superior Court, 30 Wash. 282, 70 Pac. 484. Compare Fulton v. Short Route &c. Co., 85 Ky. 640, 4 S. W. 332, 7 Am. St. 619; Garrett v. Lake Roland El. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396. It is held in Illinois that they do not ordinarily at least, constitute an additional servitude: Doane v. Lake St. El. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. 265.

[77] Freiday v. Sioux City &c. Co., 92 Iowa 191, 60 N. W. 656, 26 L. R. A. 246. See also Koch v. North Ave. R. Co., 75 Md. 222, 33 Atl. 463, 15 L. R. A. 377. Peoples &c. Co. v. Dash, 125 N. Y. 93, 26 N. E. 25, 10 L. R. A. 728, 46 Am. & Eng. R. Cas. 114. A subway railway with frequent stations from which the surface could be reached was held in effect a street railway in New York &c. R. Co., In re, 107 N. Y. 42, 14 N. E. 187. But see Board of Rapid Transit R. Comrs., In re, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647n, 18 Ann. Cas. 366 (holding it an additional servitude, as are also ordinary railways in New York).

[78] Hill v. Rome St. R. Co., 101 Ga. 66, 28 S. E. 631; Halsey v. Rapid &c. R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Paterson R. Co. v. Grundy, 51 N. J. Eq. 213, 26 Atl. 788; Hudson River Tel. Co. v. Watervliet &c. Co., 135 N. Y. 393, 32 N. E. 148, 17 L. R. A. 674, 31 Am. St. 838; Thompson-Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. 86, 47 Am. & Eng. R. Cas. 51; Elliott Roads and Streets (3rd ed.), § 887. See also North Texas Transfer &c. Co. v. State (Tex.), 191 S. W. 550. But compare Chicago, &c. R. Co. v. Milwaukee &c. R. Co., 95 Wis. 561, 70 N. W. 678, 37 L. R. A. 856, 60 Am. St. 137.

[79] Williams v. City Electric St. R. Co., 41 Fed. 556; Chicago &c. R.

spects, they are governed by the same rules that apply to ordinary street railways operated by animal power, and not by the rules applicable to commercial railroads. But the more dangerous nature of the motive power may require, both as to passengers and to other travelers, or the public generally, a degree of care not required in the case of horse railways, that is to say, the care should be in proportion to the danger. A forcible illustration of the rule that electric railways for carrying passengers along the streets are to be regarded as street railways rather than as commercial railroads is found in a recent case[80] in which it is held that an electric railway company has the right to run its cars across a public toll bridge, upon the payment of adequate toll, where the statute gives it the right to use "any street or highway." The court regarded it as a use which was consistent with the purpose for which the bridge was erected, being in furtherance of public travel and accommodation, and held that it did not constitute a taking of property under the power of eminent domain.[81] As electricity is now coming into use for commercial railroads, and is used almost altogether as a motive power on

Co. v. Whiting &c. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. 264; Koch v. North Avenue R. Co., 75 Md. 22, 23 Atl. 463; Green v. City Suburban R. Co., 78 Md. 294, 28 Atl. 626, 44 Am. St. 288; Detroit St. R. Co. v. Mills, 85 Mich. 634, 48 N. W. 1007; Paterson R. Co. v. Grundy, 51 N. J. 213, 26 Atl. 788; West Jersey R. Co. v. Camden &c. R. Co., 52 N. J. 452, 29 Atl. 423; Cincinnati &c. R. Co. v. City &c. Co., 48 Ohio St. 390, 27 N. E. 890, 12 L. R. A. 534, 29 Am. St. 559, 10 R. & Corp. Law Jour. 82; Lockhart v. Craig St. R. Co., 139 Pa. St. 419, 21 Atl. 26; Dubois Traction Co. v. Buffalo &c. R. Co., 149 Pa. St. 1, 24 Atl. 179, 11 R. & Corp. L. Jour. 6; Taggart v. Newport St. R. Co., 16 R. I. 668, 19 Atl. 326, 7 L. R. A. 205; Cumberland &c. Co. v. United Electric R. Co., 93 Tenn. 492, 29 S. W. 104; San Antonio &c. R. Co. v. Limburger, 88 Tex. 79, 30 S. W. 533. See also Humphrey v. Ft. Smith Trac. Co., 71 Ark. 152, 71 S. W. 662; Birmingham Trac. Co. v. Birmingham R. Co., 119 Ala. 137, 24 So. 502, 43 L. R. A. 233; note in 36 L. R. A. (N. S.) 722; Howe v. West End St. R. Co., 167 Mass. 46, 44 N. E. 386. But compare Peck v. Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357.

[80] Pittsburgh &c. R. Co. v. Point Bridge Co., 165 Pa. St. 37, 30 Atl. 511, 26 L. R. A. 323.

[81] Covington &c. Co. v. South Covington &c. Co., 93 Ky. 136, 19 S. W. 403, 15 L. R. A. 828.

interurban railroads, there is likely to be confusion, unless the term is confined to such roads as were formerly known as electric railroads, and, as already stated, the mere fact that electricity is the motive power is not conclusive as to whether the rules and principles applicable to commercial railroads or those applicable to street railroads apply.

§ 11 (9). **Cable railroads**—Railroads operated by the cable system are also classed with street railways. Indeed, as ordinarily located, constructed and operated, they may be regarded as a sub-class or particular kind of street railways. They do not, therefore, constitute an additional burden any more than ordinary horse railways.[82] In one case, however, it was held that a cable road is, "as to one part of the street, surface, and as to another part subterranean," and that a company organized merely as a surface railway company had no right to excavate the streets and construct a subterranean cable system;[83] but the same court, in a later case, held that such a company could be authorized by the legislature to use the cable system without the consent of the local authorities, notwithstanding a provision of the constitution prohibiting the passage of any law authorizing the construction or operation of a street railroad without first obtaining the consent of the local authorities.[84] Although cable

[82] Lorie v. North Chicago R. Co., 32 Fed. 270; Clement v. Cincinnati (Ohio), 16 W. L. Bull. 355; Harrison v. Mt. Auburn Cable R. Co. (Ohio), 17 W. L. Bull. 265; Rafferty v. Central Traction Co., 147 Pa. St. 579, 23 Atl. 884, 30 Am. St. 763; Booth St. Railw., § 84. Compare Tuebner v. California St. R. Co., 66 Cal. 171, 4 Pac. 1162.

[83] People v. Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174n. In New York a subway for rapid transit has also been held an additional burden. Board of Rapid Transit R. Comrs., In re, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647n, 18 Ann. Cas. 366. But the contrary is held in Massachusetts: Sears v. Crocker, 184 Mass. 586, 69 N. E. 327, 100 Am. St. 577.

[84] Third Avenue R. Co., Petition of, 121 N. Y. 536, 24 N. E. 951, 9 L. R. A. 124. The court said that, as the railroad had already been organized, constructed and operated as a horse street railway, the act of the legislature in question did not attempt to grant a franchise or authorize the "construction of operation of a street railroad," but merely regulated the use of an existing franchise.

roads in city streets engaged only in carrying passengers are usually regarded as street railways, yet a company which carries freight as well as passengers, whose road is but three miles in length, over two miles of which cars are drawn by locomotives, is a "railroad company," taxable as an ordinary railway, notwithstanding the fact that one mile of the line, up a steep ascent, is operated by cable.[85]

§ 12 (9a). **Interurban railroads.**—Interurban railroads have been defined or described as "those connecting distant communities, which are laid mainly on highways, and as to so much of them as lie within each of these communities are built upon its streets and operated so as to promote local convenience and make these streets more serviceable to the public."[86] As a matter of fact, however, interurban railroads are now constructed, so far as they extend through the country between cities and towns, mainly upon the land or right of way of the company rather than upon the country highways.[87] It is a vexed question as to whether such a railroad is an additional burden on a country highway, and it is easier or cheaper, in some instances, to obtain such a right of way. So, when the railroad is thus located and constructed there is less danger of interfering with travel; the cars can be run with more freedom, and there is less danger of liability of accident to passengers and travelers upon the highway. Such railroads are a new development of a somewhat mixed character, and the law applicable to them is not in all respects well settled. They usually extend from one city or town to and within the limits of another city or town and partake, in some respects, of the nature of both

[85] State v. Eleventh Judicial District Ct., 54 Minn. 341, 55 N. W. 816. Compare Funk v. St. Paul City R. Co., 61 Minn. 435, 63 N. W. 1099, 29 L. R. A. 208, 52 Am. St. 608. And the fact that a railroad is operated either in whole or in part by a cable system does not necessarily make it a street railroad. There are roads so operated up the sides of mountains not on or near any street, and we remember to have traveled on a commercial steam railroad in Switzerland which was so operated for a short distance of its course up the side of a mountain.

[86] Baldwin Am. Railw. Law 9.

[87] Hartzenn v. Alton &c. Trac. Co., 203 Ill. 205, 104 N. E. 1080, 1081.

street railways and ordinary commercial railroads. Their nature and characteristics, and the principles of law applicable to them, will be fully considered in a separate chapter. It may be well to note here, however, that an interurban electric railway was held in a recent case not to be a street railway because its operation was not confined to the streets of any city and because its articles of incorporation determined its class as that of an interurban road.[88]

[88] Bentler v. Cincinnati &c. R. Co., 180 Ky. 497, 203 S. W. 199, L. R. A. 1918E. 315. But in another recent case an interurban electric railway was held to be a railroad within the meaning of a statute requiring railroad companies to fence. Muskogee Elec. Trac. Co. v. Doering (Okla.), 172 Pac. 793, 2 A. L. R. 94.

CHAPTER II.

PROMOTION AND FORMATION OF THE CORPORATION.

Sec.

15. Promoters—Who are.
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§ 15 (10). **Promoters—Who are.**—The steps preliminary to the organization of a railroad corporation are frequently, if not generally, taken by persons known as "promoters," who bring together the persons interested in the enterprise, aid in procuring subscriptions, and set in motion the machinery which leads to the formation of the corporation,[1] often, also, making the necessary arrangements looking toward the purchase of property or the entering into contracts by the new company.[2] By merely subscribing the articles, or taking stock in a company not yet incorporated, a person does not assume the character of a promoter.[3] But circumstances which show that one is assuming to

[1] Dickerman v. Northern Trust Co., 176 U. S. 181, 203, 20 Sup. Ct. 311, 319, 44 L. ed. 423; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; 1 Thomp. Corp. (2nd ed.) §§ 81, 82. See also note in L. R. A. 1918E, 833, 834.

[2] Twycross v. Grant, L. R. 2 C. P. Div. 469, 503; Yale Gas Stove Co. v. Wilcox, quoted in note to § 16, infra. I Thomp. Corp. (2d ed.), § 82. See also Ex-Mission Land &c. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Bosher v. Richmond &c. Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. 879; First Ave. Land Co. v. Hildebrand, 103 Wis. 530, 79 N. W. 753.

[3] St. Louis &c. R. Co. v. Tiernan, 37 Kans. 606, 40 Am. & Eng. R. Cas. 525; Ward v. Brigham, 127 Mass.

act in the interest of a project, and is seeking to influence others to give it pecuniary assistance, will afford evidence that he has undertaken the responsibility of a promoter toward persons who deal with him as such.[4]

§ 16 (11). **Fiduciary relation of promoters—Duties and liabilities.**—A promoter occupies a fiduciary relation toward the company, and is subject, in general, to the disabilities attached to trustees.[5] Occupying this relation he is forbidden under any and

24. But see Lake v. Argyle, 6 Q. B. 477.

[4] Woodbury &c. Co. v. Loudenslager, 55 N. J. 78, 35 Atl. 436; Sidney &c. Co. v. Bird, L. R. 31, Ch. Div. 328; Lake v. Argyle, 6 Q. B. 477. The question is largely one of fact depending upon the circumstances of the particular case. Bagnall v. Carlton, 6 Ch. D. 371, 47 L. J. Ch. 30; Lydney &c. Co. v. Bird, 33 Ch. D. 85, 24 Am. & Eng. Corp. Cas. 24.

[5] De La Motte v. Northwestern Clearance Co., 126 Minn. 197, 148 N. W. 47, L. R. A. 1918E, 831, 832, and note, p. 941, et seq. Emma Silver M. Co. v. Grant, L. R. 11 Ch. Div. 918; 1 Thomp. Corp. (2nd. ed.), § 103. In the case of Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. 159, the court said: "A 'promoter' has been defined to be a person who organizes a corporation. It is said to be, not a legal, but a business term, 'usefully summing up in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence.' Bowen, J., in Printing Co. v. Green, 28 Wkly. R. (Q. B. Div. 1880) 351, 352. That such persons occupy a fiduciary relation toward the company or corporations toward whose organization they seek to promote is well settled by the decisions of both countries. Lord Cotton prefers to call them 'trustees', Bagnall v. Carlton, 6 Ch. Div. 371, 385. Sir George Jessel, M. R., in Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, said, 'A promoters stand in a fiduciary relation to that company which is their creature.' In Erlanger v. Phosphate Co., 3 App. Cas. 1218, the Lord Chancellor said of promoters: 'They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become through its managing directors, the purchasers of the property of themselves (the promoters) it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive; that is to say, with a board of directors, who shall both be aware that the property

all circumstances to make any secret profits at the expense of

which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company and then sell his property to it; but I do say that if he does he is bound to take care that he sell it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.' Lord O'Hagan, referring to the same subject, expressed a similar opinion in even more emphatic language, declaring that while an original purchase might be legitimate, and not less so because the object of the purchaser was to sell it again and to sell it by forming a company which might afford them a profit on the transaction, yet 'the privilege given them for promoting such a company for such an object involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders.' The test, therefore, of the validity of such transactions is that it must, in all its parts be open and fair, so that the promoters shall not, in fact, substantially, 'act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former.' Foss v. Harbottle, 2 Hare 461, 488; McElhenny's Appeal, 61 Pa. St. 188; Simons v. Mining Co., 61 Pa. St. 202, 100 Am. Dec. 628; Oil Co. v. Densmore, 64 Pa. St. 43; Pittsburgh Mining Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149n; South &c. Co. v. Case, 104 Mo. 572, 16 S. W. 390; British Seamless Paper-box Co., In re, 17 Ch. Div. 467; Sewage Co. v. Hartmont, 5 Ch. Div. 394. In Hichens v. Congreve, 1 Russ. & M. 150 (on appeal, 4 Russ. 562), three promoters induced their company to buy a mine for £25,000, of which they received from the vendor and divided among themselves, £15,000. This they were compelled to account for to the company. Similar cases are Beck v. Kantorowicz, 3 Kay & J. 230; Printing Co. v. Green, 28 Wkly. R. (Q. B. Div. 1880) 351, 352; Mining Co. v. Grant, 11 Ch. Div. 918; Bagnall v. Carlton, 6 Ch. Div. 371, 385; Kant v. Brickmaking Co., 17 Law T. (N. S.) 77; Water Co v. Flash, 97 Cal. 610, 32 Pac. 600. * * * A careful examination of the cases will, we think, disclose two grounds of liability of the defendants to corporations for undisclosed profits resulting from transactions with such corporations: First, where the defendants are corporate fiduciaries. The characteristic of this relation is trust. Such a relation undoubtedly exists between companies and their officers, such as directors. Mallory v. Mallory-Wheeler Co., 61 Conn. 135, 23 Atl. 707. With reference to promoters, since a man can not receive an appointment from a non-existent company, the proof may be less obvious; but it may, never-

the company,[6] or to gain any advantage over other stockholders arising from the profits of the company's transactions.[7] He must generally turn over to the company any commissions received for the sale of property to the company,[8] and it has been held that the company may sue the seller to recover such a commission if it is not yet paid,[9] or it may, in a proper case, upon discovery of the unfair character of the transaction, rescind the contract of sale and sue the promoters to recover the moneys paid them or the property.[10]

theless, be shown conclusively by a variety of representations, admissions, and acts. The second ground of liability is fraud. The law does not prohibit a promoter from dealing with his company, but he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment, or misrepresentation of material facts is fraud, upon proof of which rescission of contract, or repayment of the secret profits, will be compelled."

[6] Emery v. Parrott, 107 Mass. 95; De La Motte v. Northwestern Clearance Co., 126 Minn. 197, 148 N. W. 47, L. R. A. 1918E, 830. Plaquemines &c. Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; Simons v. Vulcan Oil &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Pittsburgh Mining Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149 and note; Emma Silver M. Co. v. Grant, L. R. 11 Ch. Div. 918; Lydney &c. Co. v. Bird, L. R. 33 Ch. Div. 85, 55 Law T. (N. S.) 558. See also Wardell v. Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509; Dunlap v. Twin City Power Co., 226 Fed. 161; Rutland &c. Co. v. Bates, 68 Vt. 579, 35 Atl. 480, 54 Am. St. 904; 1 Thomp. Corp. (2nd ed.), §§ 104, 105.

[7] Chandler v. Bacon, 30 Fed. 538, 540; Emory v. Parrott, 107 Mass. 95; Getty v. Devlin, 54 N. Y. 403; Densmore Oil Co. v. Densmore, 64 Pa. St. 43; Bagnall v. Carlton, L. R. 6 Ch. Div. 371. See also Volney v. Nilon, 68 N. J. Eq. 605, 60 Atl. 189; Heckscher v. Edenborn, 203 N. Y. 210, 96 N. E. 441.

[8] Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. 498; Emma Silver M. v. Grant, L. R. 11 Ch. Div. 918; Lydney &c. Co. v. Bird, L. R. 33 Ch. Div. 85, 55 Law T. (N. S.) 558; Beck v. Kantorowicz, 3 Kay & J. 230. See also Lomita Land &c. Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106n. De La Motte v. Northwestern Clearance Co., 126 Minn. 197, 148 N. W. 47, L. R. A. 1918E, 830.

[9] Whaley &c. Co. v. Green, L. R. 5 Q. B. Div. 109, 41 Law T. (N. S.) 674.

[10] St. Louis &c. Mining Co. v. Jackson, 5 Cent. L. J. 317; Phosphate Sewage Co. v. Hartmont, L. R. 5 Ch. Div. 394, 37 Law T. (N. S.) 9. See also Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. ed. 423. The corporation is the proper plaintiff in a suit to rescind the promoter's acts.

§ 17 (12). **Promoter may sell property to the corporation.**—A promoter may, however, honestly and fairly sell to the company property which he owned before instituting the scheme for incorporation.[11] This is true even when the scheme relates to the development of the very property which he sells to the corporation.[12] But it seems that the corporation may rescind such a contract, if the sale be made for an exorbitant price and without disclosing the real ownership of the property.[13] And after the formation of the company is begun a promoter cannot purchase property and sell it to the corporation at an advanced price without a full disclosure of the facts.[14]

Ex-Mission Land Co. v. Flash, 97 Cal. 610, 32 Pac. 600. So in a suit to recover the avails of a secret agreement between him and one from whom the corporation purchases property. Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. 159. See also Pittsburgh Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149, and note.

[11] Burbank v. Dennis, 101 Cal. 90, 35 Pac. 444; Plaquemines &c. Co. v. Buck, 52 N. J. 219; 27 Atl. 1094; Morgan v. Skiddy, 62 N. Y. 319; 1 Thomp. Corp. (2nd ed.), § 106. See also note to Yale Gas Stove Co. v. Wilcox, 64 Conn. 101, 29 Atl. 303, 25 L. R. A. 90, 42 Am. St. 159, and note to Pittsburgh Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149; Wills v. Nehalem Coal Co., 52 Ore. 70, 96 Pac. 528; Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 214, 74 N. W. 976, 40 L. R. A. 837; Hess Mfg. Co., In re, 21 Ont. App. 66.

[12] Dorris v. French, 4 Hun (N. Y.) 292; Seymour v. Spring Forest, &c. Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Densmore Oil Co. v. Densmore, 64 Pa. St. 43. Gover's Case, L. R. 1 Ch. Div. 182.

[13] Cape Breton Co., In re, L. R. 26 Ch. Div. 221, L. R. 29 Ch. Div. 795; Lindsay Petroleum &c. Co. v. Hurd, L. R. 5 P. C. 221; Thomp. Corp. (2nd. ed.), 109. See also generally Lomita Land &c. Co. v. Robinson, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106, and note. But see Densmore Oil Co. v. Densmore, 64 Pa. St. 43.

[14] Ex-Mission Land, &c. Co. v. Flash, 97 Cal. 610, 32 Pac. 600; Paducah Land &c. Co. v. Mulholland, 15 Ky. L. 624, 24 S. W. 624; South &c. Co. v. Case, 104 Mo. 572, 16 S. W. 390; Plaquemines &c. Co. v. Buck, 52 N. J. Eq. 219, 27 Atl. 1094; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843; Pittsburg Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149. Where a promoter fraudulently represents that he has bought property for a proposed corporation at a certain price, and the corporation pays him that price, it may, after discovery of the fraud, sue him for the profit thus made. Simons v. Vulcan Oil &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628.

§ 18 (13). Personal liability of promoters—When partners.—The promoters, as a general rule, are personally liable on all contracts entered into by them before the organization is completed,[15] except where they have expressly stipulated against personal liability, or except, perhaps, where the contract is made in the name of the proposed corporation alone and the credit is knowingly given to it and not to the promoters.[16] A promoter cannot, ordinarily, in the absence of evidence that he has received authority to act for his associates, render them responsible for his acts,[17] for the several promoters are not partners.[18]

[15] Hurt v. Salisbury, 55 Mo. 310; Kelner v. Baxter, L. R. 2 C. P. 174; Scott v. Lord Ebury, 36 L. J. C. P. 161. Thomp. Corp. (2nd ed.) § 84. See also Manistee Lumber Co. v. Union Nat. Bank, 143 Ill. 490, 32 N. E. 449; Hersey v. Tully, 8 Colo. App. 110, 44 Pac. 854; 1 Thomp. Corp. (2nd ed.), § 83.

[16] Higgins v. Hopkins, 3 Exch. 163; Rennie v. Clarke, 5 Exch. 292; Landman v. Entwistle, 7 Exch. 632. See note to Pittsburgh Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. 149, 162; and post, § 215. They cannot be held liable to one who knowingly agrees to accept and does accept the notes of a corporation then contemplated and afterward organized in payment, and parol evidence is admissible to show such knowledge and agreement where the notes were signed by the company with the names and titles of the officers, especially to contradict the contention of the plaintiff that the notes of the company were accepted through a misunderstanding. Case Manufacturing Co. v. Soxman, 138 U. S. 431, 11 Sup. Ct. 360; 34 L. ed. 1019. See also Durgin v. Smith, 133 Mich. 331, 94 N. W. 1044; 1Thomp. Corp. (2nd ed.), §85.

[17] Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Patrick v. Reynolds, 1 Com. B. N. S. 727; Williams v. Pigott, 5 Eng. R. & C. Cas. 544. See also Van Hummell v. International Gurantee Co. (Manitoba), 23 West L. Rep. 248, Ann. Cas. 1913E, 1163, and note.

[18] Miller v. Baker, 161 Iowa 136, 140 N. W. 407; Reynell v. Lewis, 15 Mees. & W. 517; Bailey v. Macaulay, 13 Q. B. 815; 1 Thomp. Corp., (2nd ed.), §83. See Davidson v. Hobson, 1 Mo. App. 28. And they cannot be held liable as partners under a complaint which does not proceed upon that theory but simply seeks to hold them personally liable in the event that it is ascertained that the subsequent incorporation, which was contemplated by all parties at the time of the contract, was defective, and to hold them liable as stockholders, if it should be determined to be an effective incorporation. Sheilds v. Clifton &c. Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700. See also Buffington v. Bardon, 80 Wis. 635, 50 N. W. 776. In some cases promoters have been called partners and often rules

They may, however, take on the character of partners by holding themselves out as such,[19] or by fraudulently acting in concert for their own common personal benefit.[20] If the scheme prove abortive, and the proposed corporation is never chartered, the expenses incurred in the attempted organization must usually be borne by the promoters,[21] and the subscribers, unless estopped by acquiescence or some act of their own, may recover back the money paid for shares of its stock.[22] The promoters are also liable to one who they have induced to subscribe by fraudulent representations.[23]

applicable to partners apply. Leeds v. Townsend, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 191n; Vaughn v. Morris (Tex. Civ. App.), 180 S. W. 954. See also Botsford v. VanPiper, 33 Nev. 156, 110 Pac. 705.

[19] Collingwood v. Berkeley, 15 C. B. N. S. 145; Lake v. Duke of Argyll, 6 Q. B. 447. See also McFall v. McKeesport &c. Co., 123 Pa. St. 259, 16 Atl. 478; McLennan v. Hopkins, 2 Kans. App. 260, 41 Pac. 1061.

[20] Chandler v. Bacon, 30 Fed. 538; Colt v. Woollaston, 2 P. Wms. 154. See also Hornblower v. Crandall, 7 Mo. App. 220; Getty v. Delvin, 54 N. Y. 403. New Sombrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73, 36 Law T. (N. S.) 222.

[21] Sproat v. Porter, 9 Mass. 300. Johnson v. Corser, 34 Minn. 355, 25 N. W. 799; Nockels v. Crosby, 3 Barn. & C. 814, 822. This may, however, be regulated by contract or depend upon the peculiar circumstances of each particular case. That the corporation is not necessarily liable to him, see Ritchie v. McMullen, 79 Fed. 522; Winters v. Hub Min. Co., 57 Fed. 287; Wilson v. Trenton &c. R. Co., 56 N. J. Eq. 783, 40 Atl. 597; Seymour v. Spring Forest &c. Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859. See also Van Hummell v. International Guarantee Co. (Manitoba), 23 West. L. Rep. 248, Ann. Cas. 1913E, 1163.

[22] Williams v. Page, 24 Beav. 654; Walstab v. Spotiswoode, 15 Mees. & W. 501; Ashpitel v. Sercombe, 5 Exch. 147; Nockels v. Crosby, 3 Barn. & C. 814; Grand Trunk &c. R. Co. v. Brodie, 9 Hare 823. But see Moore v. Garwood, 4 Exch. 681. See Thomp. Corp. (2nd ed.), § 112.

[23] Miller v. Barber, 66 N. Y. 558; Teachout v. Van Hosen, 76 Iowa 113, 40 N. W. 96, 1 L. R. A. 664, 14 Am. St. 206; Short v. Stevenson, 63 Pa. St. 95; Paddock v. Fletcher, 42 Vt. 389; Cridland v. De Mauley, 1 DeGex & S. 459, 12 Jur. 701; Glasier v. Rolls, 60 Law T. (N. S.) 59 L. R. 42 Ch. Div. 436. See also Brewster v. Hatch, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. 498; Capel v. Sim's &c. Co., 58 Law T. (N. S.) 807, 57 L. J. Ch. 713; Gerhard v. Bates, 2 El. & Bl. 476.

§ 19 (13a.) **Representations by promoters.**—Misrepresentations made by the promoters of a corporation at a public meeting, called for the purpose of procuring subscriptions to stock, will not, ordinarily, vitiate a subscription made in reliance thereon by one of the class to whom the representations are made, where such representations are not authorized by the corporation.[24] Indeed, as already stated, those who promote or undertake to organize a proposed corporation are not, and cannot be in the nature of things, its agents before it comes into existence. They cannot, therefore, bind it by engagements in behalf of the corporation not ratified or adopted by it after it comes into existence, nor by their declarations and representations.[25] But the promoters may render themselves personally liable by their own misrepresentations and fraud in their prospectus or at a public meeting to those who are injured thereby as a proximate cause.[26]

§ 20 (14). **Contracts of promoters—When binding on corporation.**—The promoters cannot bind the corporation by their contracts made before the organization of the company,[27] except so

[24] Smith v. Tallahassee &c. Co., 30 Ala. 650; Mississippi &c. R. Co. v. Cross, 20 Ark. 443, 454; First Nat. Bank v. Hurtford, 29 Iowa 579; Vicksburg &c. R. Co. v. McKean, 12 La. Ann. 638; St. Johns Mfg. Co. v. Munger, 106 Mich. 90, 64 N. W. 3, 58 Am. St. 468; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336. Compare Atlanta &c. R. Co. v. Hodnett, 36 Ga. 669; Weems v. Georgia &c. R. Co., 88 Ga. 303, 14 S. E. 583; and see note in 85 Am. St. 385, 386.

[25] United States &c. Co. v. Schlegel, 143 N. Y. 537, 38 N. E. 729; Weatherford &c. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. 837; Lynde v. Anglo-Italian, &c. Co. (1896), 1 Ch. 178, 73 L. T. 502; 1 Thomp. Corp. (2nd ed.), § 91. See also Sumner-May Hdw. Co. v. Scally, 66 Fla. 93, 62 So. 900; Atlantic City R. Co. v. Wood, 78 N. J. Eq. 298, 81 Atl. 1132; Moriarity v. Meyer, 21 N. Mex. 521, 157 Pac. 652, L. R. A. 1916E, 1165; Tanner v. Sinaloa Land &c. Co., 43 Utah 14, 134 Pac. 586, Ann. Cas. 1916C, 100, and note.

[26] Walker v. Anglo-American &c. Co., 72 Hun 334, 25 N. Y. S. 432; Reese &c. Min. Co. v. Smith, L R. 4 H. L. 64; New Brunswick R. Co. v. Muggeridge, 1 Drew & Sm. 363; Clarke v. Dickson, 6 C. B. (N. S.) 453. See also Tuttle v. George A. Tuttle Co., 101 Maine 287, 64 Atl. 496.

[27] Little Rock &c. R. Co. v. Perry, 37 Ark. 164; Perry v. Little Rock &c. R. Co., 44 Ark. 383, 25 Am. & Eng. R. Cas. 44; New York &c. R.

far as it adopts or ratifies their acts, either directly[28] or, in some cases, by accepting the benefits of contracts made for it,[29] and

Co. v. Ketchum, 27 Conn. 170; Rockford &c. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Sellers v. Greer, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; Tuttle v. George A. Tuttle Co., 101 Maine 287, 64 Atl. 496; Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193; Carmody v. Powers, 60 Mich. 26, 26 N. W. 801; Hill v. Gould, 129 Mo. 106, 30 S. W. 181; Munson v. Syracuse &c. R. Co., 103 N. Y. 58, 8 N. E. 355, 29 Am. & Eng. R. Cas. 377; Caledonian &c. Co. v. Helensburgh, 2 Macq. 391. See also Tanner v. Sinaloa Land &c. Co., 43 Utah 14, 134 Pac. 386, Ann. Cas. 1916C, 100, and authorities there cited in note and at close of last preceding note, supra. A promoter cannot bind the corporation by contract made in obtaining a subscription before the organization of the corporation. Joy v. Manion, 28 Mo. App. 55.

[28] Cotting v. Grant &c. R. Co., 65 Fed 545. Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110; Wood v. Whelen, 93 Ill. 153; Low v. Connecticut &c., 45 N. H. 370, 46 N. H. 284; Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84; Payne v. New South Wales &c. Co., 10 Exch. 283; Hutchinson v. Surrey &c. Association, 11 C. B. 689. See also Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063. It has been held that the president and general manager may adopt and ratify a contract made by himself for the corporation before it was legally created, for services for the company which he would have authority to engage if no previous contract existed. Oakes v. Cattaraugus Water Co., 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544. See also Arapahoe &c. Co. v. Platt, 5 Colo. App. 584, 39 Pac. 584.

[29] In re, Ballou, 215 Fed. 810; Moore &c. Co. v. Towers &c. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23; Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110; Van Noy v. Central Union Fire Ins. Co., 168 Mo. App. 287, 153 S. W. 1090; Girard v. Case Bros. Cutlery Co., 225 Pa. 327, 74 Atl. 201; Coyote Gold &c. Co. v. Ruble, 8 Ore. 284; Schreyer v. Turner &c. Co., 29 Ore. 1, 43 Pac. 719; Bells Gap. R. Co. v. Christy, 79 Pa. St. 59; Edwards v. Grand Junction R. Co., 1 Mylne & C. 650; Stanley v. Birkenhead R. Co., 9 Simmons 264. See also Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Continental Trust Co. v. Toledo &c. Co., 86 Fed. 929, 948; Frankfort &c. Co. v. Churchill, 6 T. B. Mon. (Ky.) 427, 17 Am. Dec. 159; Battelle v. Northwestern &c. Co., 37 Minn. 89, 33 N. W. 327; Bommer v. American Spiral &c. Co., 81 N. Y. 468; Seymour v. Spring Forest &c. Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Hall v. Vermont &c. R. Co., 28 Vt. 410. In some cases, however, it is denied that a corporation can ratify a contract so as to make it relate back to its inception before the corporation came into existence. Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193,

impliedly adopting it. The corporation can only take advantage of an executory contract entered into by the promoters by fulfilling all the engagements entered into by them on its behalf.[30] It cannot, as a rule, accept and retain the benefit without assuming the burden.[31] But it has been held that where the promoters mutually agree to perform services without compensation, the company cannot be held liable for such services although it received the benefit.[32] Where the contract is not made for the benefit of the corporation and the parties did not rely in any way

citing Kelner v. Baxter, L. R. 2 C. P. 174; Gunn v. London &c. Co., 12 C. B. N. S. 694; Melhado v. Porto Alegre &c. R., L. R. 9 C. P. 503; Empress &c. Co., In re, 16 Ch. Div. 125. See also Natal Land &c. Co. v. Pauline &c. Syndicate (1904), App. Cas. 120, 73 L. J. P. C. 22, 11 Manson 29; Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063, 50 L. R. A. (N. S.) 979n. But, as we understand these decisions, they do not decide that the corporation may not be held as upon a new contract from the time of its adoption. McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. 653. See also Van Hummell v. International Gurarantee Co. (Manitoba), 23 West L. Rep. 248, Ann. Cas. 1913E, 1163; 1 Thomp. Corp. (2nd ed.) §§ 95-102.

[30] Burrows v. Smith, 10 N. Y. 550; Thomp. Corp. (2nd ed.) §§ 101, 102; Bedford &c. R. Co. v. Stanley, 32 L. J. Eq. 60. Unless it in some way accepts the contract so as to make it liable for failure to perform the same it cannot successfully claim the right to enforce the contract to which it never became a party. Penn Match Co. v. Hapgood, 141 Mass. 145, 7 N. E. 22. See also Gent v. Manufacturers' &c. Co., 107 Ill. 652, 8 Am. & Eng. Corp. Cas. 306; Van Buren &c. R. Co. v. Lamphear, 54 Mich. 575, 20 N. W. 590; note to Moore &c. Co. v. Towers &c. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23.

[31] Smith v. Parker, 148 Ind. 127, 45 N. E. 770; Paxton Cattle Co. v. First Nat. Bank, 21 Nebr. 621, 33 N. W. 271, 59 Am. Rep. 852; Low v. Connecticut &c. R. Co., 45 N. H. 370, 46 N. H. 284; Bell's Gap R. Co. v. Christy, 79 Pa. St. 59; Grand Junction R. Co., 1 Mylne & C. 650; 1 Thomp. Corp. (2d. ed.), §§ 96, 102. But see Weatherford &c. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, 40 Am. St. 837; Davis &c. Co. v. Hillsboro &c. Co., 10 Ind. App. 42, 37 N. E. 549; Taft v. Quaker &c. Bank, 141 Pa. St. 550, 21 Atl. 660; Rotherham &c. Co., In re, 50 Law T. (N. S.) 219. See also note to Pittsburgh Min. Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am St 149, 161, 162.

[32] Powell v. Georgia &c. R. Co., 121 Ga. 803, 49 S. E. 759.

upon the corporation, but looked solely to the responsibility of the promoters, the corporation would not, as a rule at least, be liable and it is not every contract that can be so adopted by the corporation as to make it liable thereon, for there may be an absolute want of power on the part of the corporation and the contract may be ultra vires in every sense.[33]

§ 21 (15). Legislative authority essential to creation of corporation.—A corporation has been defined as a body consisting of one[34] or more persons, established by law for certain specific purposes, with the capacity of succession and with special privileges not possessed by individuals, yet acting in many respects as an individual.[35] It is necessary to the creation of the corporation that it be authorized by legislative enactment.[36] It was formerly

[33] Marshall County v. Schneck, 5 Wall. (U. S.) 772, 18 L. ed. 556. Stanton v. New York &c. R. Co., 59 Conn. 272, 22 Atl. 300, 21 Am. St. 110; Shrewsbury v. North Staffordshire R. Co., L. R. 1 Eq. 593, 12 Jur. (N. S.) 63; Skegness &c. Tramways Co., In re, 41 Ch. Div. 215. See also Marshalltown First Nat. Bank v. Church Federation, 129 Iowa 268, 105 N. W. 578. But compare Cook Mfg. Co. v. Randall, 62 Iowa 244, 17 N. W. 507. In some instances, however, there may, perhaps, be a liability because of the acceptance and retention of benefits and upon the ground of estoppel, although not strictly upon the contract.

[34] Penobscot &c. Co. v. Lamson, 16 Maine 224, 33 Am. Dec. 656. Under the general laws in most states the minimum number of incorporators is usually fixed at some certain number more than one. Indeed, the number required for the incorporation of railroad companies as fixed by such laws is often greater than the laws of the same state require for many other corporations. The corporations is a separate entity from the person or persons who may own its stock, and the fact that one person owns all the stock has been held not to make him and the corporation the same person. Monongahela Bridge Co. v. Pittsburgh &c. Co., 196, Pa. St. 25, 46 Atl. 99, 79 Am. St. 685. See also Ulmer v. Lime Rock R. Co., 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; Chase v. Michigan &c. Co., 121 Mich. 631, 80 N. W. 717.

[35] 1 Thomp. Corp., §§ 1, 2. Many definitions are given by Judge Thompson from judicial decisions.

[36] Franklin Bridge Co. v. Wood, 14 Ga. 80; Hoadley v. County Commissioners, 105 Mass. 519; People v. Assessors, 1 Hill (N. Y.) 616; Atkinson v. Marietta &c. R. Co., 15 Ohio 21. "Corporations are creatures of statutes and cannot come into existence in a manner other than prescribed by statute." They cannot be created by mere agreement between individuals. 1 Thomp. Corp (2nd ed)

a criminal offense to assume to act as a corporation without such authority,[37] and is still held to be so, in theory at least, in some jurisdictions.[38]

§ 22 (16). **Creation by special charter.**—Such legislative authority was formerly given by special act, in which the powers, duties and liabilities of the specified corporation were enumerated at length, and it is still granted in this way in some states,[39] but in a number of states special laws are prohibited by the constitution and comparatively few special charters are now granted even where there is no such prohibition. It is not necessary to the existence of a corporation that it be expressly declared a corporation in so many words.[40] It is sufficient if powers are granted to a body of men that can only be exercised by a corporation.[41] Where certain designated persons are declared to be a corporation and given corporate powers by a special charter, they have been held to become a corporation eo instanti.[42] But

§ 171. Congress has power to charter railroad companies in the territories within its jurisdiction. Thompson v. Pacific R. Co., 9 Wall. (U. S.) 579, 19 L. ed. 792; Union Pacific R. Co. v. Lincoln County, 1 Dill. (U. S.) 314, Fed. Cas. No. 14378; California v. Central Pac. R. Co., 127 U. S. 1, 39 Sup. Ct. 1037, 32 L. ed. 150.

[37] Duvergier v. Fellows, 5 Bing. 248, 5 Moore & P. 403.

[38] People v. Ridgley, 21 Ill. 65.

[39] An act declaring that "a company is hereby created called the St. Joseph and Iowa Railroad Company," and naming the first board of directors, was held to be a present grant of corporate powers, of which the construction and operation of part of its road by such company was a sufficient acceptance. Roosa v. St. Joseph &c. R. Co., 114 Mo. 508, 21 S. W. 1124. See also Little Rock &c. R. Co. v. Little Rock &c. R. Co., 36 Ark. 663, 684; Stoops v. Greensburgh &c. Co., 10 Ind. 47. New York v. New York City R. Co., 193 N. Y. 543, 86 N E. 565.

[40] Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Commonwealth v. West Chester R. Co., 3 Grant Cas. (Pa.) 200.

[41] Liverpool Ins. Co. v. Massachusetts, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Blanchard v. Kaull, 44 Cal. 440; Dean v. Davis, 51 Cal. 406; Inhabitants of Springfield v. Miller, 12 Mass. 415; Coburn v. Ellenwood, 4 N. H. 101; Atkinson v. Bemis, 11 N. H. 44; Dunn v. Oregon University, 9 Ore. 357; Delaware &c. Co. v. Commonwealth, 50 Pa. St. 399. But see Shelton v. Banks, 10 Gray (Mass.) 401; Walsh v. New York and Brooklyn Bridge, 96 N. Y. 427; State v. Davis, 23 Ohio St. 434; Neil v. Board, 31 Ohio St. 15.

[42] Compare Dartmouth College v.

a man cannot be compelled to become a member of a private corporation against his will.[43]

§ 23 (17). **Acceptance of charter.**—For the reason stated in the last section, a special charter does not, ordinarily, create an effective private corporation until it is accepted.[44] But, as special charters are usually for the benefit of those who are named, an acceptance may be presumed in many cases.[45] Thus, the fact that they had applied for the charter[46] that they afterwards exercised the powers conferred,[47] or the like,[48] is strong, if not con-

Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Talledega Ins. Co. v. Landers, 43 Ala. 115; Little Rock &c. R. Co. v. Little Rock &c. R. Co., 36 Ark. 663, 684; Stoops v. Greensburgh &c. Plank Road Co., 10 Ind. 47; State v. Dawson, 16 Ind. 40.

[43] 2 Kent Com. 277; Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Lauman v. Railroad Co., 30 Pa. St. 46, 72 Am. Dec. 685.

[44] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 708, 4 L. ed. 629; Lexington &c. R. Co. v. Chandler, 13 Metc. (Mass.) 311; Haslett v. Wotherspoon, 1 Strobh. Eq. (S. Car.) 209; Quinlan v. Houston &c. Co., 89 Tex. 356, 34 S. W. 738. See also Jennings v. Dark, 175 Ind. 332, 92 N. E. 778.

[45] Bangor &c. R. Co. v. Smith, 47 Maine 34; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; 1 Elliott Ev. § 106.

[46] Atlanta v. Gate City &c. Co., 71 Ga. 106; Middlesex &c. v. Davis, 3 Metc. (Mass.) 137; St. Joseph &c. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Astor v. New York R. Co., 48 Hun 562, 1 N. Y. S. 174. But the presumption of acceptance arising from the application for the charter may, it seems, be rebutted by proof that no steps were taken to organize or proceed under it, although a great many years had elapsed since it was granted. Newton v. Carbery, 5 Cranch (U. S.) 632 Fed. Cas. No. 10190.

[47] Newton v. Carbery, 5 Cranch (U. S.) 632, Fed. Cas. No. 10190; Louisville Trust Co. v. Louisville &c. R. Co., 75 Fed. 433; Talladega Ins. Co. v. Landers, 43 Ala. 115; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Quinlan v. Houston &c. R. Co., 89 Tex. 356, 34 S. W. 738. See also Roosevelt v. Hamblin, 199 Mass. 127, 85 N. E. 98, 18 L. R. A. (N. S.) 748n; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74.

[48] Snead v. Indianapolis &c. R. Co., 11 Ind. 104; St. Paul Division v. Brown, 11 Minn. 356; Taylor v. Newberne, 55 N. Car. 141, 64 Am. Dec. 566; McKay v. Beard, 20 S. Car. 156; Gleaves v. Turnpike Co., 1 Sneed (Tenn.) 491. See also Glymont Imp. Co. v. Toler, 80 Md. 278, 30 Atl. 651; Cincinnati &c. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Dec. 729; 3 Elliott Ev. §§ 1932, 1936.

clusive, evidence of an acceptance. It is not, therefore, essential that an express acceptance of the charter should appear in the records of the corporation.[49] The acceptance must usually be unconditional, for a charter cannot be accepted in part and rejected in part, but must either be accepted or rejected as offered.[50] Although directors may sometimes bind a corporation by acts performed by them in other states than that in which the corporation was created, yet the meetings of the stockholders or corporators must usually be held within the jurisdiction creating the corporation, and it has been held that the acceptance of a charter by the corporators in their constituent capacity at a meeting held in another state for the purpose of organization is ineffective.[51] If a charter is granted by the legislature without any application upon the part of those to whom it is granted, it is regarded as a mere offer upon the part of the state, and may be withdrawn at any time before it is accepted.[52] When accepted, a charter takes effect immediately,[53] unless otherwise provided.

§ 24 (18). **Incorporation under general laws.**—To prevent the grant of special and exclusive privileges, to secure uniformity in the powers of all corporations of the same class and render them

[49] Russell v. McLellan, 14 Pick. (Mass.) 63. The question of acceptance is usually a question of fact for the jury. Hammond v. Straus, 53 Md. 1.

[50] Kenton County Court v. Bank Lick &c. Co., 10 Bush (Ky.) 529; Lyons v. Orange &c. R. Co., 32 Md. 18; Rex. v. Westwood, 2 Dow & Cl. 21, 7 Bing. 1, 90.

[51] Miller v. Ewer, 27 Maine 509, 46 Am. Dec. 619, and note; Smith v. Silver Valley &c. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760. See also Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329. Freeman v. Machias &c. Co., 38 Maine 343. But compare Missouri Lead &c. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746.

[52] State v. Dawson, 16 Ind. 40. See also State v. Bull, 16 Conn. 179, 191; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 463, 464, 15 N. E. 524; Chesapeake &c. Co. v. Baltimore &c. R. Co., 4 G. & J. (Md.) 1; Mississippi Society v. Musgrove, 44 Miss. 820, 7 Am. Rep. 723.

[53] Kaiser v. Lawrence Savings Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85. See also Coleman v. Coleman, 78 Ind. 344; Cincinnati, &c. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729.

subject to all such general laws as may be enacted for the government of corporations of that class, and to secure to the state the right to amend or repeal the charter at pleasure, provision is made for the creation of corporations by general laws in most of the states,[54] in several of which the constitutions forbid the passage of any special act chartering railroads.[55] These general laws usually provide for the filing of articles of association, conforming to certain statutory requirements, by persons who have subscribed stock in the projected company. The persons subscribing to the articles of incorporation need not be residents of the state issuing the charter, unless the statute requires it.[56] When the requisite stock is subscribed, and the articles signed and filed as provided (generally with the secretary of state) the subscribers and stockholders usually become a corporation, clothed with the powers and charged with the duties and liabilities of corporations.[57] Proof of the act of incorporation and of

[54] 1 Thomp. Corp. (2d ed.), § 171, et seq. This reservation may appear in the Constitution, or in the general laws, or in the charter itself. Thomp. Corp. (2nd ed. § 404. As to formation by consolidation, see Yazoo &c. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. ed. 395, and chapter 15 on Consolidation.

[55] This is true of Arkansas, Colorado, California, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska New Jersey, Texas, New York, Michigan, Minnesota, Nevada, Maryland, Maine, Oregon, Ohio, Wisconsin and the territories. 1 Thomp. Corp. (2nd ed.) § 146, et seq. The Kansas act in relation to the Missouri, Kansas and Texas Railway Company and the Union Pacific Railway Company, purporting to convey and extend all the rights possessed to any part of their line to their entire road, and to give a right of way over all lands as full as that enjoyed over other lands under other acts, is in violation of Kans. Const. art. 12, § 1, providing that the legislature shall pass no special act conferring corporate powers. Roberts v. Missouri &c. R. Co., 43 Kans. 102, 22 Pac. 1006, 43 Am. & Eng. R. Cas. 532.

[56] Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755; note to State v. Manufacturers &c. Assn., 50 Ohio St. 145, 33 N. E. 401, 24 L. R. A. 252; Detwiller v. Commonwealth, 31 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357; Commonwealth v. Hemmingway, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 360. See generally, 1 Thomp. Corp. (2d ed.), § 177.

[57] Cincinnati &c. R. Co. v. Danville &c. R. Co., 75 Ill. 113; Hoagland v. Cincinnati &c. R. Co., 18 Ind. 452; James v. Greensboro &c.

user or corporate action under it is generally sufficient evidence of the existence of the corporation,[58] and a proper certificate of incorporation, or copy of the original articles of incorporation, is, in most states prima facie, and, perhaps, conclusive evidence thereof;[59] but a certificate which fails to comply, in substance, with the statutory requirements is not proof of a valid corporate existence.[60] The articles of incorporation are generally required to specify the objects of the corporation in at least substantial compliance with the statute,[61] the place in which its operations are to be carried on or in which its principal office is located,[62]

Co., 47 Ind. 379; Hunt v. Kansas and Missouri Brige Co., 11 Kans. 412. Clarkson v. Hudson River R. Co., 12 N. Y. 304. The requirements of the statute must be substantially complied with. People v. Chambers, 42 Cal. 201; McCallion v. Hibernia &c. Society, 70 Cal. 163, 12 Pac. 114; People v. Cheeseman, 7 Colo. 376, 16 Am. & Eng. R. Cas. 400; Reed v. Richmond &c. R. Co., 50 Ind. 342; Abbott v. Omaha &c. Co., 4 Nebr. 416; Eaton v. Acpinwall, 19 N. Y. 119; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362. But slight omissions in the certificate will not vitiate it. People v. Stockton &c. R. Co., 45 Cal. 306, 13 Am. Rep. 178; Eakright v. Logansport &c. R. Co., 13 Ind. 404; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506; Buffalo &c. R. Co. v. Cary, 26 N. Y. 75; Rogers v. Danby Universalist Society, 19 Vt. 187. The fact that nearly all the officers of a railroad company are also officers of other railroad companies does not affect the corporate existence of the former company, and, under the Kansas law, its existence dates from the filing of its charter. Southern &c. R. Co. v. Towner, 41 Kans. 72, 21 Pac. 221.

[58] Wood v. Wiley &c. Co., 56 Conn. 87, 13 Atl. 137; Braintree &c. Co. v. Braintree, 146 Mass. 482, 16 N. E. 420; Columbia &c. Co. v. Meier, 39 Mo. 53; Bank v. International Bank, 21 N. Y. 542; 3 Elliott Ev. §§ 1934-1941. See also Elliff v. Oregon R. &c. Co., 53 Ore. 66, 99 Pac. 76; Wisconsin River Imp. Co. v. Pier, 137 Wis. 325, 118 N. W. 857, 21 L. R. A. (N. S.) 538n.

[59] Thomp. Corp. (2d ed.), § 284. See 3 Elliott Ev. § 1941; also Reno v. Reno &c. Ditch Co., 51 Colo. 588, 119 Pac. 473.

[60] People v. Selfridge, 52 Cal. 331; McCallion v. Hibernia &c. Society, 70 Cal. 163, 12 Pac. 114; Fifth Baptist Church v. Baltimore &c. R. Co., 4 Mackey (D. C.) 43.

[61] West v. Bullskin &c. Co., 32 Ind. 138; O'Reiley v. Kankakee &c. Co., 32 Ind. 169; Attorney-General v. Lorman, 59 Mich. 157, 26 N. W. 311, 60 Am. Rep. 287; State v. Central Ohio &c. Assn., 29 Ohio St. 399.

[62] Harris v. McGregor, 29 Cal. 124; Clegg v. Hamilton &c. Co., 61 Iowa 121, 15 N. W. 865; People v. Beach, 19 Hun (N. Y.) 259.

the amount of the capital stock,[63] and the names and residences of the incorporators,[64] and the like.[65] In the case of a railroad company it is also usually provided that the line of the road shall be more or less definitely described, but where the statute merely requires that the termini should be stated and the counties named into or through which it is intended to pass, it is sufficient so to describe the line by designating such place and naming each county into or through which it is expected to run.[66] Most of the statutes require that the articles of incorporation shall be signed and acknowledged by a certain number of incorporators,[67]

[63] State v. Shelbyville &c. Co., 41 Ind. 151; Heinig v. Adams &c. Co., 81 Ky. 300. See also Huntington v. Curry, 14 Cal. App. 468, 112 Pac. 583.

[64] Busenback v. Attica &c. Co., 43 Ind. 265; Vawter v. Franklin College, 53 Ind. 88. But the residence need not be stated unless the statute requires it. State v. Foulkes, 94 Ind. 493. It is sufficient if the initials of the Christian name be used. State v. Beck, 81 Ind. 500.

[65] Piper v. Rhodes, 30 Ind. 309; New Orleans &c. R. Co. v. Frank, 39 La. Ann. 707, 2 So. 310, 30 Am. & Eng. R. Cas. 275; State v. Central Ohio &c. Assn., 29 Ohio St. 399. See also Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. 151; People v. Montecito &c. Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. 172, and note on pages 178, 179.

[66] Board v. Center Tp., 105 Ind. 422, 441, 2 N. E. 368, 7 N. E. 189. See also Hyattsville v. Washington &c. R. Co., 120 Md. 128, 87 Atl. 828; New York &c. R. Co. v. O'Brien, 121 App. Div. 819, 106 N. Y. 909. Where the line is described with reasonably certainty and the termini are shown to be in the state in which the company is incorporated it has been held that the fact that the line as described runs partly through another state does not invalidate the incorporation. Piedmont &c. R. Co. v. Speelman, 67 Md. 260, 10 Atl. 77, 293, 30 Am. & Eng. R. Cas. 316. An approximate estimate of the length of the road is sufficient where the length is required to be stated. Buffalo &c. R. Co. v. Hatch, 20 N. Y. 157. And indefiniteness in the description of the route may be rendered immaterial by legislative recognition, and the construction and operation of the road. Cayuga Lake Co. v. Klye, 5 Thomp. & C. 659, 64 N. Y. 185. See post, § 47.

[67] People v. Montecito &c. Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. 172; Indianapolis &c. Mining Co. v. Herkimer, 46 Ind. 142; State v. Critchett, 37 Minn. 13, 32 N. W. 787; Corey v. Morrill, 61 Vt. 598. In such a case one who merely signs the articles of association without acknowledging them does not become a

and that the certificate or copy shall be filed with the secretary of state, or other officer, or published in some specified manner. In some jurisdictions the failure to comply with such a requirement has been held not to vitiate the organization or prevent the corporation from coming into existence,[68] but much depends upon the language of the particular statute, and if the requirement is a condition precedent it must be complied with.[69] It is, indeed, the general rule that all conditions precedent must be substantially performed.[70] Thus, where the statute provides that a certain amount of stock shall be subscribed before articles of incorporation can be filed, or that a certain percentage of the capital stock shall be paid in before the articles are filed, the statute must be complied with before a corporation can be legally organized.[71] In the absence, however, of any provision upon the

stockholder and is not bound by the subscription. Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591.

[68] Shakopee &c. Co., In re, 37 Minn. 91, 33 N. W. 219; Granby Mining Co. v. Richards, 95 Mo. 106, 8 S. W. 246; Holmes v. Gilliland, 41 Barb. (N. Y.) 568. See also Vanneman v. Young, 52 N. J. L. 403, 3 Lewis Am. R. & Corp. 660, and note.

[69] Elgin &c. Co. v. Loveland, 132 Fed. 41; Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. 151; Bigelow v. Gregory, 73 Ill. 197; Indianapolis &c. Mining Co. v. Herkimer, 46 Ind. 142; Clegg v. Hamilton, 61 Iowa 121, 15 N. W. 865; Field v. Cooks, 16 La. Ann. 153; State v. Critchett, 37 Minn. 13, 32 N. W. 787; Hurt v. Salisbury, 55 Mo. 310; Capp v. Hastings &c. Co., 40 Nebr. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. 677; Childs v. Hurd, 32 W. Va. 66, 9 S. E. 362; Bergeron v. Hobbs, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. 85; 1 Thomp. Corp. (2d ed.), § 265. Where, however, the articles are properly delivered to the designated officer for record, the fact that he records them in the wrong book will not invalidate the incorporation. Walton v. Riley, 85 Ky. 413, 3 S. W. 605. See also State v. Foulkes, 94 Ind. 493.

[70] Garnett v. Richardson, 35 Ark. 144; Mokelumne Hill &c. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; Danbury &c. R. Co. v. Wilson, 22 Conn. 435; Attorney-General v. Hanchett, 42 Mich. 436, 4 N. W. 182; Dutchess &c. R. Co. v. Mabbett, 58 N. Y. 397.

[71] People v. Chambers, 42 Cal. 201; State v. Dillon, 36 Ind. 388; State v. St. Paul &c. Co., 92 Ind. 42; Holman v. State, 105 Ind. 569, 5 N. E. 702. But where this is not required to precede the filing of the articles there may be a corporate existence sufficient, at least to, withstand a collateral attack. Eastern &c. Co. v. Vaughn, 14 N. Y. 546;

subject in the statute or contract of subscription, it has been held not to be necessary that the entire capital stock should have been subscribed for before the incorporation.[72] And where the general laws for the incorporation of railroads requires the payment of a certain part of the subscription in cash before the filing of the articles of incorporation it should be reasonably construed, and it has been held sufficient if the payment is made by check which would have been cashed.[73]

§ 25 (19). **Perfecting the organization.**—Under some of the statutes the names of those who are to serve as directors for the first year must be stated in the article of incorporation, and where such or similar provisions are found it would seem that there must be a preliminary meeting and organization, or at least a selection in some manner of those who are to serve as directors. But, ordinarily, the articles of incorporation are first executed and filed and a meeting of the stockholders or members is then held for the purpose of adopting by-laws, electing directors, and perfecting the corporate organization;[74] although, as already

Palmer v. Lawrence, 3 Sandf. (N. Y.) 161. See also People v. Stockton &c. R. Co., 45 Cal. 306, 13 Am. Rep. 178; McClinch v. Sturgis, 72 Maine 288; Boston &c. Co. v. Moring, 15 Gray (Mass.) 211; Buffalo &c. R. Co. v. Hatch, 20 N. Y. 157; Ogdensburgh &c. R. Co. v. Frost, 21 Barb. (N. Y.) 541; Cheraw &c. R. Co. v. White, 14 S. Car. 51; Spartanburg &c. R. Co. v. Ezell, 14 S. Car. 281.

[72] Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Bolling v. Le Grand, 87 Ala. 482, 6 So. 332; Johnson v. Kessler, 76 Iowa 411, 41 N. W. 57; Massey v. Citizens' &c. Assn., 22 Kans. 624; Schenectady &c. Plank Road Co. v. Thatcher, 11 N. Y. 102; Waterford &c. R. Co. v. Dalbiac, 20 L. J. Exch. 227; Macdougall v. Jersey &c. Co., 2 H. & M. 528. But see Shurtz v. Schoolcraft &c. R. Co., 9 Mich. 269; Cabot &c. Bridge v. Chapin, 6 Cush. (Mass.) 50; Salem Mill Dam Co. v. Ropes, 6 Pick. (Mass.) 23; Worcester &c. R. Co. v. Hinds, 8 Cush. (Mass.) 110; Livesey v. Omaha &c. Co, 5 Nebr. 50, and compare City Hotel v. Dickinson, 6 Gray (Mass.) 586; Boston &c. R. Co. v. Wellington, 113 Mass. 79. See post, § 129.

[73] People v. Chambers, 42 Cal. 201. See also People v. Stockton &c. R. Co., 45 Cal. 306, 13 Am. Rep. 178.

[74] See Walker v. Devereaux, 4 Paige Ch. (N. Y.) 229; Lehman v. Warner, 61 Ala. 455; McClinch v. Sturgis, 72 Maine 288. See generally 1 Thomp. Corp. (2d ed.), Ch. 7, and particularly, § 194.

stated, the corporation comes into existence, under many of the statutes, as soon as the articles of incorporation are properly filed. The directors then usually hold a directors' meeting and elect the officers. This ordinarily, completes the corporate organization, although there may be other statutory requirements that should be complied with before the corporation is ready to do business.[75]

§ 26 (20). **Defective organization—Waiver—Collateral attack.** —If the organization be defective, this fact cannot, as a rule, be taken advantage of in any collateral action,[76] for mere irregulari-

[75] In the case of Wechselberg v. Flour City Nat. Bank, 64 Fed. 90, 26 L. R. A. 470, it was held that, under the Wisconsin statute, where the requisite number of persons duly signed, acknowledged and filed articles of incorporation, but did not subscribe for or issue any stock or do anything else to perfect the organization, the corporation had only a qualified existence without the full privileges of a complete incorporation and organization, and that one of said persons was bound with the others for debts incurred by them in the name of the corporation, although he did not actively participate in their acts. See also Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Hammond v. Straus, 53 Md. 1; State v. Fidelity &c. Co., 49 Ohio St. 440, 31 N. E. 658, 16 L. R. A. 611, 6 Lewis Am. R. Corp. 599; Hughesdale &c. Co. v. Vanner, 12 R. I. 491; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232. As a general rule, however, conditions to be performed after incorporation, in order to carry on business, are not conditions precedent in such a sense as to effect the corporate existence. Spartanburg &c. R. Co. v. Ezell, 14 S. Car. 281; Harrod v. Hamer, 32 Wis. 162. And see Rutherford v. Hill, 22 Ore. 218, 17 L. R. A. 549, 29 Am. St. 596n; People v. Rose, 210 Ill. 582, 71 N. E. 580; Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524.

[76] Frost v. Frostburg Coal Co., 24 How. (U. S.) 278, 283, 16 L. ed. 637; Baltimore &c. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. ed. 784; Lahman v. Warner, 61 Ala. 455; Illinois &c. R. Co. v. Cook, 29 Ill. 237; Brown v. Calumet R. Co., 125 Ill. 600, 18 N. E. 283; Aurora &c. R. Co. v. Lawrenceburg, 56 Ind. 80; Commissioners v. Hall, 70 Ind. 469; Cleveland &c. R. Co. v. Feight, 41 Ind. App. 416, 84 N. E. 15; Gill v. Kentucky &c. Co., 7 Bush (Ky.) 635; Taylor v. Portsmouth &c. St. R., 91 Maine 193, 64 Am. St. 216; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760n; Swartout v. Michigan A. L. Co., 24 Mich. 389, 394; Eaton v. Aspinwall, 19 N. Y. 119; Hanover Junction &c. R. Co. v. Haldeman, 82 Pa. St. 36, 46; Monongahela Bridge Co. v. Pittsburgh &c. Co., 196 Pa. St. 25, 46 Atl. 99, 79

ties may be waived by the state,[77] which alone can object to the unauthorized assumption of corporate powers.[78] Legislative recognition of a corporation as a subsisting one is such a waiver,[79] for the legislature has the same right to ratify and confirm an irregularly organized corporation that it has to create a new one,[80] but mere legislative recognition only operates to cure

Am. St. 685; Postal Tel. &c. Co. v. Oregon Short Line &c. Co., 23 Utah 474, 90 Am. St. 705. See also Georgia Southern &c. R. Co. v. Mercantile Trust &c., Co., 94 Ga. 306, 21 S. E. 701, 32 L. R. A. 208n, 47 Am. St. 153; Terre Haute &c. R. Co. v. Robbins, 247 Ill. 376, 93 N. E. 398; note to People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. 172, 180 et seq.; Lusk v. Riggs (Nebr.), 102 N. W. 88; note to Vanneman v. Young, 3 Lewis Am. R. Corp. 660, 662 et seq.

[77] If the state fail for eight years to avail itself by quo warranto, of a defect in articles of association consisting in an uncertain statement of a terminus of a road, it cannot do it afterward. State v. Bailey, 19 Ind. 452. Under the statutes of Tennessee which provide that a railroad company's charter shall first be registered in the county where the company's principal office is; that it shall then be transmitted to the secretary of state, who shall affix his certificate of registration and the great seal of state, and that these shall be registered where the charter was originally registered; and that this shall complete the company's corporate character, it has been held that, where a company was organized to run a railroad through several counties, the county where its charter is registered should be deemed to have been determined on as the location of the principal office, and holding a directors' and stockholders' meeting in another county will not change the rule. Anderson v. Middle and East Tennessee Cent. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149.

[78] Hay v. People, 59 Ill. 94; Reisner v. Strong, 24 Kans. 410, 10 Am. & Eng. R. Cas. 335. See also Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. 700.

[79] Cowell v. Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547, 3 Colo. 82; Mead v. New York &c. R. Co., 45 Conn. 199; McAuley v. Columbus &c. R. Co., 93 Ill. 348; McCartney v. Chicago &c. R. Co., 112 Ill. 611, 29 Am. & Eng. R. Cas. 326; Koch v. North Ave. R. Co., 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377n; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; Black River &c. R. Co. v. Barnard, 31 Barb. (N. Y.) 258; 1 Thomp. Corp. (2d ed.), § 269.

[80] Comanche County v. Lewis, 133 U. S. 198, 10 Sup. Ct. 286, 288, 33 L. ed. 604; Illinois &c. Co. v. Cook, 29 Ill. 237; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621. See also Fisher v. Evansville &c. R. Co., 7 Ind. 407, 413. See generally Hogue

defects in the organization, and not to create a new corporation where there is not even a de facto organization upon which it can act.[81]

v. Capital &c. Bank, 47 Nebr. 929, 66 N. W. 1036; People v. Barker, 39 N. Y. S. 88; Mylrea v. Superior &c. R. Co., 93 Wis. 604, 67 N. W. 1138; note in 33 Am. St. 179, 180; Smith v. Havens &c. Soc. 90 N. Y. S. 168.

[81] Attorney-General v. Railroad Cos., 35 Wis. 425, 602; State v. Ford Co., 12 Kans. 441, approved in Comanche County v. Lewis, 133 U. S. 198, 10 Sup. Ct. 286, 288, 33 L. ed. 604. See also Oroville &c. R. Co. v. Supervisor, 37 Cal. 354. On this theory it is held that a statute curing defects in the organization of a de facto corporation does not violate a constitutional provision prohibiting the *creation* of a corporation by special legislation. Central Agricultural Assn. v. Alabama &c. Co., 70 Ala. 120. Where articles of incorporation filed are void, it has been held that they cannot be made good by amendment. State v. Critchett, 37 Minn. 13, 23 N. W. 767. See generally Pearsall v. Great Northern &c. R. Co. 73 Fed. 933; State v. Webb, 110 Ala. 214, 20 So. 462; Willis v. Chapman, 68 Vt. 459, 35 Atl. 459; 1 Thomp. Corp (2d ed.), § 269.

CHAPTER III.

LEGAL STATUS.

Sec.
30. As individual, person, citizen.
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§ 30 (21). As individual, person, citizen.—A railroad company may be regarded as an individual, in the sense that it may, unless restrained by law make contracts,[1] sue and be sued,[2] buy and sell property,[3] in furtherance of its business, and in general carry on business much the same as if it were a natural person. It is for most purposes at least, regarded and treated as a distinct entity.[4]

[1] See 1 Elliott Cont., §§ 272, 540; post chapter on Contracts.

[2] See post chapters on Actions by and against Railroad Companies.

[3] Graham v. Railroad Co., 102 U. S. 148, 161, 26 L. ed. 106; Richardson v. Mass. &c. Association, 131 Mass. 174; Crawford v. Longstreet, 43 N. J. L. 325. See also Georgia Pac. R. Co. v. Wilks, 86 Ala. 478, 6 So. 34; McClure v. Missouri River &c. R. Co., 9 Kans. 373 (not merely for speculation). As elsewhere shown, however, it cannot, without legislative authority, sell all property necessary for it to keep in order to perform its duties to the public.

[4] Pullman Palace Car Co. v. Missouri R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; Ulmer v. Lime Rock R. Co., 98 Maine 579, 57 Atl. 1001, 66 L. R. A. 387; Monongahela Bridge Co. v. Pittsburgh &c. Co., 196 Pa. St. 25, 48 Atl. 99, 79 Am. St. 685.

It is a "person" within the meaning of the fourteenth amendment to the United States constitution forbidding a state to deny to any person the equal protection of the laws;[5] and, generally, is to be treated as a person within the meaning of statutes conferring rights and remedies on "persons,"[6] unless it is evidence

[5] Santa Clara Co. v. Southern &c. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. ed. 118, 24 Am. & Eng. R. Cas. 523; Pembina &c. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 830, 31 L. ed. 650; Missouri &c. R. Co. v. Mackey, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L ed. 107; Minneapolis &c. R. Co. v. Beckwith, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. ed. 585; Gulf &c. R. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; San Mateo Co. v. Southern &c. R. Co., 7 Sawy. (U. S.) 517. See also Kane v. Erie R. Co., 133 Fed. 681, 68 L. R. A. 788; United States v. McHie, 194 Fed. 894 (within fifth amendment); Jaquette v. Capitol Trac. Co., 34 App. D. C. 41, 25 L. R. A. (N. S.) 407n; State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639n. Case, In re, 20 Idaho 128, 116 Pac. 1037; Cleveland &c. R. Co. v. Backus, 133 Ind. 513, 32 N. E. 421, 18 L. R. A. 729; Luman v. Hitchins Bros. Co., 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393; State v. Blake, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913C, 1283, note in Ann. Cas. 1914A, 1308. Knoxville &c. R. Co. v. Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; note in 14 L. R. A. 585; Portland R. Co. v. Railroad Com., 56 Ore. 468, 105 Pac. 709, 109 Pac. 273.

[6] Mineral Point R. Co. v. Keep, 22 [illegible] 9, 74 Am. Dec. 354; Louisville Safety &c. Co. v. Louisville &c. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579, and note. Mott v. Hicks, 1 Cow. (N. Y.) 513, 13 Am. Dec. 550; Indiana v. Woram, 6 Hill (N. Y.) 33, 40 Am. Dec. 378; Wright v. New York &c. R. Co., 28 Barb. (N. Y.) 80 Field v. New York &c. R. Co., 29 Barb. (N. Y.) 176; Boyd v. Craydon R. Co., 4 Bing. (N. Car.) 669; Lehigh Bridge Co. v. Lehigh Coal Co., 4 Rowle (Pa.) 9, 26 Am. Dec. 26; State v. Nashville University, 4 Humph. (Tenn.) 157. So, under statutes imposing taxes, People v. Utica Ins. Co., 15 John (N. Y.) 358;—relating to usury, Thornton v. Bank of Washington, 3 Pet. (U. S.) 36, 7 L. ed. 594; Grand G. B. v. Archer, 16 Miss. 151; Commercial Bank v. Nolan, 7 How. (Miss.) 508;—relating to limitations, Olcott v. Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393;—relating to penal offenses, United States v. Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502; Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 654, Ann. Cas. 1912D, 734n (by express provision of anti-trust act). But see as to not being liable to indictment. Commonwealth v. Illinois Cent. R. Co., 152 Ky. 320, 153 S. W. 459, 45 L. R. A. (N. S.) 344n, Ann. Cas. 1915B, 617n; People v. Rochester R. Co., 195 N. Y. 102, 88 N. E. 22, 133 Am. St. 770, 21 L. R. A. (N. S.) 998n, 16

that the intention of the legislature was that it should not be so considered.[7] It is not, however, a citizen entitled to the privileges and immunities of citizens of the several states within the meaning of the constitution of the United States.[8] But it is, for jurisdictional and other purposes, regarded as a citizen of the state chartering it.[9]

§ 31 (22). Corporation confined to jurisdiction creating it—Business elsewhere—Comity.—In common with other corporations, a railroad company exists only by force of law, and cannot migrate and remove beyond the jurisdiction of that law,[10] nor can it exercise any rights or privileges in a foreign jurisdiction unless it is admitted to do so by express or implied permission of the

Ann. Cas. 837. See further as to when corporation is a "person", State v. Rutland R. &c. Co., 85 Vt. 91, 81 Atl. 252, Ann. Cas. 1914A, 1305, and note. See generally as to what is and what is not a denial of equal protection of the laws within the meaning of the constitution, note to Louisville Safety Vault Co. v. Louisville &c. R. Co., 92 Ky. 233, 17 S. W. 567, 14 L. R. A. 579.

[7] Commonwealth v. Phenix Bank, 11 Metc. (Mass.) 129.

[8] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Chicago &c. R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Pembina &c. Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. ed. 650; Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed 394; State v. Delaware &c. Co., 7 Houst. (Del.) 269, 31 Atl. 714; Woodward v. Commonwealth (Ky.), 7 S. W. 613, 35 Am. & Eng. R. Cas. 498; State v. Louisville &c. R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150n; Hawley v. Hurd, 72 Vt. 122, 47 Atl. 401, 52 L. R. A. 195, 82 Am. St. 922. See also Attorney-General v. Electric &c. Co., 188 Mass. 239, 74 N. E. 467; Bacon v. Board, 126 Mich. 22, 85 N. W. 307, 60 L. R. A. (N. S.) 321, and note, 86 Am. St. 524; Daggs v. Orient &c. Co., 136 Mo 391, 38 S. W. 85, 35 L. R. A. 226, affirmed in 172 U. S. 557; note in 14 L. R. A. 580; Union Cent. L. Ins. Co. v. Channing, 86 Tex. 654, 26 S. W. 982, 24 L. R. A. 505.

[9] See post, § 32.

[10] Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Connor v. Vicksburg &c. R. Co., 36 Fed. 263, 1 L. R. A. 331, and note; Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329; Eel River R. Co. v. State, 143 Ind. 231, 238, 42 N. E. 617; Miller v. Ewer, 27 Maine 509, 46 Am. Dec. 619; County of Allegheny v. Cleveland &c. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; note to Young v. South Tredegar &c. Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. 752, 760.

foreign state,[11] or except, perhaps, as an instrument of interstate commerce. A corporation, where not restrained by the law of its creation may, however, do business and perform corporate acts in any state which will permit it to do so.[12] By the comity of nations, such permission, within proper limits, is always implied unless there is an affirmative refusal.[13]

§ 32 (23). **Citizenship—Removal of causes.**—It is generally held that a corporation may be adopted by the legislation of a state, so as to become a citizen thereof, for the purposes of jurisdiction, where that is plainly the legislative intent.[14] It has been

[11] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Paul v. Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357; Duke v. Taylor, 37 Fla. 64, 19 So. 172; Atchison &c. R. Co. v. Fletcher, 35 Kans. 236; Baltimore &c. R. Co. v. Glenn, 28 Md. 287, 96 Am. Dec. 533; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 845. See also California v. Central &c. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L ed. 150. State v. Illinois Cent. R. Co., 246, Ill. 188, 92 N. E. 814.

[12] Bank v Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Christian Union v. Yount, 101 U. S. 352, 25 L. ed. 888; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Dodge v. Council Bluffs, 57 Iowa 560, 10 N. W. 886; Atchison &c. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Miller v. Ewer, 27 Maine 509, 46 Am. Dec. 619; Baltimore &c. R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Williams v. Creswell, 51 Miss. 817; Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129 Merrick v. Van Santvoord, 34 N. Y. 208; Newburg &c. Co. v. Weare, 27 Ohio St. 343; Ohio Life Ins. &c. Co. v. Merchants' Ins. &c. Co., 11 Humph. (Tenn.) 1, 53 Am. Dec. 742.

[13] Cowell v. Colorado Springs Co., 100 U. S. 55, 3 Colo. 82, 25 L. ed. 547; Christian Union v. Yount, 101 U. S. 352, 356, 25 L. ed. 888; Mannington v. Hocking Val. R. Co., 183 Fed. 133; Reichwald v. Commercial Hotel Co., 106 Ill. 439, Baltimore &c. R. Co. v. Glenn, 28 Md. 287, 92 Am Dec. 688; Clark v. Memphis St. R. Co., 123 Tenn. 232, 130 S. W. 751. See Toledo Trac. &c. Co. v. Smith, 205 Fed. 643; Hammond v. International R. Co., 63 Misc. 437, 116 N. Y. S. 854; note to Cone &c. Co. v. Poole, 41 S. Car. 70, 19 S. E. 203, 24 L. A. R. 289.

[14] Williams v. Missouri &c. R. Co., 3 Dill (U. S.) 267, Fed Cas. No. 17728; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. ed 354; Railway Co. v. Whitton, 13 Wall. (U. S.) 270; 20 L. ed. 571; Railroad Co. v. Vance, 96 U. S. 450, 24 L. ed. 752; Baldwin v. Chicago &c. R. Co., 86 Fed. 167. But compare Lehigh Valley

held in Virginia that a corporation, by leasing and operating a road in a foreign state becomes a citizen of that state for purposes of jurisdiction; and that a suit against it for a cause of action arising in that state could not be removed from the state courts to the federal courts.[15] But the weight of authority is that a railroad company is a citizen of the state by which it is created, for the purposes of jurisdiction of the United States courts, and may take advantage of the constitutional privilege of conducting its suits against the citizens of other states in those courts.[16] And a foreign corporation can not be deprived of the right of removal to the federal courts by state legislation.[17] Any officer authorized

Coal Co. v. Yensavage, 218 Fed. 547. A railroad corporation of another state operating a railroad in the state under a lease may be so adopted. Western &c. R. Co. v. Roberson, 61 Fed. 592. See also Stonega Coke &c. Co. v. Southern Steel Co., 123 Tenn. 428, 131 S. W. 988, 31 L. R. A. (N. S.) 278n.

[15] Baltimore &c. R. Co. v. Wightman, 29 Grat. (Va.) 431, 26 Am. Rep. 384; Baltimore &c. R. Co. v. Noell, 32 Grat. (Va.) 394. Contra Wilkinson v. Delaware &c. R. Co., 22 Fed. 353, 20 Am. & Eng. R. Cas. 597, and cases cited. See also Crane v. Chicago &c. Co., 20 Fed. 402.

[16] Louisville &c. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Marshall v. Baltimore R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed 130; Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Southern &c. R. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942; St. Louis &c. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802; Barrow S. S. Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; Williams v. Missouri &c. R. Co., 3 Dill. (U. S.) 267, Fed. Cas. No. 17728; Callahan v. Louisville &c. R. Co., 11 Fed. 536; Wilkinson v. Delaware &c. R. Co., 22 Fed. 353; Baltimore &c. R. Co. v. McLaughlin, 73 Fed. 519; Quigley v. Cent. Pac. Co., 11 Nev. 350, 21 Am. Rep. 757. See also Harrison v. St. Louis &c. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. ed. 621, L. R. A 1915F, 1187, and note, to the same effect, citing additional authorities.

[17] State legislation seeking to deprive foreign corporations of the right to resort to the federal courts must be held inoperative where such right is conferred by the constitution and laws of the United States. Rece v. Newport News &c. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, 5 Ry. & Corp. L. J. 515; Chicago &c R. Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. A statute attempting to prohibit the right of removal would be unconstitutional. Home Ins. Co. v. Morse,

to act for it in that behalf may make the necessary affidavit and procure the transfer to the federal courts of any suit begun against it in the courts of a state wherein it is not domiciled.[18] Where a railroad corporation is chartered by two or more states, it is for most purposes a citizen of each.[19]

§ 33 (24). Residence and domicile—Jurisdiction.—A railroad corporation is a legal entity, or person, capable of having a home, or domicile, which is always within the state or sovereignty by which it is created.[20] And it has been held by the supreme court of the United States that, under the act of congress of March 3, 1887, as corrected by the act of August 13, 1888, a corporation incorporated in one state only is not a citizen nor a resident or inhabitant of another state, although it has a place of business in the latter, and cannot be sued in a United States circuit court of the latter state, which is in a different district from that in which the company is incorporated, by a citizen of a third state.[21]

20 Wall. (U. S.) 445, 22 L. ed. 365; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943; Metropolitan &c. Co. v. Harper, 3 Hughes (U. S.) 260, Fed. Cas. No. 9505; Commonwealth v. East Tenn. Coal Co., 97 Ky. 238, 30 S. W. 608. See also Harrison v. St. Louis &c. R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. ed. 621, L. R. A. 1913F, 1187, and note.

[18] Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. ed. 915; Mahone v. Manchester &c. R. Co., 111 Mass. 72, 15 Am. Rep. 9; Quigley v. Central &c. R. Co., 11 Nev. 350, 21 Am. Rep. 757.

[19] Railroad Co. v. Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Uphoff v. Chicago &c. R. Co., 5 Fed. 545; Mackay v. New York &c. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768n; Smith v. Cleveland &c. R. Co., 170 Ind. 382, 81 N. E. 501; post, § 35.

[20] Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Railroad Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643. Cunningham v. Klamath Lake R. Co., 54 Ore. 13, 101 Pac. 1099. See also Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 221, 36 L. ed 943; United States v. Northern Pac. R. Co., 134 Fed. 715; Central, &c. R. Co. v. Carr, 76 Ala. 388, 52 Am. Rep. 339; Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 701; Fowler v. Des Moines &c. R Co., 91 Iowa 533, 60 N. W. 116; Connecticut &c. R. Co. v. Cooper, 30 Vt. 476, 73 Am. Dec. 319; 1 Thomp. Corp. (2d. ed), § 490.

[21] Shaw v. Quincy Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, 6 Lewis' Am. R. & C. R. 357. This decision sets at rest a vexed question upon

Like a natural person, however, it may, for some purposes, have a legal residence in a state of which it is not a citizen;[22] and under the statutes of most states is held to be a resident of each state and municipality through which the road runs, so as to be entitled to the protection of the local laws,[23] and for purposes of taxation,[24] and of suing and being sued,[25] and for the service of summons.[26] And "a law which requires a foreign corporation to appoint an agent upon whom process may be served, as a condition precedent to its right to transact business within the limits of a state, is valid and binding."[27] For most other purposes rail-

which there was much difference of opinion among the circuit judges. Keasbey &c. Co., In re, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402 (defendant cannot be compelled to answer in district in which neither defendant or plaintiff is an inhabitant). Ellsworth Trust Co. v. Parramore, 108 Fed. 906. See also United States v. Northern &c. R. Co., 134 Fed. 715; Orr v. Baltimore &c. R. Co., 242 Fed. 608; Keating v. Penna. Co., 245 Fed. 155; Ostrom v. Edison, 244 Fed. 228, and leading articles in 35 Cent. Law Jour. 285, and 41 Cent. 215. But see M. Hohenberg &c. Co. v. Mobile Liners, 245 Fed. 169.

[22] Hohorst, In re, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. ed. 1211; Louisville &c. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. ed. 353; New York &c. R. Co. v. Shepard, 5 McLean (U. S.) 455, Fed Cas. No. 10198; United States v. Southern Pac. R. Co., 49 Fed. 297; Androscoggin &c. R. Co. v. Stevens, 17 Maine 434. Thorn v. New York R. Co., 26 N. J. L. 121. In Pacific R. Co. v. Perkins, 36 Nebr. 456, 54 N. W. 845, 57 Am. & Eng. R. Cas. 673, it was held that the word "nonresident," in § 100, Ch. 16 Comp. St., relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state, and not of the locality of the land affected, or of the county where it is situated.

[23] Richardson v. Burlington &c. R. Co., 8 Iowa 260; People v. Fredericks, 48 Barb. (N. Y.) 173; Glaize v. South Carolina R. Co., 1 Strobh. L. (S. Car.) 70.

[24] People v. Fredericks, 48 Barb. (N. Y.) 173.

[25] Baldwin v. Mississippi &c. R. Co., 5 Iowa 518. See also State v. Iowa Cent. R. Co., 91 Iowa 275, 59 N. W. 35; Davis v. Central &c. R. Co., 17 Ga. 323.

[26] Belden v. New York &c. R. Co., 15 How. Pr. (N. Y.) 17; Burns' Ind. R. S. 1914, § 5458. See also New Albany &c. R. Co. v. Haskell, 11 Ind. 301; Schoch v. Winona &c. R. Co., 55 Minn. 479, 57 N. W. 208; Slavens v. Southern Pac. R. Co., 51 Mo. 308; Tobin v. Chester &c. R. Co., 47 S. Car. 387, 25 S. E. 283, 58 Am. St. 890.

[27] Schollenburger, Ex parte, 96 U. S. 369, 374, 24 L. ed. 853; Wilson v Seligman, 144 U. S. 41, 45, 12 Sup

roads are treated as persons having their residence only in the place where their principal office is located.[28] Suits relating to any matters concerning the organization, and conduct of the corporation as such, must generally be brought in the state by which it is chartered, although its principal office may be in another state.[29] And so, as a rule, must all corporate acts done by the body of the corporation be performed in the domestic jurisdiction, for a corporation can only act in other states by its agents in matters which it may delegate to them.[30]

§ 34 (25). **Federal corporations.**—Corporations formed under authority of the federal government have their domicile within its territorial jurisdiction, and may reside any place within the United States where they have a general office established by authority of law.[31] Congress has power to charter railroad com-

Ct. 541, 36 L. ed. 338; Youmans v. Minnesota &c. R. Co., 67 Fed. 282, 284; Reyer v. Odd Fellows &c. Association, 157 Mass. 367, 373, 32 N. E. 469, 34 Am. St. 288. See also Katz v. Herrick, 12 Idaho 1, 86 Pac. 873.

[28] Androscoggin &c. R. Co. v. Stevens, 28 Maine 434; Thorn v. New York &c. R. Co., 26 N. J. L. 121. In Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 701, where a railroad company had surrendered its property and franchise under a perpetual lease to another company, and did no business and had no office or agency in the state, and quo warranto proceedings were instituted against it by the state, the court held that its legal residence would be in the county where its principal office was located when it ceased to do business. See also Platt v. New York &c. R. Co., 26 Conn. 544; Connecticut &c Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569.

[29] Carey v. Cincinnati &c. R. Co., 5 Iowa 357; Erickson v. Nesmith, 4 Allen (Mass.) 233; Williston v. Mich. &c. R. Co., 13 Allen (Mass.) 400; Chase v. Vanderbilt, 5 J. & S. (N. Y.) 334, 62 N. Y. 307; Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378.

[30] See Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329, where the company undertook to make a call for unpaid subscriptions at a meeting held outside the state. Ante, § 23. But a stockholder's meeting may be held in a foreign jurisdiction, if all the shareholders consent to such meeting, or ratify its action. Stutz v. Handley, 7 R. & Corp. L. J. 407, 41 Fed. 531; Missouri Lead &c. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746.

[31] Bank of United States v. McKenzie, 2 Brock. (U. S.) 393. See also Supreme Lodge &c. v. England, 94 Fed. 369; Commonwealth v. Texas &c. R. Co., 98 Pa. St. 90

panies in the territories within its jurisdiction.[32] And it seems that a state is powerless to prevent a corporation from doing acts in the discharge of its employment by the federal government,[33] or to exclude one engaged in interstate commerce under authority of the acts of congress.[34]

§ 35 (26). **Railroad in more than one state—Citizenship.**—The legislature of one state may authorize a railroad corporation of an other to extend its line into,[35] or hold property in,[36] the territory of the former. Such authority granted to a foreign corporation does not make of it a domestic corporation.[37] But where a rail-

[32] Ante, § 21, note.

[33] Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 186, 8 Sup. Ct. 737, 31 L. ed. 650; California v. Pacific R. Co., 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. ed. 150; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164; Stockton v. Baltimore &c. R. Co., 32 Fed. 9, 14.

[34] Pensacola Tel. Co. v. Western U. Tel. Co., 96 U. S. 1, 12, 24 L. ed. 708. See also People v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 24 Am. St. 542. Section 5 of the Act of Congress of January 28, 1915 provides that no courts of the United States shall have jurisdiction of any action or suit by or against a railroad company upon the ground that it was incorporated under an Act of Congress. Barnes' Fed. Code, § 1022. And the fact that a railroad company is incorporated by act of congress does not entitle it to removal of an action from the state court to a federal court. Texas &c. R. Co. v. Hughes (Tex. Civ. App.), 192 S. W. 1091.

[35] Goodlett v Louisville &c. R. Co. 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230; Baltimore &c. R. Co. v. Harris, 12 Wall. (U S.) 65, 20 L. ed. 354; Pomeroy v. New York &c. R. Co., 4 Blatch. (U. S.) 120, Fed. Cas. No. 11261.

[36] Indianapolis &c. R. Co. v. Vance, 96 U. S. 450, 24 L. ed. 752; Baltimore &c. R. Co. v. Gallahue, 12 Grat. (Va.) 655, 65 Am. Dec. 254; Baltimore &c. R. Co. v. Wightman, 29 Grat. (Va.) 431, 26 Am. Rep. 384; Baltimore &c. R. Co. v. Noell, 32 Grat. (Va.) 394; Goshorn v. Ohio County, 1 W. Va. 308. The authority granted does not confer jurisdiction as to such property on the incorporating state. Eaton &c. Co. v. Hunt, 20 Ind. 457.

[37] State v. Delaware &c. R. Co., 30 N. J. L. 473, 31 N. J. L. 531, 86 Am. Dec. 226; Denniston v. New York &c. R. Co., 1 Hilton (N. Y.) 62; Baltimore &c. R. Co. v. Cary, 28 Ohio St. 208; Erie R. Co. v. Stringer, 32 Ohio St. 468. See also Louisville &c. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081; Hollingsworth v. Southern R. Co., 86 Fed. 353; Bryan v. Louisville &c. R. Co., 244 Fed. 650. Nor does it change the rela-

road corporation is formed by the concurrent legislation of two or more states,[38] or by the consolidation of corporations of two or more states by authority of their laws,[39] it is, for most purposes at least, a corporation, whether the same or distinct, of each, having a domicile[40] therein where its corporate business may be transacted.[41] Although from one point of view it may be regarded as a single corporation or unit, yet from another it is not the same, but a distinct corporation in each state, so far as its property and business within that state are concerned,[42] and is

tionship to the incorporating state. Commonwealth v. Pittsburgh &c. R. Co., 58 Pa. St. 26. But it may be, in a sense, a domestic corporation if the statute so provides in fixing the terms upon which it is authorized to enter and carry on business in the state. Young v. South Tredegar &c. Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. 752. The same statute construed in the case just cited has, however, been held by the federal court not to make the foreign corporation authorized to do business in Tennessee a domestic corporation of that state. Markwood v. Southern R. Co., 65 Fed. 817. It was therefore, permitted to remove the cause to the federal court. See also Rece v. Newport News &c. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

[38] Ohio &c R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Nashua &c. R. Co. v. Boston &c. R. Co., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363; Newport &c. Co. v. Woolley, 78 Ky. 523. The formation of a new company by interstate consolidation by joint or concurrent acts of the legislatures of different states is, from one point of view, something of an anomaly, and has been regarded by some courts as an impossibility. See Quincy Bridge Co. v. Adams County, 88 Ill. 615; Racine &c. R. Co. v. Farmers' &c. Co., 49 Ill. 331, 95 Am. Dec. 595. But these cases are explained and criticised by the same court in the later case of Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874.

[39] Cohn v. Louisville &c. R. Co., 39 Fed. 227; Guinault v. Louisville &c. R. Co., 41 La. Ann. 571, 6 So. 850; St. Paul &c. R. Co., In re, 36 Minn. 85, 30 N. W. 432; State v. Chicago &c. R. Co., 25 Nebr. 165, 41 N. W. 128. 5 Thomp. Corp. (2nd. ed.) § 6069. See also Mackay v. New York &c. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768n.

[40] Guinault v. Louisville &c. R. Co., 41 La. Ann. 571, 6 S. W. 850; Covington &c. Bridge Co. v. Mayer, 31 Ohio St. 317. See also Smith v. Cleveland &c. R. Co., 170 Ind. 382, 81 N. E. 501.

[41] Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Baltimore &c. R. Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Covington &c. Bridge Co. v. Mayer, 31 Ohio St. 317.

[42] Peik v. Chicago &c R. Co., 94 U. S. 164, 24 L. ed. 97; Central Trust

controlled therein as to such matters by the laws of the state substantially as any other domestic corporation is controlled.[43]

§ 36 (27). **Control of railroads in more than one state.**—The laws of a state can have no effect beyond the limits of its territorial jurisdiction,[44] and such a corporation is not necessarily affected, in regard to its rights, duties and liabilities, in one sovereignty, by the terms of the charter granted to it by another,[45] but it has been held that its charter may be amended in either state so as to control its action in that state although the amendment be

Co. v. St. Louis &c. R. Co., 41 Fed. 551; Baldwin v. Chicago &c. R. Co., 86 Fed. 167; Winn v. Wabash R. Co., 118 Fed. 55; Pittsburgh &c. R. Co. v. Rothschild (Pa.), 4 Atl. 385, 26 Am. & Eng. R. Cas. 50; Sprague v. Hartford &c. R. Co., 5 R. I. 233; Atwood v. Shenandoah &c. R. Co., 85 Va. 966, 9 S. E. 748, 38 Am. & Eng. R. Cas. 534.

[43] Delaware Railroad Tax Cases, 18 Wall. (U. S.) 206, 21 L. ed. 888; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. ed. 780; Ohio &c. R. Co. v. Weber, 96 Ill. 443; Chicago &c. R. Co. v Auditor-General, 53 Mich. 79, 18 N. W. 586; Gage v. Lake Shore &c. R. Co., 70 N. Y. 220; Pollitz v. Public Utilities Com., 96 Ohio St. 49, 117 N. E. 149, L. R. A. 1918D, 166. But see post, § 38, as to whether a single new corporation is formed or more than one.

[44] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 586, 10 L. ed. 274; Louisville &c. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. ed. 353; Warren v. First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Land Grant R. Co. v. Commissioners of Coffey Co., 6 Kans. 245; Newport &c. R. Co. v. Woolley, 78 Ky. 523; County of Allegheny v. Cleveland &c. R. Co., 51 Pa. St. 228, 88 Am. Dec. 584; Whaley v. Bankers' Union, 39 Tex. Civ. App. 385, 88 S. W. 259.

[45] Ohio &c. R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207. One state cannot impose any restrictions or limitations upon the exercise of corporate powers in another state by a corporation which extends into both jurisdictions. Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748, 38 Am. & Eng. R. Cas. 534. But is is held that a corporation which has been adjudged insolvent and placed in the hands of a receiver in the state of its incorporation cannot prosecute a writ of error in another state, over the objection of the receiver. American Waterworks Co. v. Farmers &c. Co., 20 Colo. 203, 37 Pac. 269, 25 L. R. A. 338, 46 Am. St. 285. The court admitted the general rule that laws have no extra territorial force as mere laws, but said that "things done in one state in pursuance of laws thereof are valid and binding in other state."

opposed to the constitution or laws of another state by which it is also chartered.[46] Where it has but one set of shareholders owning shares of a capital stock which represents the entire property, and its entire business and property are under a single management and operated as a unit, contracts made by the controlling power are held to be made by each of the corporations,[47] and a decree rendered against the railroad in one state will bind it in the other.[48] It may be restrained by the courts of one state from using its corporate funds for other than corporate purposes in another through which it runs.[49] But it has been held that a state cannot tax bonds of such a railroad corporation, secured by a mortgage on its entire line, for the reason that this would be a tax upon property lying without the state.[50] The courts of one state, having jurisdiction of the mortgagor and trustees under a mortgage covering such a road may order the sale of the entire road, subject to liens existing in the other state.[51] But where a corporation which is subject to a mortgage in one state, consolidates with a corporation of another state, the courts of such other state acquire no jurisdiction to enforce a foreclosure of the mortgage.[52] The courts of either state may appoint a receiver

[46] Covington v. Covington &c. Bridge Co., 10 Bush (Ky.) 69.

[47] Racine &c. R. Co. v. Farmers' &c. Co., 49 Ill. 331, 95 Am. Dec. 595; Bissel v. Michigan &c. R. Co., 22 N. Y. 258.

[48] Paine v. Lake Erie &c. R. Co., 31 Ind. 283, 347.

[49] Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775; State v. Northern R. Co., 18 Md. 193, 215; Baltimore &c R. Co. v. Glenn, 28 Md. 287, 320, 92 Am. Dec. 698; March v. Eastern R. Co., 40 N. H. 548, 577, 77 Am. Dec. 732; Fisk v. Chicago &c. R. Co., 53 Barb. 513, 4 Abb. Pr. (N. S.) (N. Y.) 378. And it may be enjoined as an entirety in the courts of either state from making unjust discrimination as a common carrier, although some of the acts were performed in the other state. Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846, 23 Am. & Eng. R. Cas. 612; McDuffee v. Portland &c. R. Co., 52 N. H. 430, 447, 13 Am. Rep. 72.

[50] Northern &c. R. Co. v. Jackson, 7 Wall. (U. S.) 262, 19 L. ed. 88. See also Wood v. Goodwin, 49 Maine 260.

[51] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Mead v. New York &c. R. Co., 45 Conn. 199; McElrath v. Pittsburgh &c. R. Co., 55 Pa. St. 189; Hand v. Savannah &c. R. Co., 12 S. Car. 314, 366.

[52] Eaton &c. R. Co. v. Hunt. 20 Ind. 457.

for so much of the line as lies within its jurisdiction,[53] and it has been held that the corporation in one state may be wound up and dissolved without affecting its charter rights in other states.[54] It is generally held that a United States court, for a district in one state, may exercise jurisdiction to appoint a receiver for an entire line extending into several states.[55] It may be somewhat difficult to reconcile all of these decisions with one another, for in several of them the court evidently looked upon the corporation as one and the same in each state, while in most of them the court treated it as practically a separate corporation in each state. In some of the cases the result would have been the same from either point of view.

§ 37. **Control of railroad incorporated in more than one state.** —Where a corporation of one state has incurred a liability under the laws of that state it can not escape the jurisdiction of such state merely because it is also incorporated in another state.[56] No shareholder who consents to a consolidation or incorporation in more than one state can complain that each of such states regulates the conduct of the corporation therein so far as concerns the franchises such state has granted, and, in general, it seems that each state has power over the consolidated corporation as to intrastate matters the same as if there were merely a corporation of that state.[57] Thus, it is held that a state which has co-operated in the consolidation of several railroads incorporated in different states may enforce the agreement of the consolidated company to guarantee an undertaking of one of the constituent companies, incurred and to be performed within the limits of the state and valid by its laws, even though such agree-

[53] Ellis v. Boston &c. R. Co., 107 Mass. 1; United States Rollingstock Co., In re, 55 How. Pr. (N. Y.) 286, 57 How. Pr. 16; Richardson v. Vermont &c. R. Co., 44 Vt. 613.

[54] Hart v. Boston &c. R. Co., 40 Conn. 524.

[55] Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775; Brassey v. New York &c. R. Co., 19 Fed. 663; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 1 L. R. A. 397

[56] Patch v. Wabash R. Co., 207 U. S. 277, 28 Sup. Ct. 80, 52 L. ed. 204, 12 A. & E. Ann. Cas. 518.

[57] See note to Mackay v. New York &c. R. Co., (82 Conn. 73, 72 Atl. 583) in 24 L. R. A. (N. S.) 769.

ment might be invalid under the laws of another one of the states co-operating in the consolidation.[58]

§ 38 (28). **Result of consolidation or concurrent action of several states creating new corporations.**—It is said that the fiction that makes two or three corporations out of what is in fact one, is established for the purpose of giving each state its legitimate control over the charters which it grants; but the acts and neglects of the corporation are those of it as a whole.[59] There is conflict among the authorities as to whether the result of a consolidation or incorporation under the laws of two or more states is one corporation or several corporations with a common name, stock, stockholders and property. But, as already stated, they are substantially in accord upon the proposition that for certain purposes, practically at least, two or more corporations are thus created. In other words, the portion of a railroad in either state is subject, in the main, to the laws of that state just as if it were a separate corporation of such state. Upon the general subject, however, it is said on the one hand, that the legislatures of two different states cannot co-operate and unite in creating a single corporation so as to make it one and the same legal being in both.[60] A corporation created by two states having the same name, for the same purpose, and composed of the same corporators must be regarded as distinct corporations existing under the laws of the several states authorizing them.[61] On the other hand it is said that there is no reason why several states cannot unite in creating one and the same corporation having a common

[58] Mackay v. New York &c. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768n. Compare also Attorney-General v. New York &c. R. Co., 198 Mass. 413, 84 N. E. 737; Peik v. Chicago &c. R. Co., 94 U. S. 164, 24 L ed. 97; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196.

[59] Horne v. Boston &c. R. Co., 18 Fed. 50.

[60] Ohio & Mississippi R. Co. v. Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Missouri &c. R. Co. v. Meeh, 69 Fed. 753, 30 L. R. A. 250; Racine &c. R. Co. v. Farmers' &c. Co., 49 Ill. 331, 95 Am. Dec. 595; Newport &c. Bridge Co. v. Woolley, 78 Ky. 523; Allegheny County v. Cleveland &c. R. Co., 51 Pa. St. 228, 88 Am. Dec. 579.

[61] 5 Thomp. Corp. (2nd. ed.) §6069.

name, stock, stockholders and property,[62] which will be, in reality, a single corporation, although it may be clothed with the powers of two corporations.[63] Thus, it has been held that such a corporation may legally hold shareholders' meetings in either state which will be valid as to all the property and stockholders in both.[64] Another court has said that "a corporation may have a twofold organization, and be, so far as its relation to our state is concerned, both foreign and domestic. It may have a corporate entity in each state, yet its general character be of a bifold organization."[65] It is also said that when "two corporations created in different states consolidate, though for most purposes they are not therefore to be separately regarded, yet in each state the consolidated company is deemed to stand in the place of the corporation to which it there succeeded, and of its members, and consequently to be a citizen of that state for many purposes, while in the other state it would stand in the place of the other corporation in respect to citizenship there."[66] Perhaps the question is to some extent to be determined by the legislative intention, for, if it be conceded that two states can co-operate so as to create one and the same corporation, as it certainly must be, in a sense, at least, it must also be conceded that each may authorize the same persons to incorporate a distinct company in that state, for the same general business, to hold property and operate in that

[62] Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Bishop v. Brainard, 28 Conn. 289. See also Missouri Pac. R. Co. v. Meek, 69 Fed. 753, 30 L. R. A. 250. 1 Thomp. Corp. (2nd. ed.) § 505.

[63] Covington Bridge Co. v. Mayer, 31 Ohio St. 317. See also Smith v. Cleveland &c. R. Co., 170 Ind. 382, 81 N. E. 501; State v. Keokuk &c. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222; Lee v. Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556; Pollitz v. Public Utilities Com., 96 Ohio St. 49, 117 N. E. 149, L. R. A. 1918D, 166. Rio Grande &c. R. Co. v. Telluride &c. Co., 16 Utah 125, 51 Pac. 146.

[64] Covington Bridge Co. v. Mayer, 31 Ohio St. 317; Graham v. Boston &c. R. Co., 14 Fed. 753, on appeal, 118 U. S. 161. See also Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874; Guinault v. Louisville &c. R. Co., 41 La. Ann. 571, 6 So. 850.

[65] McGregor v. Erie R. Co., 35 N. J. L. 115, 118.

[66] Chicago &c. R. Co. v. Auditor General, per Cooley, C. J., 53 Mich. 79, 92, 18 N. W. 586.

state in connection with the company in the other state.[67] The question most often arises with respect to the jurisdiction of the federal courts, but it seems that such jurisdiction does not necessarily depend altogether upon the answer to the question, for, whether there be one or two corporations, it is generally held, as we have already shown, that there is a domestic corporation or citizen of each state by which a charter is granted.[68] But this ruling seems to be more consistent with the theory that there are two corporations. Yet, in any event, where a corporation is created in one state and afterwards also made a corporation of another state, it remains, for purposes of jurisdiction of the United States courts, a citizen of the first state.[69] The view that two corporations exist appears to have been taken by the Supreme Court of the United States in a recent decision, which, however, it may be somewhat difficult to reconcile with other decisions and dicta of that court, and which resulted in the corporation created in the first state being held to be a foreign rather than a domestic corporation of the second state. In the case to which we refer it appeared that the Nashua and Lowell Railroad Corporation was first created by the legislature of New Hampshire in 1835. In 1836 the legislature of Massachusetts constituted the same persons a corporation of that state, under the same name, and authorized them to build their road from Nashua, New Hampshire, to Lowell, Massachusetts. In 1838 both states

[67] Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878, 27 L. ed. 780. Ante, § 35. And may authorize a consolidation, socalled, at least, by keeping one of the corporations alive and permitting it to absorb or merge the other. See post, chapter on Consolidation.

[68] Railway Co. v. Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Memphis &c. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 519; Phinizy v. Augusta &c. R. Co., 56 Fed. 273; State v. Chicago &c. R. Co., 25 Nebr. 156, 2 L. R. A. 564, and note. See also Trester v. Missouri &c. R. Co., 33 Nebr. 171, 49 N. W. 1110. But compare Walters v. Chicago &c. R. Co., 104 Fed 377. See generally St. Joseph &c. R. Co. v. Steele, 167 U. S. 659, 17 Sup. Ct. 925, 42 L. ed. 315; Bradley v. Ohio &c. R. Co., 78 Fed. 387, Baldwin v. Chicago &c. R. Co., 86 Fed. 167.

[69] Louisville &c. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081. See also Missouri Pac. R. Co. v. Castle, 224 U. S. 541, 32 Sup. Ct. 606, 56 L. ed. 875.

passed laws constituting the stockholders of each corporation stockholders in the other, and uniting them into one corporation under the old name, and providing that all the "tolls, franchises, rights, powers, privileges and property of the two should be held and enjoyed by all the stockholders in proportion to the number of their shares in either or both of said corporations." In 1857, the Nashua and Lowell Railroad Corporation entered into a traffic agreement with the Boston and Lowell Railroad Corporation, which was incorporated under the laws of Massachusetts. A controversy afterwards arose over this, and the former, alleging that it was a New Hampshire corporation, brought suit against the latter in the United States circuit court of Massachusetts. It was held that the plaintiff "must be considered simply in its character as a corporation created by the laws of New Hampshire, and, as such, a citizen of that state, and so entitled to go into the circuit court of the United States and bring its bill against a citizen of any other state, and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire."[70] The court, as an

[70] Nashua & Lowell R. Corp. v. Boston &c. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363. Citing Farnum v. Blackstone Canal Corp., 1 Sum. (U. S.) 46, Fed. Cas. No. 4675; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; St. Louis &c. R. Co. v. Indianapolis &c. R. Co., 9 Biss. (U. S.) 144, Fed. Cas. No. 12237; on appeal sub nom., Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 24, 30 L. ed. 83; Racine &c. R. Co. v. Farmers' &c. Co., 49 Ill. 331, 95 Am. Dec. 595; Quincy &c. Bridge Co. v. Adams Co., 88 Ill. 615. See also Western &c. R. Co. v. Roberson, 61 Fed. 592; Louisville T. Co. v. Louisville &c. R. Co., 75 Fed. 433; St Louis &c. R. Co. v. James, 161 U. S. 545, 16 Sup. Ct. 621, 40 L. ed. 802; Louisville &c. R. Co v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081; Rece v. Newport News &c. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572. In Walters v. Chicago &c. R. Co., 104 Fed. 377, 378, it is said: "The rule deducible from the decisions of the Supreme Court * * * is that a corporation, as such, has no citizenship; that the citizenship of the incorporators determines the jurisdiction of the federal court; that the citizenship of the incorporators is conclusively presumed to be that of the state in which the corporation was first created; that while a corporation organized by the laws of one state may become a domes-

additional reason for this opinion, called attention to the injustice that would result if the defendant, as a citizen of Massachusetts, could sue the plaintiff, as a citizen of New Hampshire, in the federal court of New Hampshire, and yet prevent the plaintiff from suing it in Massachusetts on the ground that they were both citizens of the latter state. Another interesting case upon the same general subject was recently decided by the supreme court of Massachusetts. An action was brought in Massachusetts by the administrator of a man who had lived there but had been killed by the defendant in Connecticut. The defendant was incorporated in both states, and there was a statute in Massachusetts providing that a cause of action for the death of a person shall survive in his personal representative, but there was no such law in Connecticut. The court held that the fact that a railroad is operated as a continuous line under a charter from each of two different states does not make its liabilities different or greater in one of them on account of an accident occurring in the other, or because the person injured was a resident of the former, and that, as the statute of Connecticut gave no right of action, the plaintiff could not recover in Massachusetts.[71]

§ 39 (29). **Railroad only a citizen or domestic corporation of states that charter it—Effect of mere license.**—Many railroad corporations operate lines in other states than those by which the corporations are created, under license only, in which case they remain domestic corporations and citizens only of the states by which their charters are granted, and foreign corporations in the states granting the license.[72] An act of the legislature recogniz-

tic corporation in another state, the laws of the two states permitting, yet the citizenship of the incorporators remains that of the state in which such corporation was first created. Where, however, a new corporation is created by the joint action or operations of the laws of two or more states, the citizenship of such corporation will be treated as that of each state."

[71] Davis v. New York &c. R. Co., 143 Mass. 301, 9 N. E. 815, 58 Am. Rep. 138.

[72] Railroad Co. v. Harris, 12 Wall. (U. S.) 65, 83, 20 L. ed. 354; Pennsylvania Co. v. St. Louis &c. R. Co., 118 U. S. 290, 7 Sup. Ct. 24, 30 L. ed. 83; Goodlett v. Louisville &c. R. Co., 122 U. S. 391, 7 Sup. Ct. 1245, 30 L. ed. 1230; Martin v. Baltimore &c. R. Co., 151 U. S. 673, 14 Sup

ing a foreign corporation, or granting it privileges, will not be construed to be a charter of incorporation, unless there be a manifest intention to create a new corporation within the state.[73] And the fact that the title of an act denominates it "an act to incorporate," is not sufficient to show such intention, where the body of the act is more properly construed as a license.[74] A railroad company operating a line in a foreign jurisdiction under a lease,[75] or under authority given to it to condemn land for a

Ct. 533, 38 L. ed. 311. See also Southern Pac. R. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 943; Wilson v. Winchester &c. R. Co., 99 Fed. 642; Howard v. Gold &c. Co., 102 Fed. 657; Southern Pac. R. Co. v. Harrison, 73 Tex. 103, 11 S. W. 168; Jennings v. Idaho &c. R. Co., 26 Idaho 705, 146 Pac. 101, L. R. A. 1915D, 115n, Ann. Cas. 1916E, 359; Fribourg v. Pullman Co., 176 Fed. 981. In Baltimore &c. R. Co. v. Allen, 58 W. Va. 388, 52 S. E. 465, 3 L. R. A. (N. S.) 608n, 112 Am. St. 975, it is held that Railroad corporations chartered by other states, but owning and operating railroads in West Virginia, have the status of residents of this state, although they are not citizens of it, within the meaning of clause 1 of section 2 of article 3 and clause 1 of section 2 of article 4 of the constitution of the United States, nor domiciled in West Virginia state in the technical sense of that term; and that such corporations may be proceeded against as garnishees, without reference to the jurisdiction in which debts due from them were contracted or are payable. See also on the garnishment question the numerous and conflicting authorities there reviewed, also the recent cases of Louisville &c. R. Co. v. Deer, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. ed. 426; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. ed. 1023.

[73] Memphis &c. R. Co. v. Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; New Orleans &c. R. Co. v. Delamore, 114 U. S. 508, 5 Sup. Ct. 1009, 29 L. ed. 247; Martin v. Baltimore &c R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. ed. 311. See also Markwood v. Southern R. Co., 65 Fed. 817. But compare Louisville Trust Co. v. Louisville &c. R. Co., 75 Fed. 433; Angier v. East Tennessee &c. R. Co., 74 Ga. 634, 20 Am. & Eng. R. Cas. 618; Indianapolis &c. R. Co. v. Vance, 96 U. S. 450, 24 L. ed. 752.

[74] Goodlett v. Lousville &c. R. Co., 122 U. S. 391, 7 Sup. Ct. 1245, 30 L. ed. 1230.

[75] Baltimore &c. R. Co. v. Koontz, 104 U. S. 5, 26 L. ed. 643; Callahan v. Louisville &c. R. Co., 11 Fed. 536; Baltimore &c. R. Co. v. Cary, 28 Ohio St. 208. See also Illinois Cent. R. Co. v. Sanford, 75 Miss. 862, 23 So. 355. So, where it purchases the local road. Morgan v. East Tennessee &c. R. Co., 48 Fed. 705; Conn v. Chicago, &c. R. Co., 48 Fed. 177. Unless it is merged or consolidated with it. Angier v. East Tennessee

right of way, and to build and operate a railroad,[76] does not thereby become a domestic corporation, even where the act giving it authority contains a proviso that it shall be deemed a domestic corporation as to all causes of action arising within the state.[77] Where a corporaton is doing business under a license, the license may generally be revoked at the pleasure of the state granting it;[78] but this rule would probably be subject, as to railroads, to the principal that a state cannot exclude a corporation engaged in interstate commerce.[79]

§ 40 (30). Foreign corporations—Conditions of admission to state.—The provision of the fourteenth amendment of the federal constitution, declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a state from imposing conditions upon foreign corporations before admitting them and allowing them to do business within the state.[80] But the conditions must not be such as tax

&c. R. Co., 74 Ga. 634, 20 Am. & Eng. R. Cas. 618; Schaefer v. East Tennessee &c. R. Co., 76 Ga. 99.

[76] Hand v. Savannah &c. R. Co., 12 S. Car. 314. "A corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may, by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road, by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana." Pennsylvania Co. v. St. Louis &c. Co., 118 U. S. 290, 7 Sup. Ct. 24, 30 L. ed. 83.

[77] Chicago &c. R. Co. v. Becker, 32 Fed. 849. But see Western &c. R. Co. v. Roberson, 61 Fed. 592.

[78] Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; Hartford Ins. Co. v. Raymond, 70 Mich. 485, 38 N. W. 474. See also State v. Louisville &c. R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912C, 1150n. See also 5 Thomp. Corp. (2nd. ed.) § 6664.

[79] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708; Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394. See also, 41 Cent. L. J. 152; Sault Ste. Marie v. International Trans. Co., 234 U. S. 333, 34 Sup. Ct. 826, 58 L. ed. 1337.

[80] Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; Milnor v. New York &c. R. Co., 53 N. Y. 363; People v. Fire Assn., 92 N. Y. 311, 44 Am. Rep. 380. Dugger v. Mechanics' &c. Co., 95 Tenn. 245, 32 S. W. 5. See also State v. Louisville &c. R. Co., 97 Miss. 35, 51 So. 918,

interstate commerce,[81] or invade the province of congress. Many of the states have laws prescribing the conditions upon which such corporations will be permitted to do business.[82] Several of them prohibit any foreign railroad corporation from acquiring a right of way and doing business without procuring a charter and becoming a domestic corporation.[83] Bringing an action in the

53 So. 454, Ann. Cas. 1912C, 1150n. A statute imposing as a condition upon foreign corporations doing business in Pennsylvania that they shall assess and collect the tax upon that portion of their loans in the hands of individual residents within the state was held valid, as such statute does not impose a tax, but simply defines a duty, and fixes a penalty for a disregard thereof. Commonwealth v. New York &c. R. Co., 129 Pa. 463, 18 Atl. 412, 25 W. N. C. 15; New York &c. R. Co. v. Comonwealth, 18 Atl. 412, 7 R. & Corp. L. J. 14. But this was reversed in New York &c. R. Co. v. Pennsylvania, 153 U. S. 628, 14 Sup. Ct. 952, 38 L. ed. 846, for the reason that the statute impaired the obligation of the contract between the company and the state. See note to State v. Ackerman (Ohio), 24 L. R. A. 298, and note to Cone &c. Co. v. Poole (S. Car.), 24 L. R. A. 289; "State Legislation Against Foreign Corporations," 41 Cent. L. J. 152.

[81] Crutcher v. Commonwealth, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. ed. 649; Norfolk &c. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958, 34 L. ed. 394; McCall v. People, 136 U. S. 104, 10 Sup. Ct. 881, 34 L. ed. 391. See also Blake v. McClung, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. ed. 432; Pensacola Tel. Co. v. Western U. Tel. Co., 96 U. S. 1, 24 L. ed. 708; Southern R. Co. v. Greene, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536; Stockton v. Baltimore &c. R. Co., 32 Fed. 9; People v. Wemple, 131 N. Y. 64, 29 N. E. 1002, 24 Am. St. 542.

[82] See notes in Ann. Cas. 1913A, 702; Ann. Cas. 1913C, 1278; Ann. Cas. 1914A, 702.

[83] See for instance, Barnes' West Virginia Code, pp. 748, 749. Thus in Nebraska, it is held that a foreign railroad corporation, being prohibited by the constitution from acquiring a right of way in Nebraska, cannot do so indirectly through a Nebraska corporation. Koenig v. Chicago &c. R. Co., 27 Nebr. 699, 43 N. W. 423. In Pennsylvania, where the statutes allow the stock of domestic corporations to be held by other corporations, it is held that a foreign corporation does not, by owning all the stock of a domestic corporation, "acquire or hold" the real estate of the domestic corporation so as to violate the act of April 26, 1855, against acquiring or holding real estate "directly in the corporate name, or by, or through any trustee or other device whatsoever, unless specially authorized," under penalty of escheat. Commonwealth v. New York &c. R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634, 25 W. N. C. 404, 47 Leg. Int. 222. A constitutional pro-

state or federal courts of a foreign state does not constitute "doing business" in such state, and such an action may be maintained, although the laws of that state relating to foreign corporations within its limits have not been complied with.[84] Where a foreign corporation doing business in the state fails to designate a resident agent, upon whom service of process may be made as required by law, it has been held that a court possessing equity powers has jurisdiction to appoint a receiver for the business of such corporation, without personal service, upon a showing of an immediate necessity for such action.[85]

§ 41 (31). **Railroads as property.**—All property essential to the operation of a railroad, including the right of way, roadbed, ties, rails, side-tracks, switches, depots, station-houses, water-tanks, and other fixtures, together with the rolling stock and other necessary movable appliances, has been held by the federal courts to be real estate.[86] The same ruling is made by the courts

vision that no foreign corporation shall "have power to condemn or appropriate property" does not prevent a foreign railroad corporation from acquiring a right of way by agreement with the landowner. St. Louis &c. R. Co. v. Foltz, 52 Fed. 627.

[84] American Loan &c. Co. v. East &c. R. Co., 37 Fed. 242; Christian v. American &c. Co., 89 Ala. 198, 7 So. 427; Ayres v. Siebel, 82 Iowa 347, 47 N. W. 989; C. B. Rogers & Co. v. Simmons, 155 Mass. 259, 29 N. E. 580; Powder River &c. Co. v. Custer County, 9 Mont. 145, 22 Pac. 383; Texas Land &c. Co. v. Worsham, 76 Tex. 556, 13 S. W. 384. See also Toledo Trac. &c. Co. v. Smith, 205 Fed. 643. But operating a line of railroad in the state is "doing business" therein. Cafasso v. Philadelphia &c. R. Co., 169 Fed. 887; State v. Chicago &c. R. Co., 95 Ark. 114, 128 S. W. 555; Missouri &c. R. Co. v. Demere (Tex. Civ. App.), 145 S. W. 623. See also Mauser v. Union Pac. R. Co., 243 Fed. 274; Reynolds v. Missouri &c. R. Co., 228 Mass. 584, 117 N. E. 913.

[85] Glines v. Supreme S. O. of I. H., 20 N. Y. S. 275. See generally as to compelling appointment of such agent as condition of right to do business in the state. State v. St. Mary's Franco-American Petroleum Co., 58 W. Va. 108, 51 S. E. 865, 1 L. R. A. (N. S.) 558, and note, 112 Am. St. 951, 6 Ann. Cas. 38.

[86] Minnesota Co. v. St Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; Pennock v. Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Farmers' &c. Co. v. St. Jo. &c. R. Co., 3 Dill. (U. S.) 412, Fed. Cas. No. 4669. But see post, § 450. This ruling is made the more readily when necessary to the protection of the rights of lien

of many states,[87] in some of which, however, the character of rolling stock as property is fixed by statute.[88] In those states in which the subject is uncontrolled by statute, the preponderance of authority is to the effect that only the land owned by the railroad company, together with the ties, rails and other structures permanently affixed thereto, is realty; and that engines, cars, and other moveable appliances are to be regarded for most purposes as personalty.[89] The question of what is permanently affixed to

holders, in whose hands the permanent structure without the movable appliances would have little value. An analogy is drawn between rolling stock and other movable railroad appliances, and venetian blinds, lightening rods, cattle, and slaves, and implements used in working a plantation, a steel-yard in a machine house, fish in a pond, doves in a cote, all of which have been held to be realty. Farrar v. Stackpole, 6 Greenl. (Maine) 155; Lushington v. Sewell, 1 Sim. 435, 480; Washburn Real Prop. (3d ed.), p. 10. But see as to taxation, the more recent decisions of the Supreme Court of the United States in Green v. Van Buskirk, 7 Wall. (U. S.) 139, 150, 19 L. ed. 109; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. ed. 158, 13 Am. & Eng. Corp. Cas. 365; Baltimore &c. R. Co. v. Allen, 22 Fed. 376, 17 Am. & Eng. R. Cas. 461; Union Loan & T. Co. v. Southern &c. Co., 51 Fed. 840. Much, however, depends upon the statute. See generally Webster Lumber Co. v. Keystone &c. Co., 51 W. Va. 545, 42 S. E. 632, 66 L. R. A. 33, and note.

[87] Farmers' &c. Co. v. Hendrickson, 25 Barb. (N. Y.) 484, 493; Palmer v. Forbes, 23 Ill. 237; Louisville &c. R. Co. v. State, 25 Ind. 177, 87 Am. Dec. 358; Youngman v. Elmira &c. R. Co., 65 Pa. St. 278. State Treasurer v. Somerville &c. R. Co., 28 N. J. L. 21; Sangamon & M. R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497; Chicago & N. W. R. Co. v. Ft. Howard, 21 Wis. 45, 91 Am. Dec. 458; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124, 1 N. W. 434. Railroad ties, rails and, other materials brought to, but not actually fixed upon, the right of way, designed to be used in constructing a projected line of railroad, are taxable by the local authorities as personalty. Chicago, B. & Q. R. Co. v. Hitchcock County, 40 Nebr. 781, 59 N. W. 358.

[88] Phillips v. Winslow, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729; Miller v. Rutland &c. R. Co., 36 Vt. 452, 490.

[89] Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; Boston &c. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Williamson Trustee v. New Jersey R. Co., 29 N. J. Eq. 311, 15 Am. Rep. 572, and authorities there cited; Randall v. Elwell, 52 N. Y. 521, 11 Am. Rep. 747; Hoyle v. Plattsburgh &c. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Chicago &c. R. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458; post, § 450. Interest of railway

a railroad right of way is one partly of law and partly of fact, mainly dependent on the purpose of the builders, whether, for example, it be to construct a main line or side branches for temporary use.[90] A railroad corporation's property, so far as the ownership and the profit are concerned, is in ordinary respects private, though applied to a use in which the public has an interest.[91]

§ 42 (32). **Railroads as monopolies.**—A railroad is not necessarily nor usually a monopoly in a legal sense, nor is the company entitled to prevent the location of a rival railroad upon or across the territory through which its road runs, when such rival road is duly authorized by the state;[92] for the grant of a franchise to one corporation will not be construed as a pledge that the state will not grant similar franchises to another, although by so doing it may impair or even destroy the value of the first franchise.[93] The legislature may, however, unless prohibited by the constitu-

company in street is held real estate in Newark &c. Co. v. North Arlington, 65 N. J. L. 150, 46 Atl. 568. See also Thompson v. Schenectady R. Co., 124 Fed. 274; Palmer v. Forbes, 23 Ill. 301; Western &c. R. Co. v. Deal, 90 N. Car. 110. But compare People v. Tax Comrs., 104 N. Y. 240, 10 N. E. 437; Front St. &c. R. Co. v. Johnson, 2 Wash. 152, 25 Pac. 1084, 11 L. R. A. 693, and ante, § 6.

[90] Van Keuren v. Central R. Co., 38 N. J. L. 165, 13 Am. Rep. 43.

[91] Lake Shore &c. R. Co. v. Chicago &c. R. Co., 97 Ill. 506; Pittsburgh &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 36 Am. & Eng. R. Cas. 531.

[92] Newcastle &c R. Co. v. Peru &c. R. Co., 3 Ind. 464; Baltimore &c. R. Co. v. State, 45 Md. 596; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; 1 Thomp. Corp. (2nd. ed.) § 338. But see Raritan &c. R. Co. v. Delaware &c. Canal Co., 18 N. J. Eq. 546.

[93] Charles River Bridge v. Warren Bridge, 6 Pick. (Mass.) 376, 7 Pick. (Mass.) 344, 11 Peters (U. S.) 420. See also as to turnpike, Turnpike Co. v. State, 3 Wall. (U. S.) 210, 18 L. ed. 180; Indiana C. R. Co. v. Robinson, 13 Cal. 519; Bartram v. Central T. Co., 25 Cal. 283; Lafayette P. R. Co. v. New Albany & S. R. Co., 13 Ind. 90, 74 Am. Dec. 246; Washington &c. R. Co. v. Baltimore &c. R. Co., 10 Gill & J. (Md.) 392; Collins v. Sherman, 31 Miss. 679; White R. T. Co. v. Vermont C. R. Co., 21 Vt. 590. As to bridges, see Fall v. Sutter C., 21 Cal. 237; Hartford B. Co. v. Union Ferry Co., 29 Conn. 210; Oswego Falls B. Co. v. Fish, 1 Barb. Ch. (N. Y.) 547; Hamilton Ave., In re, 14 Barb. (N. Y.) 405 Thompson v. New York &c. R. Co., 3 Sandf. Ch. 625. As to ferries, see Wright v. Nagle, 101 U. S. 791,

tion, grant an exclusive franchise to build and maintain a railroad within certain limits,[94] such franchise being always subject to the right of eminent domain.[95] But a monopoly is not to be implied.[96]

25 L. ed. 921; Fitch v. New Haven &c. R. Co., 30 Conn. 38; McLeod v. Burroughs, 9 Ga. 213; Harrison v. Young, 9 Ga. 359; Shorter v. Smith, 9 Ga. 517; Richmond &c. R. Co. v. Rogers, 1 Duvall (Ky.) 135. Collins v. Sherman, 31 Miss. 679. As to canals, see Tuckahoe C. Co. v. Tuckahoe &c. R. Co., 11 Leigh (Va.) 42, 36 Am. Dec. 374; Illinois & M. C. Co. v. Chicago &c. R. Co., 14 Ill. 314.

[94] Richmond &c. R. Co. v. Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Bridge Proprietors v. Hoboken Co., 1 Wall. (U. S.) 116, 17 L. ed. 571; Binghamton B. Co., In re, 3 Wall. (U. S.) 51, 18 L. ed. 137; Boston &c. R. Co. v. Salem &c. R. Co., 2 Gray (Mass.) 1; Pierce Rail., citing Micou v. Tallassee C. Co., 47 Ala. 652; California State Tel. Co. v. Alta T. Co., 22 Cal. 398; Pontchartrain R. Co. v. Orleans Nav. Co., 15 La. 404; State v. Noyes, 47 Maine 189, 208; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Michigan C. R. Co. v. Michigan S. R. Co., 4 Mich. 361; Martin v. O'Brien, 34 Miss. 21; Delaware & R. Co. v. Camden & A. R. Co., 16 N. J. Eq. 321, 18 N. J. Eq. 546; Pennsylvania R. Co. v. National &c. R. Co., 23 N. J. Eq. 441; Chenango B. Co. v. Binghamton B. Co., 27 N. Y. 87; Chenango B. Co. v. Lewis, 63 Barb. (N. Y.) 111; Camblos v. Phila. &c. R. Co., 4 Brewster (Pa.) 563, 595; 1 Thomp. Corp. (2nd. ed.) § 338. In Fidelity &c. Co. v. Mobile St. R. Co., 53 Fed. 687, it is held that one public corporation cannot take the franchise of another even under legislative authority, if such taking will materially affect its use. where there is no reserved right of amendent, it has been held that the grant of an exclusive franchise to operate a railroad within certain limits amounts to a contract on the part of the state, which it cannot violate by the conferring upon another company power to build and operate a parallel road. Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Boston &c. R. Co. v. Salem &c. R. Co., 68 Mass. 1. See also Raritan &c. R. Co. v. Canal Co., 18 N. J. Eq. 546; Pontchartrain R. Co. v. New Orleans &c. R. Co., 11 La. Ann. 253. But compare Boston &c. R. Co. v. Boston &c. R. Co., 5 Cush. (Mass.) 375; Richmond &c. R. Co. v. Louisa &c. R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Louisville &c. R. Co. v. Louisville City R. Co., 2 Duv. (Ky.) 175.

[95] New Orleans &c. R. Co. v. Southern & A. T. Co., 53 Ala. 211; Enfield T. B. Co. v. Hartford & N. H. Co., 17 Conn. 40, 454, 42 Ann. Dec. 716; Metropolitan C. R. Co. v. Chicago &c. R. Co., 87 Ill. 317; Piscataqua B. v. New Hampshire Bridge, 7 N. H. 35; New Jersey S. R. Co. v. Long Branch Com., 39 N. J. L. 28.

[96] Charles River Bridge v. War-

§ 43 (33). **Railroads as public highways.**—Railroads, by whomsoever constructed or owned or operated, are quasi public works and are often likened by the courts and writers to public highways.[97] The constitutions and laws of some states declare them to be public highways; those of others declare the companies to be common carriers, whose roads are available to all

ren Bridge, 11 Peters (U. S.) 420, 9 L. ed. 773, 938; Citizens' St. R. Co. v. Jones, 34 Fed. 579; Lafayette Plank Road Co. v. New Albany &c. R. Co., 13 Ind. 90, 34 Am. Dec. 246; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893; Hudson River Tel. Co. v. Watervliet Turnp. & R. Co., 56 Hun. 67, 9 N. Y. S. 177, 29 N. Y. St. 694; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 22 N. E. 381, 26 N. Y. S. 364, 5 L. R. A. 546, 29 Am. & Eng. Corp. Cas. 307; State v. Hamilton, 47 Ohio St. 52, 23 N. E. 935, 29 Am. & Eng. Corp. Cas. 208, 23 W. L. Bull. 190. Post, § 50.

[97] White River T. Co. v. Vermont C. R. Co., 21 Vt. 590. "We regard it as a misnomer to attach even the name 'quasi public corporation' to a railroad company. * * * Its road may be called a quasi public highway." Gordan, J., in Peirce v. Commonwealth, 104 Pa. St. 150, 13 Am. & Eng. R. Cas. 74, 79. Lake Superior &c. R. Co. v. United States, 93 U. S. 442, 458, dissenting opinion. "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. * * * Building a railroad, though it be bulit by a private corporation, is an act done for public use. And the reason why the use has always been held a public one, is that such a road is a highway, whether made by the government itself, or by the agency of corporate bodies, or even by individuals when they obtain their power to construct it from legislative grant." Olcott v. Supervisors, 16 Wall. (U. S.) 678, 694, 21 L. ed. 382. See also Cherokee Nation v. Southern Kans. R. Co., 135 U. S. 641, 10 Sup. Ct. 965, 971, 34 L. ed. 295. But the old theory that a railroad is a public highway in the same sense as a turnpike, over which any person may run his vehicles upon payment of suitable tolls, has been abandoned. Beekman v. Saratoga, &c. R. Co., 3 Paige (N. Y.) 45, 74, 22 Am. Dec. 679; Samblos v. Philadelphia &c. R. Co., 4 Brewester (Pa.) 563, 597. See also Estes Park Toll Road Co. v. Edwards, 3 Colo. App. 74, 32 Pac. 549; Chicago &c. R. Co. v. Chicago, 140 Ill. 309, 29 N. E. 1109; Cox v. Louisville &c. R. Co., 48 Ind. 178; Clark v. Chicago &c. R. Co., 127 Mo. 197, 29 S. W. 1013; Murch v. Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631. They are not highways in such a sense as to render an obstruction thereon a public nuisance. Stoneback v. Thomas Iron Co. (Pa.), 4 Atl. 721. See also Comer v. State, 62 Ala. 320.

persons for the transportation of themselves and their property.[99] This latter definition expresses most nearly the relation of a completed railroad to the public. Except in discharging its duties as a carrier, the company is entitled to the exclusive use and possession of its property.[1] There may also be said to be a resemblance to public highways in that the power of eminent domain can be invoked to aid in the construction and extension of railroads,[2] whenever, in the judgment of the legislature, they will be of value as thoroughfares over which the services of com-

[99] The Pennsylvania railroad is declared by its charter (Pamphlet Laws, 1846, 323) to be a public highway, over which the company must haul the cars of all persons who require such service subject to restrictions. Trunick v. Smith, 63 Pa. St. 18. In lake Superior &c. R. Co. v. United States, 93 U. S. 442, the doctrine of railroads as highways is carried very far, and it is held that the act of Congress granting lands in aid of a railroad and providing that it should be a public highway for the free use of the government in transporting troops and property gave the government its use as a highway only and not free transportation in the cars of the company.

[1] Central of Georgia v. Brinson, 10 Ga. 207, 19 Am. & Eng. R. Cas. 42; Toledo &c. R. Co. v. Pence, 68 Ill. 524; Hoyt v. Chicago &c. R. Co., 93 Ill. 601; Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258, 47 Am. Rep. 706, 8 Am. & Eng. R. Cas. 544; Chicago &c. R. Co. v. Chicago City Railway Co., 10 Nat. Corp. Rep. 651. See also Western Un. Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540, 25 Sup. Ct. 133, 49 L. ed. 312; Donovan v. Pennsylvania R. Co., 199 U. S. 279, 26 Sup. Ct. 91, 94, 50 L. ed. 192; Hyde v. Missouri Pac. R. Co., 110 Mo. 272, 19 S. W. 483. Pittsburgh &c. R. Co. v. Bingham, 29 Ohio St. 364, 370, 371, 23 Am. Rep. 751.

[2] Olcott v. The Supervisors, 16 Wall. (U. S.) 678, 21 L. ed. 382; Hodgerson v. St. Louis &c. R. Co., 160 Ill. 430, 43 N. E. 614; Worcester v. Western R. Co., 4 Metc. (Mass.) 564, 1 Am. R. Cas. 350, 352; Stewart v. Erie &c. Trans. Co., 17 Minn. 372; Niagara Falls &c. R. Co., In re, 108 N. Y. 375, 15 N. E. 429; Gibson v. Mason, 5 Nev. 283; Cooley's Const. Lim. (7th ed.) 753. Thus, in Cherokee Nation v. Southern Kans. R. Co., 135 U. S. 641, 657, 10 Sup. Ct. 965, 971, 34 L. ed. 302, it is said: "It is because it is a public highway and subject to such (governmental) control that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner in the mode prescribed by law."

mon carriers can be rendered.[3] Again, they are so far public improvements that the state may levy and collect a tax to aid in their construction.[4]

[3] Newburyport T. Co. v. Eastern R. Co., 23 Pick. (Mass.) 326, 1 Am. R. Cas. 294; Weir v. St. Paul &c. R. Co., 18 Minn. 155. Contra Costa R. Co. v. Moss, 23 Cal. 323.

[4] Olcott v. Supervisors, 16 Wall. (U. S.) 678, 21 L. ed. 382; Ravenswood R. Co. v. Ravenswood, 41 W. Va. 732, 24 S. E. 597, 56 Am. St. 906; ante § 1. See also Lehigh Valley R. Co. v. Canal Board, 204 N. Y. 471, 97 N. E. 964, Ann. Cas. 1913C, 1228; post chapter on Municipal Aid.

CHAPTER IV.

CHARTERS.

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§ 45 (34). Special charters and general laws.—The power to grant railroad charters in common with charters of other corporations is a legislative function, usually exercised in this country by the legislatures of the various states,[1] although congress may, in the exercise of its power to regulate interstate commerce, construct, or authorize individuals or corporations to construct, railroads across the states and territories of the United States.[2] These charters are either special, in which case corporate powers are conferred upon certain designated persons by an act of the legislature, in which the powers, duties and liabilities of the specified corporation are enumerated at length; or they are derived from a general authorization to any man or men to be and act as a body corporate upon complying with certain terms.[3] In order to prevent the granting of special and exclusive privileges, and to render all corporations amenable to the will of the legislature at all times, charters are usually conferred only by general laws,[4] special charters being prohibited by the constitutions of most of the states.[5]

[1] 1 Thomp. Corp. (2d ed.), §§ 35, 145, 170 et seq.

[2] California v. Central Pac. R. Co., 2 Interstate Com. 153, 127 U. S. 1, 8 Sup Ct. 1073, 32 L. ed. 150; Thompson v. Pacific R. Co., 9 Wall. (U. S.) 579, 19 L. ed. 792.

[3] The general law and the articles of incorporation or association exe cuted and filed in compliance therewith, in such case, constitute the charter. Westport Stone Co. v. Thomas, 175 Ind. 319, 94 N. E. 406, 35 L. R. A. (N. S.) 646n. See also Attorney General v. Great Eastern R. Co., L. R., 5 App. Cas. 473; 1 Thomp. Corp. (2d ed.) 172.

[4] 1 Thomp. Corp. (2d. ed.), § 147.

[5] 1 Thomp. Corp. (2d ed.), § 146. Even when the Constitution prohibits the creation of corporations by special laws, it has been held that a special charter granted before the adoption of the Constitution may be amended by special act. State v. Cape Girardeau R. Co., 48 Mo. 468; Roosa v. St. Joseph &c. R. Co., 114 Mo. 508, 21 S. W. 1124. See also United States v. Stanford, 161 U. S. 412, 16 Sup. Ct. 576, 40 L. ed. 751; State v. Webb, 110 Ala. 214, 20 So. 462; Smith v. Indianapolis &c. R. Co., 158 Ind. 425, 63 N. E. 849; Bohmer v. Hoffen, 161 N. Y. 390, 55 N. E. 1047. In support of the text, see Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; San Francisco v. Spring Valley, 48 Cal. 493; Roberts v. Missouri &c. R. Co., 43 Kans. 102, 22 Pac. 1006, 43 Am. & Eng. R. Cas. 532; St. Paul Fire Ins. Co. v. Allis, 24 Minn. 75. In England general power to organize railroads is given by the Railways Construction Facilities Act, 27 and 28 Vict. Ch. 121.

§ 46 (35). **Acceptance of charter.**—In either case the charter is generally of no effect until the terms upon which it is granted are complied with, and it is accepted by the incorporators.[6] The construction and operation by a railroad company of a part of its road is sufficient evidence of an acceptance of its charter, where no particular mode of acceptance is designated,[7] and it is held that a railroad charter may be considered as presumptively accepted at its date without record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments and have fully constructed the road,[8] although it has been said that the certificate of incorporation constitutes the only evidence of the acceptance of the terms and conditions contained in the statute.[9] This, however, is not the rule with regard to special charters, and it may be doubted if it is of universal application even in other cases.[10]

§ 47 (36). **Terms upon which charter is granted must be complied with—Provisions in general laws.**—It is generally essential to the existence of a de jure corporation that the terms upon which a grant of corporate rights is made should be substantially complied with, though slight irregularities will not necessarily defeat the incorporation,[11] particularly where the statute pro-

[6] Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 8 R. & Corp. L. J. 144; ante, Ch. II. But filing the necessary article of incorporation and organizing under the general law operates of course as an acceptance, including the provisions of such general law as part of the corporate charter or constitution. 1 Thomp. Corp. (2d ed.) § 172; Chicago Union Trac. Co. v. Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631. Proof of acceptance, see Thomp. Corp. (2d. ed.), § 289.

[7] Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, Ann. Cas. 1914C, 1282; St. Joseph & I. R. Co. v. Shambaugh, 106 Mo. 557, 17 S. W. 581; Roosa v. St. Joseph &c. R. Co., 114 Mo. 508, 21 S. W. 1124. See also City R. Co. v. Citizens' St. R. Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114 (so holding in care of franchise).

[8] Farnsworth v. Lime Rock R. Co., 83 Maine 440, 22 Atl. 373. See also Benbow v. Cook, 115 N. Car. 324, 20 S. E. 453, 44 Am. St. 454.

[9] Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 8 R. & Corp. L. J. 144.

[10] See ante §§ 23, 24, where the subject is more fully treated. And see also 3 Elliott Ev., §§ 1934-1938.

[11] People v. Montecito &c. Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. 172, and note; People v. Cheeseman, 7

vides for their amendment.[12] The general laws for the incorporation of railway companies in the various states of this country are substantially the same in most respects.[13] They usually require that the articles shall state the name of the company,[14] the amount of the capital stock, and the number of shares into which it is divided, the termini of the road, the names of the counties through which it will pass, its length as near as may be, and the number of directors chosen to manage the affairs of the corporation, together with their names.[15] To these are added various requirements by different states, as that the capital stock shall be not less than a certain sum per mile, or that the places

Colo. 376, 3 Pac. 716; Eakright v. Logansport &c. R. Co., 13 Ind. 404; Busenback v. Attica &c. R. Co., 43 Ind. 265; Busey v. Hooper, 35 Md. 15, 6 Am. Rep. 350; State v. Wood, 84 Mo. 378; Buffalo &c. R. Co. v. Cary, 26 N. Y. 75; Cayuga Lake R. Co. v. Kyle, 64 N. Y. 185, 5 Thomp. & C. 659; 1 Thomp. Corp. (2d ed.) §§ 178-186. A statement in the articles of association of a railroad company that it shall be operated as a transfer road, and no discrimination shall be made against any road, and that uniform rates for the same services shall be charged to either persons or railroad companies, does not show that the carriage of passengers was excluded from the purposes of its organization, especially where the articles state that the organization is for the purpose of constructing, operating and maintaining a railroad of standard gauge. Bay City Belt Line R. Co. v. Hitchcock, 90 Mich. 533, 51 N. W. 808.

[12] 1 Thomp. Corp. (2d. ed.), § 183 et seq.

[13] The general acts of the various states are built upon the railroad act of New York, enacted in 1850. Laws 1850, ch. 140.

[14] Rhodes v. Piper, 40 Ind. 369; Goodyear Rubber Co. v. Goodyear Rubber Mfg. Co., 8 Am. & Eng. Corp. Cas. 317. A corporation is entitled to the exclusive use of the name it chooses. Holmes v. Holmes &c. Man. Co., 37 Conn. 278, 9 Am. Rep. 324; note to Cincinnati Cooperage Co. v. Bate, 10 Lewis' Am. R. & Corp. 653, 672.

[15] See ante, § 24; Burns' R. S. Ind. 1914, § 5176. The fact that the articles are required to name the termini of the road affords no argument that such road shall be longitudinal. A circular railroad may be incorporated and may exercise the power of eminent domain. State v. Martin, 51 Kans. 462, 33 Pac. 9. The names of the directors are essential. Dutchess &c R. Co. v. Mabbett, 58 N. Y. 397. The contrary is held in Eakright v. Logansport &c. R. Co., 13 Ind. 404. But the force of that case as an authority is destroyed by the cases of Busenback v. Attica &c. R. Co., 43 Ind. 265, and Reed v. Richmond Street R. Co., 50 Ind. 342, 19 Am. Rep. 718; 1 Thomp. Corp. (2d ed.), § 178.

of residence of the directors shall be given, or that the number of years the corporation is to continue shall be stated. The articles must usually be signed by a certain number[17] of subscribers to the capital stock, each of whom, under most statutes, must state his place of residence and the number of shares taken by him.[18] The filing of such articles, properly verified or acknowledged, in some public repository, as the office of the secretary of state or of some local recording officer, with the addition, perhaps, of the certificate of some public officer, that the statutes have been complied with, usually creates the corporation.[19] After such articles have been filed they are usually evidence of the existence of a corporation de jure.[20] It is held in Colorado that the omission of any of the requisites of a certificate of incorporation required by the general act for the formation of corporations is a fatal defect, and no de jure right is conferred by such certificate to exercise corporate franchises; and, therefore, a certificate of incorporation containing no provision for directors, trustees, or any governing body, as required by the statute, but vesting the control and management of the corporation in a president, vice-president, and attorney, is insufficient to confer a right to exercise such franchises.[22] And in Tennessee it has

[17] The number required is twenty-five in New York, while five are sufficient in many states. Three only are required in Florida and one may incorporate in Iowa. Subscriptions of stock upon conditions that can only be fulfilled after incorporation are not to be counted as a part of the necessary preliminary subscription. Fairview R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688.

[18] See 1 Thomp. Corp. (2d. ed.), § 187; also ante, § 24.

[19] Ante, § 24; 8 Thomp. Corp. § 200. See also Chicago &c. R. Co. v. Lake, 130 Ill. 42, 22 N. E. 616; North Point &c. Co. v. Utah &c. Co., 16 Utah 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. 607. In Illinois it is said that a corporation cannot do business until the certificate of complete organization and a copy of all papers filed with the secretary of state have been duly recorded, and that fraudulently and surreptitiously recording papers of a new corporation, contrary to the agreement of the incorporators, is of no effect. Ricker v. Larkin, 27 Ill. App. 625.

[20] Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 8 R. & Corp. L. J. 144.

[22] Bates v. Wilson, 14 Colo. 140, 24 Pac. 99, 8 R. & Corp. L. J. 144. See also Reed v. Richmond St. R. Co., 50 Ind. 342, 19 Am. Rep. 718.

been held that where the statute states what must be done to complete the corporate organization and prescribes the form of the charter the statute must be followed no matter how inconvenient or unnecessary some of the requirements may seem.[23] But it has been held that a statute which requires the certificate of organization of a railroad company to state the termini of the road, and the county or counties through which the road shall pass, applies only to the main line of the company, and, hence, it is unnecessary for the certificate to specify the termini of branch lines or the counties through which they will pass.[24] And it has also been held that the description of a terminus as "at or near" a certain place is not so indefinite and defective as to vitiate the articles of incorporation.[25] So, where an estimate of the length of the road is required, it may be approximately given.[26]

§ 48 (37). **Particular corporation must be authorized.**—The charter confers corporate rights and privileges only upon those named as incorporators or upon those to whom their rights are transferred by authority of law. Parties cannot take a corporate character with which they have no concern and which belongs to others, and effect a valid corporate organization by a pretense of user thereunder.[27] The mere purchase of all the corporate

[23] Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155. See generally as to what is a fatal defect, New York Cable Co. v. Mayor, 104 N. Y. 1, 10 N. E. 332; Heinige v. Adams, &c. Co., 81 Ky. 300. 1 Thomp. Corp. (2d. ed.), § 178.

[24] Trester v. Missouri, &c. R. Co., 33 Nebr. 171, 49 N. W. 1110. See ante, § 24; and Pacific R. &c. Co. v, Astoria R. &c. Co., 53 Ore. 247, 99 Pac. 1044. As to what is within charter power to build lateral railroads, see note in 12 L. R. A. (N. S.) 326.

[25] Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Warner v. Callender, 20 Ohio St. 190. See also New York &c. R. Co. v. O'Brien, 121 App. Div. 819, 106 N. Y. S. 909. But see De Long v. Schimmel, 58 Ind. 64; Indianapolis, &c. R. Co. v. Newsom, 54 Ind. 121. As to the right to construct a circular road, notwithstanding the statute requires the termini to be stated. See State v. Martin, 51 Kans. 462, 33 Pac. 9; Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

[26] Buffalo, &c. R. Co. v. Hatch, 20 N. Y. 157.

[27] Welch v. Old Dominion Min. & R. Co., 31 N. Y. St. 916, 10 N. Y. S. 174, 8 R. & Corp. L. J. 254. See

property will not give any right to the use of the corporate franchise,[28] when unauthorized. Nor can a corporation, it seems, be formed for the purchase and operation of a railroad under a charter merely authorizing a corporation for the purpose of construing and operating such a road.[29]

§ 49 (38). **Construction of charter—General rules.**—The charter of a railway company in common with those of other private corporations,[30] is to be strictly but reasonably construed in favor of the public and against the company,[31] wherever their interests conflict. This rule is, however, subject to the qualification that inasmuch as railway corporations are created to further great public interests, their charters will receive a liberal interpretation in furtherance of those interests, when they are apparent to the courts, instead of the strict construction usually given to the charters of private corporations organized exclusively for pecu-

also Rogers v. Nashville, &c. R. Co., 91 Fed. 299; Memphis, &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; 1 Thomp. Corp. (2nd ed.), §§ 229, 230. The pretended purchase of the right of way of a railroad company at a sale on execution will give the purchaser no rights under the franchises of the execution-defendant. East Alabama R. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136. The roadbed and superstructure of a railroad built under charter from the state is charged not only in the hands of the original corporation, but of purchasers, with the burden of the charter obligations. Such burden can only be removed by consent of the state. State v. Dodge City R. Co., 53 Kans. 377, 36 Pac. 747, 42 Am. St. 295.

[28] Bruffett v. Great Western R. Co., 25 Ill. 310; Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, and note; Atkinson v. Marietta, &c. R. Co., 15 Ohio St. 21, 35. See also People v. Union Gas &c. Co., 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916 B, 201.

[29] Gulf &c. Co. v. Morris, 67 Tex. 692, 4 S. W. 156, 35 Am. & Eng. R. Cas. 94; State v. Beck, 81 Ind. 500. See also State v. International Invest. Co., 88 Wis. 512, 60 N. W. 796, 43 Am. St. 920.

[30] Perrine v. Chesapeake, &c. Canal Co., 9 How. (U. S.) 172, 13 L. ed. 92. 1 Thomp. Corp. (2d. ed.), § 299, et seq. See also Washington-Oreg. Corp. v. Chehalis, 202 Fed. 591; State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437.

[31] 1 Thomp. Corp. (2d ed.) § 297. The charter of a corporation is to be strictly construed; nothing is to be taken as conceded but what is given in unmistakable terms or by

niary profit.[32] The powers of a corporation under its charter are such, and such only, as are expressly conferred by the stat-

an implication equally clear. Rockland Water Co. v. Camden & R. Water Co., 80 Maine 544, 15 Atl. 785, 1 L. R. A. 388; Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837, 5 R. & Corp. L. J. 364; Richmond &c. R. Co. v. Louisa &c. R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Coosaw Mining Co. v. State, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537; Bradley v. New York &c. R. Co., 21 Conn. 294; Florida &c. R. Co. v. Pensacola &c. R. Co., 10 Fla. 145; Macon v. Macon &c. R. Co., 7 Ga. 221; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. St. 221; People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961; Pennsylvania R. Co. v. Canal Comrs., 21 Pa. St. 9; Monongahela &c. Co. v. Kirk, 46 Pa. St. 112, 84 Am. Dec. 527; East Line &c. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; Parker v. Great Western R. Co., 7 M. & G. 253, 49 E. C. L. 253. "A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation." Black, J., in Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471 n; Jackson County Horse Car Co. v. Interstate &c. Co., 24 Fed. 306, 308; Pennsylvania R. Co. v. Philadelphia &c. R. Co., 10 Pa. Co. Ct. 625, 49 Leg. Intel. 5. See also Oppenheimer v. Philadelphia &c. R. Co., 39 App. D. C. 253.

[32] Jacksonville &c. Co. v. Hooper, 160 U. S. 514, 523, 16 Sup. Ct. 379, 40 L. ed. 515; Mayor v. Baltimore &c. R. Co., 6 Gill (Md.) 288, 48 Am. Dec. 531; Fall River Iron Works Co. v. Old Colony &c. R. Co., 5 Allen (Mass.) 221, 226; West Branch &c. Co. v. Lumber &c. Co., 121 Pa. St. 143, 6 Am. St. 766. See State v. Stoll, 17 Wall. (U. S.) 425, 21 L. ed. 650; Bradley v. New York &c. R. Co., 21 Conn. 294; North London R. Co. v. Metropolitan Board, 1 Johns. Eng. Ch. 405, 5 Jur. (N. S.) 1121; Mayor v. Baltimore &c. R. Co., 21 Md. 50, 93. In this last case it was held that power given to a railroad company to subscribe in aid of the construction of lateral roads authorizes it to loan money or bonds to such road, and take a mortgage to secure such loan. A grant of power for the performance of a public act is not to be so construed as to make the act impossible, and such a construction is not justified by the rule that private charters are to be strictly interpreted; provisos in a grant will not be allowed to defeat the grant itself. West Branch Boom Co. v. Pennsylvania Joint Lumber and Land Co., 121 Pa. St. 143, 15 Atl. 509, 6 Am. St. 766, 22 W. N. C. 303. The interpretation of a railroad charter, like the interpretation of any other grant, is the ascertainment of intention. The means reasonably necessary for the enjoyment of a granted property or rights, to the exercise of the granted power, and for the carry-

utes granting it, together with such additional powers as are fairly implied,[33] as being necessary to the enjoyment of the powers enumerated.[34] The enumeration of certain powers implies the exclusion of all others not reasonably necessary to their enjoyment.[35] The phrase "necessary powers," however, generally means such as are convenient, useful and appropriate to the spe-

ing out of the purpose of the grant, are given by implication. Burke v. Concord R. Co., 61 N. H. 160. But see Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837, 5 R. & Corp. L. J. 364; Baltimore &c. R. Co. v. Dist. of Columbia, 3 McArthur (D. C.) 122; East Line &c. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834, and authorities cited in last preceding note.

[33] Thomas v. Railroad Co., 101 U. S. 71, 82, 25 L. ed. 950; Mobile v. Railroad Co., 84 Ala. 115, 5 Am. St. 342 n; Central R. Co. v. Collins, 40 Ga. 582; Lower v. Chicago &c. R. Co., 59 Iowa 563, 13 N. W. 718, 10 Am. & Eng. R. Cas. 17; Mobile &c. R. Co. v. Franks, 41 Miss. 494, 511; Pacific R. Co. v. Seely, 45 Mo. 212, 220, 100 Am. Dec. 369; State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164 n; Delaware &c. Canal Co. v. Camden &c. R. Co., 16 N. J. Eq. 321, 372; Morris &c. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542, 562; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471 n; Pittsburg &c. R. Co. v. Allegheny County, 63 Pa. St. 126, 135; National Car Advertising Co. v. Louisville &c. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010 n. This does not mean that express powers themselves can be enlarged by implication. People v. Chicago &c. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181, 13 Ann. Cas. 285; Pittsburg R. Co. v. Pittsburg, 226 Pa. St. 498, 75 Atl. 681.

[34] Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Ross &c. Co. v. Southern Co., 72 Fed. 957; Enfield Toll Bridge Co. v. Hartford R. Co., 17 Conn. 454, 44 Am. Dec. 556 n; Housatonic R. Co. v. Lee &c. R. Co., 118 Mass. 391; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Morris &c. R. Co. v. Newark, 10 N. J. Eq. 352; Shawmut Bank v. Plattsburgh &c. R. Co., 31 Vt. 491.

[35] Thomas v. Railroad Co., 101 U. S. 71, 82, 25 L. ed. 950; Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513; Lewis &c. Co. v. Thomas, 8 Ky. L. 872, 3 S. W. 907; Tennessee &c. R. Co. v. Adams, 3 Head. (Tenn.) 596; Pittsburgh &c. R. Co. v. Jones, 111 Pa. St. 204, 2 Atl. 410, 56 Am. Rep. 260; 1 Thomp. Corp. (2d ed.) § 306; 1 Elliott Cont., § 540. See also National Car Advertising Co. v. Louisville &c. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010, and note.

cific power granted.[36] Ambiguity in the terms used may be so great as to vitiate the charter[37] as all doubtful expressions will generally be construed against the corporation.[38] A charter, however, like a contract between individuals,[39] is to be construed fairly and reasonably,[40] according to the natural import of the language used, with reference to the purposes and objects of the corporation,[41] and with a view to carrying out the intention of the legislature in granting it.[42] Where similar franchises are granted to two corporations, the charters must, if possible, receive such a construction that effect may be given to both, and neither be held to be in derogation of the other.[43]

§ 50 (39). Grants of monopolies and powers in derogation of public rights—Perpetuity.—The rule of strict construction against corporations is peculiarly applicable to grants of exclusive privi-

[36] McCulloch v. Maryland, 4 Wheat (U. S.) 316, 413, 4 L. ed. 579, Marshall, C. J.; Green Bay &c. R. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; Hood v. New York &c. R. Co., 22 Conn. 1, 16; Buffett v. Troy &c. R. Co., 40 N. Y. 168, 176; Buffit v. Troy &c. R. Co., 36 Barb. (N. Y.) 420. See also Choctaw &c. R. Co. v. Bond, 160 Fed. 403; State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814; Logansport v. Smith, 47 Ind. App. 64, 93 N. E. 883; McAdow v. Kansas City Western R. Co., 96 Kans. 423, 151 Pac. 1113, L. R. A. 1917B, 1158n; 8 Elliott Cont., §§ 541, 542. But not such as are unusual and too remote and indirect. Northside R. Co. v. Worthington, 88 Tex. 562, 53 Am. St. 778; People v. Chicago &c. Co., 130, Ill. 268, 17 Am. St. 319; Burrill L. Dict., title "Necessary."

[37] 1 Thomp. Corp. (2d ed.), § 303

[38] Richmond &c. R. Co. v. Louisa &c. R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Rice v. Railroad Co., 1 Black (U. S.) 358, 17 L. ed. 147; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574n; Pennsylvania R. Co. v. Canal Comrs., 21 Pa. St. 22; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506; Scales v. Pickering, 4 Bing. 448.

[39] Except that it is usually more strictly construed.

[40] Green Bay &c. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326, 336; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 67 Am. Dec. 471n.

[41] 1 Thomp. Corp. (2d ed.), § 297,

[42] 1 Thomp. Corp. (2d. ed.), §§ 298, 301, 309. See Wells v. Northern Pac. R. Co., 23 Fed. 969.

[43] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 507; Hudson Riv. Tel. Co. v. Watervliet Turnp. Co., 56 Hun 67, 9 N. Y. S. 177.

leges, monopolies, and powers in derogation of public rights, or the like. In such cases it is generally held that nothing passes by implication, and it is said that "this rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority."[44] Thus, exclusive privileges and monopolies are not to be presumed, and if not unequivocally granted must be deemed to be withheld.[45] So, grants in derogation of public rights,[46] or of the rights and franchises of other corporations,[47] are to be strictly construed. And, "as between a construction which will place a limitation on the grant and one which

[44] Central Transp. Co. v. Pullman's Car Co., 139 U. S. 24, 49, 11 Sup. Ct. 478, 35 L. ed. 55, Per Gray, J.; Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 27, 9 Sup. Ct. 409, 32 L. ed. 837.

[45] Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773; Richmond &c. R. Co. v. Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; Lehigh &c. Co. v. Easton, 121 U. S. 388, 7 Sup. Ct. 916, 30 L. ed. 1059; Jackson &c. R. Co. v. Interstate R. Transit Co., 24 Fed. 306; Omaha Horse R. Co. v. Cable Tramway Co., 30 Fed. 324; Georgia R. Co. v. Smith, 70 Ga. 694; East St. Louis &c. R. Co. v. East St. Louis Union R. Co., 108 Ill. 265; Indianapolis Cable R. Co. v. Citizens' R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539n; Gaines v. Coates, 51 Miss. 335; De Lancey v. Insurance Co., 52 N. H. 581; People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961. See also Detroit Citizens' St. R. Co. v. Detroit R. Co., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67; Augusta &c. R. Co. v. Augusta &c. R. Co., 96 Ga. 562, 23 S. E. 501; Chicago &c. R. Co. v. Louisville &c. R. Co., (Ky), 58 S. W. 799.

[46] Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651. See also State v. Des Moines City R. Co., 159 Iowa 259, 140 N. W. 437. Thus, property already devoted to a public use cannot be taken and used by a corporation unless the right is clearly granted. People v. Thompson, 98 N. Y. 6; Stamford v. Stamford R. Co., 56 Conn. 381, 15 Atl. 749, 1 L. R. A. 375; People v. Newton, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174n; Elliott Roads and Streets, §§ 185-188.

[47] Bridgeport v. New York R. Co., 36 Conn. 255, 4 Am. Rep. 63; Worcester &c. R. Co. v. Railroad Comrs., 118 Mass. 561; Packer v. Sunbury &c. R. Co., 19 Pa. St. 211; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

will give rise to a perpetuity, it is clear that it is the duty of the court, in favor of the public, to impose the limitation."[48]

§ 51 (40). **Practical construction.**—It is a familiar rule that, in cases of doubt, the practical exposition or construction of a contract by the parties is entitled to great, if not controlling influence, and will usually be followed by the courts.[49] This rule has been applied to statutes which have received a contemporaneous construction,[50] and even to constitutional provisions.[51] It follows, therefore, that the practical construction of a grant to a railroad company established by years of uniform usage, acquiesced in by the public and all parties interested, will be of great weight in determining the construction of the grant and will usually be followed by the courts if the meaning or extent of the grant would otherwise be doubtful.[52] But this rule should not perhaps, be carried to the extent to which it is carried by some of the courts in the construction of ordinary contracts, that is, it should not be so applied as to enable corporations to acquire rights, as against the public, which are clearly not given to them, either expressly or impliedly, by their charters or grants

[48] Detroit v. Detroit City R. Co., 56 Fed. 867, 886. See also Choctaw Min. Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. ed. 537.

[49] Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. ed. 594; District of Columbia v. Gallaher, 124 U. S. 505, 8 Sup. Ct. 585, 31 L. ed. 526; Central Trust Co. v. Wabash &c. R. Co., 34 Fed. 254; Union Pac. R. Co. v. Anderson, 11 Colo. 293, 18 Pac. 24; Reissner v. Oxley, 80 Ind. 580, and authorities there cited; Vinton v. Baldwin, 95 Ind. 433; Frazier v. Myers, 132 Ind. 71, 31 N. E. 536. 2 Elliott Cont. § 1537.

[50] United States v. Philbrick, 120 U. S. 52, 7 Sup. Ct. 413, 30 L. ed. 559; People v. Board, 100 Ill. 495; Hovey v. State, 119 Ind. 386, 395, 21 N. E. 890; Rogers v. Goodwin, 2 Mass. 475; Pike v. Megoun, 44 Mo. 491; State v. Parkinson, 5 Nev. 15. In Bruce v. Schuyler, 4 Gilm. (Ill.) 221, it is said: "It has always been regarded by the courts as equivalent to a positive law." Approved in Board of Comrs. v. Bunting, 111 Ind. 143, 12 N. E. 151.

[51] Johnson v. Joliet, 23 Ill. 202; State v. Mayhew, 2 Gill (Md.) 487; Bingham v. Miller, 17 Ohio 445, 49 Am. Dec. 471.

[52] Mobile v. Louisville &c. R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. 342. See also McGilvra v. Seattle Elec. Co., 61 Wash. 38, 111 Pac. 896, Ann. Cas. 1912 B, 1020 n.

from the public. In other words, the mere assumption of a right on their part and inaction on the part of the public will not necessarily be conclusive that such a right exists, especially as against the plain letter of the law.[53]

§ 52 (41). Charter to build and operate a railroad—What powers are included.—The grant of authority to build and operate a railroad carries with it, when necessary to the enjoyment of the franchise, the implied authority to condemn lands for a right of way;[54] to appropriate land of the state over which the chartered route runs, although no provision is made for compensation for it when taken;[55] to erect bridges over navigable streams;[56] to repair bridges where it is authorized to build;[57] to construct its road across a highway[58] or railroad[59] between its authorized termini; but not, ordinarily, along and upon a highway[60] or property already devoted to railroad use;[61] to take gravel and mate-

[53] Powers that can only be obtained by charter or grant cannot be acquired by assuming, without authority, to exercise them; nor is the public, although it may be represented by its officers, in a situation to protect its rights or take action to the same extent as are individuals.

[54] Tennessee &c. R. Co. v. Adams, 3 Head (Tenn.) 596.

[55] Indiana Cent. R. Co. v. State, 3 Ind. 421. But this doctrine is of doubtful soundness.

[56] Hamilton v. Vicksburg &c. R. Co., 34 La. Ann. 970, 44 Am. Rep. 451; Fall River Iron Works Co. v. Old Colony &c. R. Co., 5 Allen (Mass.) 221; Tennessee R. Co. v. Adams, 3 Head (Tenn.) 596; Miller v. Prairie du Chien &c. R. Co., 34 Wis. 533. In Schofield v. Pennsylvania &c. R. Co., 12 Pa. Co. Ct. 122, it was held that the railroad had power to build a branch road extending a thousand feet along the bed of a navigable stream. But see Stevens v. Erie R. Co., 21 N. J. Eq. 259.

[57] Central Trust Co. v. Wabash &c. R. Co., 32 Fed. 566.

[58] State v. Montclair R. Co., 35 N. J. L. 328; Lewis v. Germantown R. Co., 16 Phila. (Pa.) 608; White River Turnp. Co. v. Vermont Cent. R. Co., 21 Vt. 590.

[59] St. Louis &c. R. Co. v. Springfield &c. R. Co., 96 Ill. 274; Ft. Wayne v. Lake Shore &c. R. Co., 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367n, 32 Am. St. 277; Baltimore &c. R. Co. v. Union R. Co., 35 Md. 225.

[60] St. Louis &c. R. Co. v. Haller, 82 Ill. 208; Kenton County Court v. Bank Lick Turnp. Co., 10 Bush (Ky.) 529; Springfield v. Connecticut River R. Co., 4 Cush. (Mass.) 63.

[61] Housatonic &c. R. Co. v. Lee &c. R. Co., 118 Mass. 391. Contra Costa &c. R. Co. v. Moss, 23 Cal.

rial for use in construction of the roadbed, and water for the use of the engines;[62] to run trains of cars over the road by the use of steam as a motive power, even though it be so near to a public highway as to frighten horses driven thereon;[63] and to take tolls for the carriage of goods and passengers.[64] The grant of a right to construct a railroad between two towns has been held

323; Seymour v. Jeffersonville &c. R. Co., 126 Ind. 466, 26 N. E. 188; Alexandria &c. R. Co. v. Alexandria &c. Co., 75 Va. 780; 40 Am. Rep. 143 n; 1 Thomp. Corp. (2d. ed.), § 363. Express, or at least clearly implied, authority is generally necessary in such cases. Central City &c. R. Co. v. Fort Clark &c. R. Co., 81 Ill. 523; Baltimore &c. R. Co. v. North, 103 Ind. 486, 3 N. E. 144; Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Elliott Roads and Streets, §§ 185, 186. See also Denver &c. R. Co. v. Denver &c. Co., 5 McCrary (U. S). 443, 17 Fed. 867; Railway Co. v. Alling, 99 U. S. 463, 25 L. ed. 438, as to respective rights of two railroad companies in a narrow canon or defile. Other authorities, and a full treatment of this subject will be found in the chapter on Eminent Domain.

[62] See Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; also Strohecker v. Alabama &c. R. Co., 42 Ga. 509; Henry v. Dubuque &c. R. Co., 2 Iowa 288; Earlywine v. Topeka &c. R. Co., 43 Kans. 746, 23 Pac. 940; Taylor v. New York &c. R. Co., 38 N. J. L. 28; Pennsylvania R. Co. v. Miller, 112 Pa. St. 34, 3 Atl. 780; Aldrich v. Drury, 8 R. I. 554. But see Preston v. Dubuque &c. R. Co., 11 Iowa 15.

[63] Bordentown &c. T. Co. v. Camden &c. R. Co., 17 N. J. L. 314, 319.

[64] See Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860. Courts have construed the charter of a canal or railroad company, in relation to the right to take freight or toll, in favor of the public and against the company. 1 Thomp. Corp. (2d. ed.), § 303. Stourbridge Canal Co. v. Wheeley, 2 B. & Ad. 793; Barrett v. Stockton &c. R. Co., 2 Man. & Gr. 134, 7 Man. & Gr. 870; Gildart v. Gladstone, 11 East 675; Leeds &c. Canal v. Hustler, 1 B. & C. 424; Camden &c. R. Co. v. Briggs, 22 N. J. L. 623. Where the charter of a canal imposed a toll on goods carried on vessels passing through the canal, and on such vessels as had not sufficient goods aboard to yield a toll of four dollars, it was held that the company had no right to charge toll for passengers, and a vessel laden exclusively with passengers was entitled to navigate the canal upon payment of the toll imposed upon an empty vessel. Perrine v. Chesapeake &c. Canal Co., 9 How. (U. S.) 172, 13 L. ed. 92.

to carry implied authority to run a branch line along a street of one of the towns to reach a depot and turn-table which lay off from the direct line.[65] Power to build a road "to" or "from" a certain town, or to construct works "at" such a town, includes power to build to such point within the corporate limits suitable for the transaction of its business and the accommodation of the public as may be fixed upon by the company and the municipal authorities.[66] "A railroad company whose charter gives it the right to build its road from a certain city is not barred from making the union depot in such city its terminus by the fact that it began to construct its road from a point in the outskirts of the city, and for some time ran trains from such point, when it appears the company never made any permanent improvements at such point, and that from the first it made efforts to extend its line to the union depot."[67] But no authority is given to build the road into such a town in a direction different from that of the general direction of the road.[68] A company chartered to build a railroad for the purpose of transporting lumber for shipment by water, with authority to construct the road "to the place of ship-

[65] Flanagan v. Great Western R. Co., L. R. 7, Eq. Cas. 116. See also Clarke v. Cuckfield Union, 21 L. J. Q. B. 349; New Orleans &c. R. Co. v. Second Municipality &c., 1 La. Ann. 128; Knight v. Carrollton R. Co., 9 La. Ann. 284. But see Northeastern R. Co. v. Payne, 8 Rich. L. (S. Car.) 177, to the effect that authority to build "from" a city does not give a right to build within the city limits.

[66] Moses v. Pittsburgh &c. R. Co., 21 Ill. 515, 522; Mohawk Bridge Co. v. Utica &c. R. Co., 6 Paige Ch. (N. Y.) 554; Commonwealth v. Erie &c. R. Co., 27 Pa. St. 339, 344, 67 Am. Dec. 471 n. These terms are generally regarded as inclusive and authorize a location within the city or place named. Chicago &c. R. Co. v. Chicago &c. R. Co., 112 Ill. 589, 25 Am. & Eng. R. Cas. 158; Mason v. Brooklyn &c. R. Co., 35 Barb. (N. Y.) 373; Rio Grande &c. R. Co. v. Brownsville, 45 Tex. 88. See also Waycross &c. R. Co. v. Offerman &c. R. Co., 109 Ga. 827, 35 S. E. 275; Colorado &c. R. Co. v. Union Pac. R. Co., 41 Fed. 293. Contra, Northeastern R. Co. v. Payne, 8 Rich. L. (S. Car.) 177. The term "between" has also been construed as inclusive. Morris &c. R. Co. v. Central &c. R. Co., 31 N. J. L. 205.

[67] Colorado E. R. Co. v. Union Pac. R. Co., 41 Fed. 293. See also Collier v. Union R. Co., 113 Tenn. 96, 83 S. W. 155.

[68] Savannah &c. R. Co. v. Shiels, 33 Ga. 601.

ping lumber" on a river, may lawfully appropriate lands for a right of way across the flats or overflowed lands within the ordinary banks of the river and extend its tracks across such lands to a convenient navigable part of the river from which lumber may be shipped.[69] A railroad corporation has implied authority to build and maintain restaurants for its passengers[70] or employes;[71] to erect or secure the erection of a telegraph line along its route;[72] and to erect and maintain depots, car houses, water tanks, repair shops, and the like.[73] It also has power to make reasonable rules and regulations for the safety and convenience of its passengers[74] and the management of its road and

[69] Peavey v. Calais R. Co., 30 Maine 498, 1 Am. R. Cas. 147.

[70] Jacksonville &c. R. &c. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814; Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412, 38 L. R. A. (N. S.) 830 n; Flanagan v. Great Western R. Co., L. R. 7 Eq. Cas. 116. But compare Western Md. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887n, 111 Am. St. 362.

[71] Jacksonville &c. R. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; Abraham v. Oregon &c. R. Co., 37 Ore. 495, 60 Pac. 899, 64 L. R. A. 391, 82 Am. St. 779. So, in some instances, it may buy or hire steamboats or run stages in connection with its line. Green Bay &c. R. Co. v. Union Steamboat Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; Buffett v. Troy &c. R. Co., 40 N. Y. 168, 172; Shawmut Bank v. Plattsburg &c. R. Co., 31 Vt. 491. See also Norfolk &c. R. Co. v. Shippers' Compress Co., 83 Va. 272, 2 S. E. 139.

[72] Prather v. Western U. Tel. Co., 89 Ind. 501; Marietta &c. R. Co. v. Western U. Tel. Co., 38 Ohio St. 24, 10 Am. & Eng. R. Cas. 387; Pittsburg &c. R. Co. v. Shaw (Pa.), 36 Am. & Eng. R. Cas. 453. Or scales at its stations for weighing freight. London &c. R. Co. v. Price, L. R. 11 Q. B. Div. 485, 13 Am. & Eng. R. Cas. 128; Western U. Tel. Co. v. Rich, 19 Kans. 517, 27 Am. Rep. 159.

[73] State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409n; Wright v. Carter 27 N. J. L. 76; State v. Newark, 1 Dutch. (N. J.) 315 But it has been held that a railroad has no implied power to erect houses for its employes nor to establish factories for making its own rails and rolling stock, nor to do any other acts not necessary to the successful operation of the road. State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409 n. See also 1 Thomp. Corp. (2d. ed.), § 309.

[74] Chicago &c. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641; Gray v. Cincinnati &c. R. Co., 11 Fed. 683, 6 Am. & Eng. R. Cas. 588. See also Martin v. Rhode

business.[75] It is not confined to making rules merely for the convenience of passengers.

§ 53 (42). Other powers of railroad companies—Implied powers included in certain grants.—A railroad company may offer a reward for the detection of persons obstructing its tracks.[76] Under an authority to erect a bridge, the corporation may condemn land for abutments[77] and may build necessary approaches.[78] So, under a general authority to condemn land for a right of way, a corporation may take land for depots, water-tanks, roundhouses, shops, and coal and wood yards, and such other works as are necessary to the operation of the road,[79] and it may build side tracks to the establishments of large shippers as a power incidental to its expressly granted powers,[80] and, under express power to build a branch road, it may buy one already built.[81] It is said

Island Co., 32 R. I. 162, 78 Atl. 548, 32 L. R. A. (N. S.) 695, Ann. Cas. 1912C, 1283n.

[75] Chicago &c. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Reagan v. St. Louis &c. R. Co., 93 Mo. 348, 6 S. W. 371, 3 Am. St. 542; Cleveland &c. R. Co. v. Bartram, 11 Ohio St. 457. See By-laws, Rules and Regulations, Chapter X, and see Martin v. Rhode Island Co., 32 R. I. 162, 78 Atl. 548, 32 L. R. A. (N. S.) 695, Ann. Cas. 1912C, 1283n, where many cases are cited and examples or illustrations are given of rules held valid though adopted for the protection of the company, and not for the convenience of passengers.

[76] Central R. &c. Co. v. Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. 48, 37 Am. & Eng. R. Cas. 282.

[77] Linton v. Sharpsburg &c. Co., 1 Grant's Cas. (Pa.) 414.

[78] Slatten v. Des Moines &c. R. Co., 29 Iowa 148, 4 Am. Rep. 205.

[79] State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409 n; Nashville &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Vermont Cent. R. Co. v. Burlington, 28 Vt. 193.

[80] Chicago &c. R. Co. v. Porter, 43 Minn. 527, 46 N. W. 75, 43 Am. & Eng. R. Cas. 170; Getz's Appeal, 65 Pa. St. 1, 3 Am. & Eng. R. Cas. 186; Wilson v. Furness R. Co., L. R. 9 Eq. Cas. 28. But see Pittsburg &c. R. Co. v. Benwood Iron Works, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680 n, 36 Am. & Eng. R. Cas. 531, where it is held that a railroad company cannot exercise the power of eminent domain to secure a right of way for a side track to a steel mill, even where there is evidence that all who wish to avail themselves of the proposed switch for shipping purposes may do so.

[81] Branch v. Jessup, 106 U. S. 468, 484, 1 Sup. Ct. 175, 27 L. ed. 279; Central Trust Co. v. Washington County R. Co., 124 Fed. 813.

that the burden is upon those asserting the fact to show that the charter of a corporation authorizes it to take or convey lands,[82] and those claiming such authority by implication must show that it is necessary to the enjoyment of the franchises expressly granted.[83] The power to make contracts includes power to dispose of securities received in the prosecution of the objects for which the company is chartered.[84] A railroad corporation has implied authority to contract generally in the course of its legitimate business, where not prohibited or restricted by some express provision of law.[85] Thus, it may make proper traffic arrangements with other companies[86] and permit them to use its terminals.[87] It may borrow money, and give negotiable notes,[88] or issue or guarantee bonds, to carry into effect the object of the organization, but not, ordinarily, to aid independent enterprises.[89]

[82] Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

[83] Renesselaer &c. R. Co. v. Davis, 43 N. Y. 137; New York Cent. R. Co., In re, 66 N. Y. 407.

[84] Chicago &c. R. Co. v. Howard, 7 Wall. (U S) 392, 412.

[85] Chicago &c. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Mobile &c. R. Co. v. Talman & Ralston, 15 Ala. 472; Arrington v. Savannah &c. R. Co., 95 Ala. 434, 11 So. 7; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Chattanooga &c. R. Co. v. Davis, 89 Ga. 708, 15 S. E. 626; Racine &c. R. Co. v. Farmers' &c. R. Co., 49 Ill. 331, 95 Am. Dec. 595; Philadelphia &c. R. Co. v. Hickman, 28 Pa. St. 318.

[86] Sussex &c. R. Co. v. Morris &c. R. Co., 19 N. J. Eq. 13; Wheeler v. San Francisco &c. R. Co., 31 Cal. 46, 89 Am. Dec. 147; Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Manchester &c. R. Co. v. Concord &c. R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. 582; Stewart v. Erie &c. Co., 17 Mich. 372; Georgia &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 321, citing text.

[87] Miller v. Green Bay &c. R. Co., 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443. See also Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265, and Georgia &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 321, citing text.

[88] Chicago &c. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; White Water Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Branch v. Atlantic &c. R. Co., 3 Woods (U. S.) 481, Fed. Cas. No. 1807; Wood v. Whelen, 93 Ill. 153.

[89] Cases cited in last preceding note; also Vanderveer v. Asbury Park &c. R. Co., 82 Fed. 355. Contra, in England, Bateman v. Mid-Wales R. Co., L. R. 1 C. P. 499. It cannot, of course, guarantee bonds merely to help others or the like. Elevator Co. v. Memphis &c.

It has been held to have no implied authority to grant an exclusive right to use its cars for advertising purposes.[90] Authority to build a branch or lateral road implies power to condemn lands for a right of way for such road,[91] and to construct a branch line running in the same general direction as the main line, even though it be built to connect with the main line of another road,[92] and even, it has been held, to build a short elevated road

R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798; Northside R. Co. v. Worthington, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. 778. See also Western Md. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (U. S.) 887 n, 111 Am. St. 362; Smead v. Indianapolis &c. R. Co., 11 Ind. 104. But it can guarantee bonds which it lawfully owns in order to make them salable and enhance their value to it.

[90] National Car Advertising Co. v. Louisville &c. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010 n. But compare Burns v. St. Paul City R. Co., 101 Minn. 363, 112 N. W. 412, 12 L. R. A. (N. S.) 757n (not, however, deciding the exact question); New York v. Interborough Rapid Transit Co., 53 Misc. 126, 104 N. Y. S. 157 (right to have advertising signs and weighing machines in subway stations); Fifth Ave. Coach Co. v. New York, 58 Misc. 401, 111 N. Y. 759; Pittsburgh &c. Trac. Co. v. Scidell, 6 Pa. Dist. R. 414.

[91] Newhall v. Galena &c. R. Co., 14 Ill. 273. The right to "construct such branches as the directors may deem necessary," conferred upon a railroad corporation by its charter gives it a continuing power of branch building which is not taken away by a subsequent act requiring the company within a certain time to complete its road "with one or more tracks, sidings, depots and appurtenances." Pittsburg &c. R. Co. v. Pittsburg &c. R. Co., 159 Pa. St. 331, 28 Atl. 155.

[92] Blanton v. Richmond &c. R. Co., 86 Va. 618, 10 S. E. 925, 43 Am. & Eng. R. Cas. 617; Howard County v. Central Nat. Bank, 108 U. S. 314, 2 Sup. Ct. 689, 27 L. ed. 739. See also Baltimore &c. R. Co. v. Waters, 105 Md. 396, 66 Atl. 685, 12 L. R. A. (N. S.) 326 n; Wheeling Bridge &c. R. Co. v. Camden &c. Co., 35 W. Va. 205, 13 S. E. 369. Where the charter of a railroad corporation empowers it to build only one specified branch road, another road, incorporated under the laws of a different state, though constructed and operated by the first road, is not a "branch" of such road within the meaning of a deed reserving a right of way over such premises in favor of such road or any of its branches. Biles v. Tacoma &c. R. Co., 5 Wash. St. 509, 32 Pac. 211. Where a railroad company's charter expressly authorizes it to build branch roads, contracts entered into by it with a construction company for the construction of a projected branch

from the original terminus of its route along a public landing.[93] A limitation as to the time within which the "works hereby required" shall be finished, will usually be held to apply only to the building and equipping of the main line, and the building of lateral roads will be understood to be optional with the company.[94]

§ 54 (43). Amendment—Power must be reserved.—The charter of a corporation constitutes a contract between the corporation and the state, and is not subject to amendment or repeal,[95] unless the right to alter or revoke is reserved.[96] And it has been held

road are valid and may be enforced. Arrington v. Savannah &c. R. Co., 95 Ala. 434, 11 So. 7.

[93] McAboy's Appeal, 107 Pa. St. 548. And along and across streets. Pittsburgh v. Pennsylvania R. Co., 48 Pa St 355

[94] Blanton v. Richmond &c. R. Co., 86 Va. 618, 10 S. E. 925. But see Newhall v. Galena &c. R. Co., 14 Ill 273, where it is held that a limitation or extension of time in which to construct should, by intendment, be applied to the lateral or branch lines equally with the main line of the road. In Commonwealth v. New York &c. R. Co., 10 Pa. Co. Ct. 129, a railroad and mining company was authorized by its charter to build a railroad or railroads from any lands held by them to a certain railroad, or to connect any two or more railroads which might be constructed by them in either or both of two counties named. The court held that the building of one road did not exhaust the powers of the company, and that having built one railroad and finding it unprofitable, the building of another did not operate to forfeit the company's charter.

[95] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. ed. 629; Piqua Branch Bk. v. Knoop, 16 How. (U. S.) 369, 14 L. ed. 977; State v. Noyes, 47 Maine 189; Pennsylvania R. Co. v. Baltimore &c. R. Co., 60 Md. 263; Thornton v. Marginal Freight R. Co., 123 Mass. 32; Ashuelot R. Co. v. Elliott, 58 N. H. 451; Commonwealth v. Erie &c. Co., 107 Pa. St. 112; Houston &c. R. Co. v. Texas &c. R. Co., 70 Tex. 649. See also Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. ed. 267; Northern Pac. R. Co. v. Minnesota, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed 630; Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, Ann. Cas. 1914 C. 1282; 1 Thomp Corp (2d ed.) §§ 313, 314, 370; Laird v. Baltimore &c. R. Co., 121 Md. 179, 88 Atl. 348, 47 L. R. A. (N. S.) 1167 n.

[96] The several states now provide by general laws or by constitutional provisions that all charters

that an express reservation by the legislature of power to repeal a charter can give no authority to take away or destroy property

granted shall be subject to alteration, amendment and repeal, at the discretion of the legislature. 1 Thomp. Corp. (2d ed.) § 402; Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Mowrey v. Indianapolis &c. R. Co., 4 Biss. (U. S.) 78, Fed. Cas. No. 9891. See St. Louis &c. R. Co. v. Ryan, 56 Ark. 245, 19 S. W. 839; Delaware R. Co. v. Tharp, 5 Harr. (Del.) 454; New Orleans &c. Co. v. Harris, 27 Miss. 517; New York El. R. Co. In re, 70 N. Y. 327; Commonwealth v. Fayette &c. R. Co., 55 Pa. St. 452; New Jersey v. Lard, 95 U. S. 104; 8 Thomp. Corp., § 401, et seq. Exemption from legislative interference, given by charter, "must appear by such clear and unmistakable language that it can not be reasonably construed consistently with the reservation of the power by the state." Georgia R. &c. Co. v. Smith, 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377, 16 Wash. L. 749. "The condition is implied in every grant of corporate existence, that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created." Hill v. Merchants' Mut. Ins. Co., 134 U. S. 515, 10 Sup. Ct. 589, 33 L. ed. 994, 7 Rail. & Corp. L. J. 442; Montclair Tp. v. New York &c. R. Co., 45 N. J. Eq. 436, 18 Atl. 242, 40 Am. & Eng. R. Cas. 342, 6 R. & Corp. L. J. 385; Reed v. Gettysburg &c. Assn., 129 Pa. St. 329, 18 Atl. 130, 24 W. N. C. 292. Exemption from future general legislation, either by a constitutional provision or by an act of the legislature, does not exist unless it is given expressly, or unless it follows by an implication equally clear with express words. In the absence of any prior contract exempting it from liability to future general legislation, a railroad corporation takes its charter subject to the general law of the state and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation. Chicago &c. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970, 41 Alb. L. J. 325, 2 Advo. 182, 42 Am. & Eng. R. Cas. 285. See also Citizens' St. R. Co. v. Memphis, 53 Fed. 715; Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup Ct. 705, 40 L. ed. 838. This rule applies to future general legislation as to compensation for property taken in the exercise of eminent domain. Pennsylvania R. Co. v. Miller, 132 U. S. 75, 10 Sup. Ct. 34, 33 L. ed. 267; Pennsylvania &c. R. Co. v. Duncan, 111 Pa. St. 353, 5 Atl. 742, 25 W. N. C. 1, 46 Phila. Leg. Int. 487.

lawfully acquired or created under authority conferred by the charter;[97] nor to disturb, affect or impair vested rights either of the corporation or of its shareholders.[98] It has no power to make any material or essential alteration in the contract between the members themselves and the corporation; and therefore a new charter obtained by the directors of a railroad company, without the consent of the stockholders, changing the capital stock and route, is not binding upon the stockholders.[99] But the right of

[97] People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 19 N. Y. St. 173, 2 L. R. A. 255, 7 Am. St. 684. See also 1 Thomp. Corp. (2d ed.) § 341. But see Greenwood v. Union Freight R. Co., 105 U. S. 13, 26 L. ed. 961; Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. ed. 408. And compare Orr v. Bracken County, 81 Ky. 593; San Mateo v. Southern &c. R. Co., 8 Sawy. (U. S.) 238, 279; New Orleans &c. Co. v. Harris, 27 Miss. 517; Black v. Delaware &c. Co., 24 N. J. Eq. 456.

[98] Hill v. Glasgow R. Co., 41 Fed. 610; Knoxville v. Knoxville &c. R. Co., 22 Fed. 758; Bryan v. Board, 90 Ky. 322, 13 S. W. 276, 7 R. & Corp. L. J. 389; Detroit v. Detroit &c. Co., 43 Mich. 140, 5 N. W. 275; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Kenosha &c. R. Co. v. Marsh, 17 Wis. 13. See generally Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; Union Pac. R. Co. v. United States, 99 U. S. 700, 25 L. ed. 496; Lewis v. Northern Pac. R. Co, 36 Mont. 207, 92 Pac. 469; Lawrence v. Rutland R. Co., 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350 n, 13 Ann. Cas. 475. "After vested rights have been acquired, the charter of a corporation can not be so amended as to impair them, unless the power to amend or repeal is expressly reserved; but where the original and amendatory acts are passed at the same session of the legislature, with only a brief interval between, during which there is no acceptance of the provisions of the original act and no rights are acquired thereunder, the amendatory act is valid." Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; Nashville Co. v. State, 96 Tenn. 249, 34 S. W. 4.

[99] Snook v. Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104, 38 Am. & Eng. R. Cas. 492. See also Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. ed. 79; Laird v. Baltimore &c. R. Co., 121 Md. 179, 88 Atl. 348, 47 L. R. A. (N. S.) 1167 n, Ann. Cas. 1915 B, 728 n; New Orleans &c. R. Co. v. Harris, 27 Miss. 517; Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; State v. Northern Pac. R. Co., 157 Wis. 73, 147 N. W. 219.

the state to amend the charter of a railroad company is not abridged or affected by executory contracts between the company and a construction company, and between the latter and subcontractors, touching the construction and equipment of the road; for all parties contracting with a corporation must take notice of the conditions on which it holds its franchises, and of its subjection to the legislative will.[1] Where a special charter containing no provision for its amendment is granted to a railroad company while an act is in force declaring that the charter of every corporation created under a general law, and every charter granted by act of the general assembly, unless such act declares the contrary, is subject to amendment, it has been held that the general assembly may impose upon such railroad, in common with others, the burden of paying the salary and expenses of a state officer to whom is given the supervision of the railroads of the state.[2] It may also impose upon the railway company the duty of constructing and maintaining bridges on the line of highways across rights of way which it has merely graded without laying the rails.[3] Such amendments may be made by the enactment of a general railroad act which applies to the specially chartered corporation.[4] A charter granting to a railway company the privilege of choosing its own route between two places may be amended by requiring it to pass through an intermediate point, even after its route has been located and contracts have been let for its construction.[5] And it is held that a change of a charter within a month after it was granted, so as to make the corporation liable to pay a certain percentage of its gross receipts from the operation of a street railroad, instead of fifty dollars per car,

[1] Macon &c. R. Co. v. Gibson, 85 Ga. 1, 11 S. E. 442, 21 Am. St. 135, 43 Am. & Eng. R. Cas. 318.

[2] Charlotte &c. R. Co. v. Gibbes 27 S. Car. 385, 4 S. E. 49, 31 Am. & Eng. R. Cas. 464.

[3] Montclair v. New York &c. R. Co., 45 N. J. Eq. 436, 18 Atl. 242, 40 Am. & Eng. R. Cas. 342.

[4] Montclair v. New York &c. R. Co., 45 N. J. Eq. 436, 18 Atl. 242, 6 R. & Corp. L. J. 385, 40 Am. & Eng. R. Cas. 342; Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838.

[5] See Macon &c. R. Co. v. Gibson (Stamps), 85 Ga. 1, 11 S. E. 442, 43 Am. & Eng. R. Cas. 318.

is within the general authority to alter a charter, under the New York statute.[6]

§ 55 (44). **Police regulations.**—Even where no power to amend the charter is reserved, the railroad company is still governed by the principle that every owner of property, however absolute and unqualified his title, holds it subject to the implied condition that the use shall not be injurious to the public, and is amenable to regulations prescribed under the police power of the state.[7] Thus, it has been held that railroad companies may be compelled by statutes passed after their incorporation to fence their tracks,[8] to provide accommodations for their passengers, and the like.[9] So, they may have imposed upon them a liability for setting fire

[6] New York v. Twenty-third Street R. Co., 113 N. Y. 311, 21 N. E. 60, 22 N. Y. St. 958, 5 R. & Corp. L. J. 583. See also Chicago &c. R. Co. v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 972, and see and compare generally. Note in L. R. A. 1915c, 277. Also 8 Thomp. Corp. §§ 401, 412.

[7] Power of state over railroads as restricted by legislative charters, 32 Cent. L. J. 181. See also Franbarger v. Chicago &c. R. Co., 250 Mo. 46, 156 S. W. 694; People v. Boston &c. R. Co., 70 N. Y. 569; Nelson v. Vermont &c. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Bacon v. Boston &c. R. Co., 83 Vt. 421, 76 Atl. 128; Fair Haven &c. R. Co. v. New Haven, 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237, and cases cited in following notes.

[8] Wilder v. Maine Central R. Co., 65 Maine 332, 20 Am. Rep. 698; Illinois Cent. R. Co. v. Willenborg, 117 Ill. 203, 7 N. E. 698, 57 Am. Rep. 862; New Albany &c. R. Co. v. Tilton, 12 Ind. 3, 74 Am. Dec. 195; Thorpe v. Rutland &c. R. Co., 27 Vt. 140, 148, 62 Am. Dec. 625.

[9] State v. New Haven &c. R. Co., 43 Conn. 351; State v. Indiana &c. R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502. To provide for safety of employes. State v. Nelson, 52 Ohio St. 88, 39 N. E. 22, 26 L. R. A. 317; State v. Hoskins, 58 Minn. 35, 59 N. W. 545, 25 L. R. A. 759, and note. To fence tracks, stop trains at crossings, slacken speed, post tariffs, charge no more than a certain fixed rate, etc., Stone v. Farmers' &c. Co., 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 636; Smith v Alabama, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. ed. 508. For other illustrations of the right to exercise the police power see New York &c. R. Co. v. Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. ed. 269; Wabash R. Co. v. Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. ed. 87; New York &c. R. Co. v. Bridgeport Traction Co., 65 Conn. 410, 32 Atl. 953, 29 L. R. A. 367.

to property along their right of way.[10] Other illustrations and a fuller treatment of this subject will be found elsewhere.[11]

§ 56 (45). **Material amendments require unanimous consent of stockholders—What are material.**—It is a general rule that fundamental and material amendments cannot be made by the directors or majority stockholders so as to bind the minority stockholders without their consent. Such amendments require the unanimous consent of the stockholders, and cannot be made by the majority stockholders under general laws authorizing the filing of amended articles of association unless the minority stockholders consent.[12] But immaterial amendments, or those for the benefit of the corporation and in furtherance of its original purposes, may usually be made or accepted by a majority of the stockholders.[13] It is difficult to formulate any general rule

10 Rodemacker v. Milwaukee &c. R. Co., 41 Iowa 297, 20 Am. Rep. 592; Grissell v. Housatonic &c. R. Co., 54 Conn. 447, 9 Atl. 137, 1 Am. St. 138, 32 Am. & Eng. R. Cas. 349; Lyman v. Boston &c. R. Co., 4 Cush. (Mass.) 288.

11 See chapter on State Control.

12 Printing House v. Trustees, 104 U. S. 711, 26 L. ed. 902; Mowrey v. Indianapolis &c. R. Co., 4 Biss. (U. S.) 78, Fed. Cas. No. 9891, Sparrow v. Evansville &c. R. Co., 7 Ind. 369; New Orleans &c. R. Co. v. Harris, 27 Miss. 517; Union Locks &c. Canals v. Towne, 1 N. H. 44, 8 Am. Dec. 32; Hartford &c. R. Co. v. Croswell, 5 Hill (N. Y.) 383; Marietta &c. R. Co. v. Elliott, 10 Ohio St. 57. The authorities are collected in the elaborate note to Commonwealth v. Cullen, 13 Pa. 133, 53 Am. Dec. 450, 462, and in Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912C, 1188 n. See also Sage v. Dillard, 15 B. Mon. (Ky). 340. 1 Thomp. Corp. (2d ed.) §§ 346, 378, 382 (where it is also shown that even the legislature can not force a material amendment upon the stockholders).

13 Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084; Winter v. Muscogee R., 11 Ga. 438; Board v. Mississippi &c. R. Co., 21 Ill. 338; Fry v. Lexington &c. R. Co., 2 Metc. (Ky.) 314, 322; Agricultural &c. R. Co. v. Winchester, 13 Allen (Mass.) 29; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; Poughkeepsie &c. Co. v. Griffin, 24 N. Y. 150; Cross v. Peach Bottom R. Co., 90 Pa. St. 392; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Stevens v. Rutland &c. R. Co., 29 Vt. 545; 1 Thomp. Corp. (2d. ed.), §§ 379, 384. Contra, Central R. Co. v. Collins, 40 Ga. 582,

for determining what are material amendments and what are immaterial. But it may be said, with a reasonable degree of accuracy, that an amendment that changes the rights of the stockholders inter se, alters the original object of the corporation, or adds to or restricts its franchises, rights and powers in such a manner as to increase the liabilities of the stockholders or deprive them of vested rights, is material and requires the consent of all the stockholders,[14] while an amendment which merely clothes the corporation with such additional immunities and privileges as are strictly in furtherance of the original design, without substantially adding to or restricting the same and without materially affecting the rights of the stockholders inter se, may be regarded as immaterial and accepted by a majority of the stockholders.[15] It is held in some cases that extensive changes may

617; Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. See also 8 Thomp. Corp. §§ 379, 386.

[14] Witter v. Mississippi &c. R. Co., 20 Ark. 463; Middlesex Turnp. Co. v. Locke, 8 Mass. 268; Hester v. Memphis &c. R. Co., 32 Miss. 378. Changing course and termini of railroad, Marietta &c. R. Co. v. Elliott, 10 Ohio St. 57; Manheim &c. Co. v. Arndt, 31 Pa. St. 317; Stevens v. Rutland &c. R. Co., 29 Vt. 545. Consolidation, Botts v. Simpsonville &c. Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184. Division into two corporations, Board v. Mississippi &c. R. Co., 21 Ill. 338; McCray v. Junction R. Co., 9 Ind. 358; Indiana &c. Turnp. Co. v. Phillips, 2 Pen. & W. (Pa.) 184. Changing purpose, Hartford &c. R. Co. v. Croswell, 5 Hill (N. Y.) 383; Ashton v. Burbank, 2 Dill. (U. S.) 435, Fed. Cas. No. 582. See also Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Mahan v. Wood, 44 Cal. 462; Oldtown &c. R. Co. v. Veazie, 39 Maine 571; Black v. Delaware &c. Co., 24 N. J. Eq. 455.

[15] Perkins v. Coffin, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912 C, 1188, and note. Extending time for completion of road, Agricultural Branch R. Co. v. Winchester, 13 Allen (Mass.) 29; Taggart v. Western R. Co. 24 Md. 563, 89 Am. Dec. 760 n; San Antonio v. Jones, 28 Tex. 19. Changing name of corporation, Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; Bucksport &c. R. Co. v. Buck, 68 Maine 81; Milwaukee &c. R. Co. v. Field, 12 Wis. 340. Slight changes in the route or branch in some direction where the general interests of the corporation and the rights of the stockholders are not affected thereby, Peoria &c. R. Co. v. Preston, 35 Iowa 115; Fry v. Lexington &c. R. Co., 2 Metc. (Ky.) 314, 323; Irwin v. Turnpike Co., 2 Pen. &

be made or accepted by the majority in the organization and objects of the corporation, provided they do not destroy its distinctive features or substitute an entirely different purpose;[16] but some of these cases, as is clearly demonstrated by Judge Thompson[17] and Mr. Morawetz,[18] are unsound in principle and contrary to the weight of authority. It is also said that the question of the materiality of an amendment must depend upon the peculiar facts and circumstances of the particular case;[19] but, while this is doubtless true to some extent, and in a limited

W. (Pa.) 466, 23 Am. Dec. 53. See also Willson v. Wills Valley R. Co., 33 Ga. 466; Hazelett v. Butler University, 84 Ind. 230; Midland &c. R. Co. v. Gordon, 16 Mees. & W. 804; leading article in 16 Am. Law Rev. 101, by W. H. Whitaker; and note in 53 Am. Dec. 465.

[16] Changes in the governing body and organization, Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec 450: Mower v. Staples, 32 Minn. 284, 20 N. W. 225. Changes in the purpose, and the like, Pacific R. Co. v. Hughes, 22 Mo. 291, 64 Am. Dec. 265 n; Delaware R. Co. v. Tharp, 1 Houst. (Del.) 149, 174; Martin v. Pensacola &c. R. Co., 8 Fla. 370, 73 Am. Dec. 713; Pacific R. Co. v. Renshaw, 18 Mo. 210. Changes in route and termini of railroad, Banet v. Alton &c. R. Co., 13 Ill. 504; Looker v. Maynard, 179 U. S. 46, 21 Sup Ct. 21, 45 L. ed. 79; Polk v. Mutual Reserve &c. Assn., 207 U. S. 310, 326, 28 Sup. Ct. 65, 52 L. ed. 229; Peoria &c. R. Co. v. Elting, 17 Ill. 429; Ross v. Chicago &c. R. Co., 77 Ill. 127. Consolidation, Sprague v. Illinois &c. R. Co., 19 Ill. 174. Purchase of other roads, Venner v. Atchison &c. R. Co., 28 Fed. 581. See also Willson v. Wills Valley R. Co., 33 Ga. 466; Rice v. Rock Island &c. R. Co., 21 Ill. 93; Hanna v. Cincinnati &c. R. Co., 20 Ind. 30; Worcester v. Norwich &c. R. Co., 109 Mass. 103; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Lord v. Equitable L. Assur. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420 n; Greenville &c. R. Co. v. Coleman, 5 Rich. L. (S. Car.) 118. Alterations or amendments which do not change the nature, purpose or character of the corporation or its enterprise, and do not impair the obligation of a contract, but which are designed to enable the corporation to conduct its authorized business with greater facility, more beneficially, or more wisely, are regarded as auxiliary to the original object. 1 Thomp. Corp. (2d. ed.). § 379.

[17] 1 Thomp. Corp. (1st ed.) §§ 72, 73.

[18] 1 Morawetz Priv. Corp. § 402.

[19] Whitter v. Mississippi &c. R. Co., 20 Ark. 463. See also Wright v. Minnesota &c. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. ed. 832.

[20] Memphis Branch R. Co. v. Sullivan, 57 Ga. 240; Witter v. Mis-

sense, there must be some general rule by which the courts shall be guided, for the question is one of law for the court to determine.[20]

§ 57 (46). **Statutory provisions authorizing amendments.**—Provision is made in the various states for the amendments of the charters granted under the various general railroad acts, by the voluntary act of the corporation, when it is desirable to increase the amount of its capital stock, or the number of its directors, or to change its route, or termini.[21] But not every change in the fundamental law of a corporation is an amendment. Where the alteration by the legislature is very material, the act may be construed as the grant of a new charter, if such an intention appears on the part of the legislature, and by accepting it the company will be held to have surrendered its rights and contracts under the original charter.[22] The legislature has, in every state, a cer-

sissippi &c. R. Co., 20 Ark. 463. But see Southern &c. Co. v. Stevens, 87 Pa. St. 190

[21] Where a charter is amended, under the Tennessee act, so ast to change the starting point of a railroad, the change will not be effected unless such amendment is registered where the charter was originally required to be registered. Anderson v. Middle &c. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149.

[22] Snook v. Improvement Co., 83 Ga. 61, 9 S. E. 1104, 38 Am. & Eng. R. Cas. 492. This was a case in which, after the incorporation of the A. & H. Co., under the general railroad law, the legislature passed an act entitled "An act to incorporate the A. & H. R. Co., to confer certain powers and privileges on said company, and for other purposes." The corporators named in the act were not altogether the same as those to whom the original charter was granted, and the act stated that "they are hereby created a body politic and corporate," and gave them all powers necessary to any railroad company. Afterwards an amendment to this act was passed, entitled "An act to amend the charter of the A. & H. R. Co., to change the name thereof, * * * to authorize the extension thereof, * * * and for other purposes." The last amendment gave the company a new name and, in the construction of the extension, all the powers granted by the act as first amended. The court held that these acts constituted a separate and distinct charter, creating a new corporation, and were not merely amendments to the original charter. Youngblood v. Improvement Co., 83 Ga. 797, 10 S. E. 124.

tain control over all corporations in the way of modifying the charters under which they operate, but where an attempted enlargement of corporate powers becomes indistinguishable from a granting of new substantive rights, a statute attempting to give such powers is within the purview of a constitutional amendment, prohibiting any private or local statute granting any exclusive privileges or franchises to a corporation.[23]

§ 58 (47). **Forfeiture—Statutory provisions dispensing with judicial determination.**—Provision is made in many charters for their forfeiture upon failure of the corporation to comply with certain conditions imposed, as that it shall begin the construction of its road within a certain time, and complete the road and put it in operation before the expiration of a time limit or the like.[24] Such provisions appear in all the general acts for the incorporation of railroads. Under some of the statutes the forfeiture will take effect upon failure to comply with the conditions imposed.[26]

[23] Astor v. New York Arcade R. Co., 113 N. Y. 93, 22 N. Y. St. 1, 20 N. E. 594, 2 L. R. A. 789 n; Braceville Coal Co. v. People, 147 Ill. 66, 35 N. E. 62, 22 L. R. A. 340, 37 Am. St. 206.

[24] People v. New York Central Underground R. Co., 137 N. Y. 606, 33 N. E. 744; Cluthe v. Evansville &c. R. Co., 176 Ind. 162, 95 N. E. 543, Ann. Cas. 1914 A, 935 n. But such a provision does not apply to every sidetrack and switch which the company may find necessary or convenient to construct after the road is put in operation. It is sufficient if the main line is constructed and the road put in operation within the time limited. Arcata v. Arcata &c. R. Co., 92 Cal. 639, 28 Pac. 676.

[26] See Brooklyn &c. R. Co., In re, 72 N. Y. 245, 55 How. Prac. 14; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524. But compare Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129, 13 N. E. 765; New York &c. Bridge Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088. A railroad company buying, at foreclosure sale, the franchise and property of another company whose road-bed is not completed, reorganizing under Laws N. Y., 1874, ch. 430, which provide that such reorganization shall become and be vested with all the rights, privileges and franchises belonging to the corporation owning the property so sold, "and shall be subject to all the provisions, duties and liabilities imposed by the general railroad act and its amendments, except so far as * * * inconsistent herewith, and with the last named rights, privileges and

without judicial determination,[27] and the franchises may be regranted by the legislature to another corporation.[28] But this, as we shall hereafter show, is not the general rule, in the absence of such a statute, for, unless otherwise provided, a mere cause of forfeiture is not ipso facto a forfeiture, but is simply ground for a judicial determination and declaration of forfeiture.[29] A

franchises;" but failing to complete the railroad within the time limited by the general railroad act and amendments under which the company owning the property received its charter, may lose its charter at suit of the attorney-general, under code Civil Proc. N. Y., § 1798 et seq. Attorney-General, In re, 50 Hun 511, 2 N. Y. S. 684.

[27] Oakland R. Co. v. Oakland &c. R Co 45 Cal. 365, 13 Am. Rep. 181; State v. St. Paul &c. R. Co., 35 Minn. 222, 224, 28 N. W. 245; Brooklyn Steam Tr. Co. v. Brooklyn, 78 N. Y. 524; Bywaters v. Paris &c. R. Co., 73 Tex. 624, 11 S. W. 856. And this is so, even though the construction of the projected road is actually begun within the time, by a lessee. Brooklyn &c. R. Co., In re, 72 N. Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Prac. 14; Sulphur Springs &c. R. Co. v. St. Louis &c. R. Co., 2 Tex. Civ. App. 650, 23 S. W. 1012. Contra Citizens' &c. R. Co. v. Belleville, 47 Ill. App. 388. See generally Atchison St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800, and note thereto.

[28] United States v. Grundy, 3 Cranch (U. S.) 337, 351, 2 L. ed. 459; Oakland R. Co. v. Oakland &c. R. Co., 45 Cal. 365, 13 Am. Rep. 181; State v. Clinton, &c. R. Co. 4 Rob. (La.) 445; Sturges v. Vanderbilt, 73 N. Y. 384; Brooklyn &c. Co. v. Brooklyn, 78 N. Y. 524; Brooklyn &c. R. Co., In re, 72 N. Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Prac. 14; Kennedy v. Strong, 14 Johns. (N. Y.) 128; La-Grange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420.

[29] Thus, in Brooklyn &c. Co. v. Brooklyn, 78 N. Y. 524, 529, it is said: "The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not ipso facto lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the people; but it can not be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter, or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used." Many authorities

condition to insure the speedy construction of the road is for the benefit of the public, and the general rule is that a forfeiture for non-compliance with such condition can be enforced only by the public authorities. A stockholder cannot take advantage of it,[30] nor can any advantage be taken of it in any collateral action.[31] Thus, it is held that such non-compliance cannot be made available to defeat condemnation proceedings instituted by the company,[32] nor can a landowner take advantage of it in support of a suit to eject the company from land over which the road has been built.[33]

§ 59 (48). **Implied condition that corporate franchise is subject to forfeiture—Judicial determination—Causes for forfeiture.**—Where no condition is expressed in the charter, there is, nevertheless, an implied condition annexed to every grant of corporate powers, that they shall be subject to forfeiture for willful misuser or non-user in regard to matters which go to the essence of the contract between the corporation and the state.[34] Such a for-

are collected, cited and reviewed in the note to State v. Atchison &c. R. Co. (24 Nebr. 143), 8 Am. St. 164, 193 et seq, and in Cluthe v. Evansville &c. R. Co., 176 Ind. 162, 95 N. E. 543, Ann. Cas. 1914 A, 935 n, and see post, §§ 59, 63.

[30] Antonio v. Jones, 28 Tex. 19. See also People v. Ulster &c. R. Co., 128 N. Y. 240, 28 N. E. 635, 60 Am. & Eng. R. Cas. 558, and note; People v. North River &c. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33 n, 18 Am. St. 843, 32 Am. & Eng. Corp. Cas. 149; Hinchman v. Philadelphia &c. Co., 160 Pa. St. 150, 28 Atl. 652.

[31] Hodges v. Baltimore &c. R. Co., 58 Md. 603; Brooklyn El. R. Co., In re, 125 N. Y. 434, 26 N. E. 479, 57 Hun 590, 11 N. Y. S. 161. See also Central &c. R. Co. v. People, 5 Colo. 39.

[32] Brooklyn El. R. Co., In re, 125 N. Y. 434, 24 N. E. 834, 57 Hun 590, 11 N. Y. S. 161. See also Dismal Swamp R. Co. v. John L. Rofer Lumber Co., 114 Va. 537, 77 S. E. 598, Ann. Cas. 1914 C, 641 n.

[33] Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; Bravard v. Cincinnati &c. R. Co., 115 Ind. 1, 17 N. E. 183.

[34] Edgar Collegiate Inst. v. Hardy, 142 Ill. 363, 32 N. E. 494; State v. Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816, 29 Am. & Eng. R. Cas. 440, and note; State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, and note on page 180; People v. Broadway R. Co., 126 N. Y. 29, 26 N. E. 961, 48 Am. & Eng. R. Cas. 692, and authorities there cited; People v. Milk Exchange, 133 N. Y. 565, 30 N. E. 850; New York

feiture can, ordinarily, be declared only by decree of some competent judicial tribunal in proceedings instituted by the sovereign or its representative for that purpose.[35] To cause a forfeiture under the implied condition that the franchise shall be used for the purposes for which it was granted, there must be either an assumption of privileges not conferred by the charter,[36] a willful abuse of corporate powers, or an improper neglect to perform duties imposed.[37] Each duty assigned by the act of incorporation has been held to be a condition annexed to the grant of the fran-

Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, Ann. Cas. 1915A, 906 n; 1 Thomp. Corp. (2d ed.) § 6528.

[35] Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084; State v. Mississippi &c. R. Co., 20 Ark. 495; Darnell v. State, 48 Ark. 321, 3 S. W. 365; Board &c. v. Hall, 70 Ind. 469, 472; Hasselman v. United States Mortgage Co., 97 Ind. 365, 368; Dyer v. Walker, 40 Pa. St. 157; Vermont &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1, 57; 1 Thomp. Corp. (2d ed.) § 6520. Neither a stockholder, a corporate creditor nor one having a private controversy with the company can institute the suit. North v. State, 107 Ind. 356, 8 N. E. 159; Gaylord v. Fort Wayne &c. R. Co., 6 Biss. (U. S.) 286, Fed. Cas. No. 5284; Folger v. Columbian &c. Ins. Co., 99 Mass. 267, 96 Am. Dec. 747 n; West Jersey &c. Co. v. Camden &c. R. Co., 52 N. J. Eq. 452, 29 Atl. 333; Moore v. Brooklyn &c. R. Co., 108 N. Y. 98, 15 N. E. 191; Pickett v. Abney, 84 Tex. 645, 19 S. W. 859. See also Commonwealth v. Germantown R. Co., 20 Pa. St. 518; Western Penna. R. Co.'s Appeal, 104 Pa. St. 399; note in 8 Am. St. 198, 199.

[36] People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

[37] People v. Kingston &c. R. Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; Central &c. R. Co. v. People, 5 Colo. 39, 46; Attorney-General v. Erie &c. R. Co., 55 Mich. 15, 22, 20 N. W. 696; 5 Thomp. Corp. (2d. ed.), § 6528; note to State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, 183. Under Rev. Stat. Ohio, § 6789, a suit to oust a corporation from its franchise for misuser must be brought within five years from the date of commission of the offense. State v. Pittsburgh &c. R. Co., 50 Ohio St. 239, 33 N. E. 1051. An allegation that the company intends at some time in the future to neglect the performance of its duties to the public, and does not in good faith intend to carry out the objects of the incorporation, is insufficient. State v. Martin, 51 Kans. 462, 33 Pac. 9, 60 Am. & Eng. R. Cas. 567; Commonwealth v. Pittsburgh &c. R. Co., 58 Pa. St. 26.

chise conferred.[38] One such act or neglect may be sufficient to justify a forfeiture if tending to mischievous consequences;[39] but the ordinary rule is that acts, to have that effect, must be willful and repeated.[40] Slight deviations from the provisions of a charter, especially when arising from accident or mistake,[41] or from the unauthorized acts of the company's servants,[42] will not necessarily cause a forfeiture, unless the franchises are made to depend upon a strict and literal performance,[43] for a substantial performance of conditions imposed is all that is ordinarily required.[44] An abuse of one department of a franchise may, however, cause a forfeiture of the entire franchise.[45]

§ 60 (49). Grounds of forfeiture—Illustrative cases.—Failure to run regular trains sufficient for the accommodation of the public,[46] even where the company possesses and continues to exercise

[38] People v. Kingston Turnpike R. Co., 23 Wend. (N. Y.) 193, 35 Am. St. 551.

[39] Attorney-General v. Petersburg R. Co., 6 Ired. (N. Car.) 456; People v. Bristol &c. Co., 23 Wend. (N. Y.) 222, 245; Commercial Bank of Nachez v. State, 6 S. & M. (Tenn.) 599, 623.

[40] Harris v. Mississippi Valley R. Co., 51 Miss. 602; State v. Pipher, 28 Kans. 127, 131; State v. Council Bluffs &c. Co., 11 Nebr. 354, 356, 9 N. W. 563; State v. Royalton &c. Co., 11 Vt. 431. The mere failure to run trains for five days, not shown to have been willful or negligent, has been held insufficient cause for declaring a forfeiture. People v. Atlantic &c. R. Co., 125 N. Y. 513, 26 N. E. 622, 48 Am. & Eng. R. Cas. 688; 1 Thomp. Corp. (2d ed.) §§ 6533, 6534.

[41] 5 Thomp. Corp. (2d. ed.), § 6534.

[42] State v. Commercial Bank, 14 Miss. 218, 237.

[43] Eastern Archipelago Co. v. Regina, 2 Ellis & B. 856, 22 Eng. L. & Eq. 338. See generally 5 Thomp. Corp. (2d. ed.), § 6523.

[44] Chicago City R. Co. v. People, 73 Ill 541; State v. Wood, 84 Mo. 378; People v. Thompson, 21 Wend. (N. Y.) 235; Thompson v. People, 23 Wend. (N. Y.) 537; Commonwealth v. Allegheny &c. Co., 20 Pa. St. 185; 1 Thomp. Corp. (2d ed.) § 6529. See also Harris v. Mississippi &c. R. Co., 51 Miss. 602.

[45] People v Kankakee &c. Co., 103 Ill. 491; People v. Bristol &c. T. Co., 23 Wend. (N. Y.) 222.

[46] State v. Minnesota Central R. Co., 36 Minn. 246, 30 N. W. 816, 29 Am. & Eng. R. Cas. 440; People v. Albany &c. R. Co., 24 N. Y. 261, 82 Am. Dec. 295; Silliman v. Fredericksburg &c. R. Co., 27 Grat. (Va.) 119. See State v. Railway Co., 40 Ohio St. 504.

other and secondary franchises,[47] refusal of a railroad company to run passenger cars where it was incorporated to run both freight and passenger cars,[48] and failure to keep its principal place of business within the state as required by statute,[49] have been held each to be a sufficient ground for enforcing a forfeiture. The state need only prove that the act complained of is such as in the nature of things is calculated to cause injury. No actual injury need be shown.[50] Where a railroad corporation became insolvent thirteen years before, surrendered its property, suspended business, and permitted another corporation to carry on the business for which it was organized, its charter was properly declared forfeited.[51] So, where a corporation permitted its road

[47] State v. Minnesota Central R. Co., 36 Minn. 246, 30 N. W. 816. But see Wadesboro &c. Co. v. Burns, 114 N. Car. 353, 19 S. E. 238.

[48] People v. Pittsburg R. Co., 53 Cal. 694.

[49] State v. Park &c. Co., 58 Minn. 330, 59 N. W. 1048, 49 Am. St. 516, 10 Lewis Am. R. & Corp. R. 585; Simmons v. Norfolk &c. Co., 113 N. Car. 147, 18 S. E. 117, 22 L. R. A. 677, 37 Am. St. 614; State v. Milwaukee &c. R. Co., 45 Wis. 579. And it is suggested that such failure is a breach of the duty of a corporation at common law, and would authorize a forfeiture in the absence of any statute on the subject. State v. Milwaukee &c. R. Co., supra; People v. Kingston &c. Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551. In this case it was shown that such action on the part of the corporation prevented the enforcement of an attachment against the shares of stockholders in an action brought in the courts of Wisconsin as provided by state laws. But it is held that a failure on the part of the principal officers to reside in the state and to keep the principal offices therein is not per se a forfeiture, and the franchises will only be forfeited for this cause upon quo warranto where it is shown that such action works an injury to the legal rights of the public or of individuals. See State v. Southern Pacific R. Co., 24 Tex. 80; North and South &c. Co. v. People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462 n, 9 Lewis Am. R. & Corp. 1.

[50] Commercial Bank v. State, 6 S. & M. (Miss.) 599.

[51] People v. Northern R. Co., 53 Barb. (N. Y.) 98. See also Hart v. Boston &c. R. Co., 40 Conn. 524, where it is held that the fact that it is an enforced suspension brought on by legal proceedings is no defense. But insolvency does not ipso facto work a forfeiture. Moran v. Lydecker, 27 Hun (N. Y.) 582; State v. Bailey, 16 Ind.

to be sold on execution and broken up into two or more parts.[52] A mere colorable exercise of the corporate powers, as by the election of directors and the holding of occasional meetings, where the ordinary business of the corporation is relinquished, will bring the case within the meaning of a statute imposing a forfeiture for suspension of business.[53] So, where a railroad company takes up part of its track[54] or abandons and ceases to operate a part of its road,[55] or neglects to keep its road in such repair that it can be used,[56] or neglects to build part of its road and uses the rest only in getting out coal from mines owned by those who control it,[57] or leases its road to another corporation for a long period without statutory authority,[58] or builds a line with other termini than those named in its charter and connects with a foreign railroad without authority of law,[59] it has been held that the state may enforce a forfeiture of the charter. And the sale of part of its road by a turnpike company to avoid the

46, 79 Am. Dec. 405; Bradt v. Benedict, 17 N. Y. 93. See also 1 Thomp. Corp. (2d ed.) § 6539.

[52] State v. Rives, 5 Ired. (N. Car.) 297, 309.

[53] Jackson &c. Ins. Co., In re, 4 Sanf. Ch. (N. Y.) 559.

[54] State v. West &c. R. Co., 34 Wis. 197.

[55] People v. Albany &c. R. Co., 24 N. Y. 261, 82 Am. Dec. 295. But see post, § 62. As to what is sufficient evidence of abandonment see 3 Elliott Ev. §§ 1577, 1578, 1579.

[56] State v. Madison &c. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771, 36 Am. & Eng. R. Cas. 135; People v. Plymouth &c. Co., 32 Mich. 248; People v. Hillsdale &c. Co., 23 Wend. (N. Y.) 254. See also Davis v. Vernon Shell Road Co., 103 Ga. 491, 29 S. E. 475; People v. Plainfield Ave. G. R. Co., 105 Mich. 9, 62 N. W. 998.

[57] State v. Hazelton &c. R. Co., 40 Ohio St. 504. See also State v. Pasumpsic Tp. Co., 3 Vt. 178. Where the charter does not limit the time within which the road is to be constructed, a railroad may build its line long after the date of its charter, no forfeiture having been enforced against it. Western &c. R. Co.'s Appeal, 104 Pa. St. 399.

[58] State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164. In Louisiana &c. R. Co. v. State, 75 Ark. 435, 88 S. W. 559, it is held that the statute providing for a forfeiture of all charter rights of any railroad company acquired by lease not made in conformity with the statute is applicable to a foreign railroad company operating in the state under such a lease, and quo warranto may be maintained against it. See also State v. Seneca Co. Bank, 5 Ohio St. 171; State v. Pawtuxet Tp. Co., 8 R. I. 182, 521, 94 Am. Dec. 123.

[59] Commonwealth v. Franklin Canal Co., 21 Pa. St. 117.

obligation to repair, has been held to be evidence of such willful non-user as authorized a decree of forfeiture.[60] Entering into an agreement with other corporations to destroy competition has been held a cause of forfeiture;[61] and such agreements on the part of competing lines of railroad are expressly forbidden in many of the states. Where the statute requires a certain amount of capital stock to be subscribed before the organization of a railroad corporation, this must be done, and it is held that the subscription must be made in good faith by those having a reasonable expectation of being able to pay for the stock subscribed, or the state may enforce a forfeiture.[62] And generally a failure to proceed in good faith to carry out the purposes of the organization, and complete the enterprise, will authorize a suit by the state for this purpose.[63] In Louisiana the issue of fictitious or "watered" stock is, by statute, made a cause for the forfeiture of the charter of a corporation; and in Nebraska, where such issues are prohibited by the constitution,[65] a railroad corporation may be

[60] State v. Pawtuxet Tp. Co., 8 R. I. 182, 94 Am. Dec. 125.

[61] People v. North River Sugar Ref., 19 N. Y. St. 853, 3 N. Y. S. 401; People v. Milk Exchange, 133 N. Y. 565, 30 N. E. 850. See also Chicago &c. R. Co. v. Wabash &c. R. Co., 61 Fed. 993, 10 Lewis' Am. R. & Corp. 173, and note; Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754 n, 22 Am. St. 593, 3 Lewis' Am. R. & Corp. 686. But see United States v. Knight & Co., 156 U. S. 1, 15 Sup. Ct. 249, 39 L. ed. 325, 10 Lewis' Am. R. & Corp. 737; Oakdale &c. Co. v. Garst, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. 784, 10 Lewis' Am. R. & Corp. 184.

[62] The state is not concluded by the fact that the articles of association were filed after the requisite subscription was made, if it be shown that the subscribers were insolvent. Holman v. State, 105 Ind. 569, 5 N. E. 702. See also State v. Debenture &c. Co., 51 La. Ann. 1874, 26 So. 600.

[63] Cook Corporations (7th. ed.), § 638; People v. Ulster &c. R. Co., 128 N. Y. 240, 28 N. E. 635; People v. New York &c. R. Co., 137 N. Y. 606, 33 N. E. 744; State v. Nonconnah &c. Co. (Tenn.), 17 S. W. 128. But it has been held that a failure to organize within the time limited will not prevent a valid organization thereafter if no forfeiture has been adjudged at the suit of the state. Seaboard &c. R. Co. v. Olive, 142 N. Car. 257, 55 S. E. 263. See also Holman v. State, 105 Ind. 569, 5 N. E. 702.

[65] Const. Nebr., art. 11, § 5.

held to have forfeited its charter for this cause;[66] but this is not, ordinarily, a cause of forfeiture.[67]

§ 61 (50). When duty to declare forfeiture is mandatory and when discretionary.—Where, in a proceeding by quo warranto on behalf of the state, a cause of forfeiture prescribed by statute is clearly shown to exist, it is mandatory upon the court to declare the forfeiture,[68] and it has no discretion to refuse judgment upon the ground that it would be against public interest.[69] But in all cases where the information is based only upon the implied condition that the corporation shall serve the purposes of its creation it is within the sound discretion of the court whether or not it will pronounce judgment of ouster against a corporation which has misused or abused its franchises, and it will generally refuse to do so if, in its judgment, the interests of the public do not require a forfeiture.[70]

§ 62 (51). What is not cause for forfeiture.—A mere intention to violate its duty,[71] or to fail to build its road[72] will not author-

[66] State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. E. 43, 8 Am. St. 164.

[67] State v. Minnesota &c. R. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506. Post. § 62.

[68] State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; State v. Minnesota Cent. R. Co., 36 Minn. 246, 30 N. W. 816, 29 Am. & Eng. R. Cas. 440; People v. Fishkill, &c. Co., 27 Barb. (N. Y.) 445; People v. Northern R. Co., 53 Barb. (N. Y.) 98; People v. Ulster &c. R. Co., 128 N. Y. 240, 28 N. E. 635; State v. Oberlin, &c. Assn., 35 Ohio St. 258; 1 Thomp. Corp. (2nd ed.) § 6524.

[69] State v. Pennsylvania, &c. Co., 23 Ohio St. 121. See also State v. Cumberland Tel., &c. Co., 114 Tenn. 194, 86 S. W. 390; State v. Southern Pac. R. Co., 24 Tex. 80; 1 Thomp. Corp. (2nd ed.) § 6254.

[70] State v. People's Mut. Benefit Assn., 42 Ohio St. 579; State v. Crawfordsville, &c. Co., 102 Ind. 283, 289, 1 N. E. 395. See also State v. United States, &c. Co., 140 Ala. 610, 37 So. 442, 103 Am. St. 60; People v. North Chicago R. Co. 88 Ill. 537; State v. Portland Nat. Gas Co., 153 Ind. 483, 53 N. E. 1089, 74 Am. St. 314, 53 L. R. A. 413; State v. Omaha, &c. R. &c. Co., 91 Iowa 517, 60 N. W. 121.

[71] Commonwealth v. Pittsburgh, &c. R. Co., 58 Pa. St. 26, 45; State v. Martin, 51 Kans. 462, 33 Pac. 9, 60 Am. & Eng. R. Cas. 567; Attorney General v. Superior, &c. Co., 93 Wis. 604, 67 N. W. 1138, 44 L. R. A. 565 n.

[72] State v. Kingan, 51 Ind. 142; State v. Beck, 81 Ind. 500.

ize a forfeiture, even though it might authorize an injunction.[73] And it is said that there must be a violation of the spirit as well as the letter of the law before such a decree is justifiable.[74] The intent is sometimes considered in deciding whether the charter has been violated. Where the charter was made liable to forfeiture for non-user for two years, the court decided that a forfeiture was not incurred by the failure of a railroad corporation to begin building its line until three years from the date of its charter, where that time had been devoted to efforts to raise the necessary funds.[75] And the holding of a meeting of the corporators of a company to which all the stock had been subscribed, at which the charter was accepted, officers elected, and contracts for building the road were authorized, was held to put the charter in operation within the meaning of the provision of the Illinois constitution[76] abrogating all charters not in operation.[77] Acceptance of a charter, paying an enrollment tax and bonus to the state, the election of officers, appointment of committees, and the expenditure of large sums of money in the purchase of mineral rights, and in surveying, grading, and constructing a railroad, were held sufficient in a recent case to exempt a railroad and mining company from the operation of the section of the Pennsylvania constitution,[78] which provides that the charters of all such corporations as have not commenced business in good faith, prior to a certain date, shall be forfeited,[79] and the court also said that: "A mere temporary suspension of the business

[73] See note to Ottaquechee Woolen Co. v. Newton, 57 Vt. 451, by H. C. Black, 21 Cent. L. J. 432, 435.

[74] Thompson v. People, 23 Wend. (N. Y.) 537, 585.

[75] Young v. Webster City, &c. R. Co., 75 Iowa 140, 39 N. W. 234. Under the New York code, which allows an action in equity for the forfeiture of the charter of a corporation, "where it has suspended its ordinary and lawful business for at least one year," it is no ground for maintaining such action that a railroad company has omitted for five days to run its trains. People v. Atlantic Ave. R. Co., 125 N. Y. 513, 26 N. E. 622, affirming 57 Hun 378, 10 N. Y. S. 907. See also State v. Consolidation Coal Co., 46 Md. 1, 14.

[76] Illinois Const. 1870, Art. XI.

[77] McCartney v. Chicago, &c. R. Co., 112 Ill. 611.

[78] Const. Pa. Art. XVI, § 1.

[79] Commonwealth v. New York, &c. R. Co., 10 Pa. Co. Ct. 129.

of a railroad company for a year, the business being afterwards resumed and continued without interruption, is not such nonuser of its franchise as will operate as a forfeiture of its charter."[80] The omission of a railroad company for five days to run its trains has been held not to be an "abuse of its powers," within the meaning of a statute,[81] which authorizes an action for dissolution for abuse of corporate powers,[82] and, in other instances, where the suspension was merely temporary, as for lack of patronage at the time, and did not injuriously affect the public, it has been held not to be sufficient cause for forfeiture in the absence of a statute requiring a forfeiture for such cause.[83] So, it has been held that the mere failure to observe some of the preliminary requirements, as a failure to file a map of the proposed route with the secretary of state within a certain time,[84] or the payment of one-half of the capital stock in property whose value exceeds one-half of the par value of the stock where the statute requires such half to be paid in lawful money of the United States,[85] will not work a forfeiture; nor, it is said, will any specific act of nonfeasance, unintentionally but negligently committed, where it does not have a mischievous tendency.[86] Building the road across lands over which the company has not ob-

[80] Commonwealth v. New York, &c. R. Co., 10 Pa. Co. Ct. 129.

[81] Code Civil Proc. N. Y. § 1798.

[82] People v. Atlantic Ave. R. Co., 125 N. Y. 513, 26 N. E. 622, affirming 57 Hun 378, 10 N. Y. S. 907.

[83] State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; Commonwealth v. Fitchburg R. Co., 12 Gray (Mass.) 180; State v. Commercial Bank, 13 Sm. & M. (Miss.) 569, 53 Am. Dec. 106; People v. Bank of Hudson, 6 Cow. (N. Y.) 217.

[84] Harris v. Mississippi Valley &c. R. Co., 51 Miss. 602. See Eastern Archipelago Co. v. Regina, 22 Eng. L. & Eq. 228, to the general effect that slight deviations from the provisions of the charter are not necessarily either an abuse or a misuse of it. But see People v. Montecito Water Co., 97 Cal. 276, 32 Pac. 236, 33 Am. St. 172 n. (Articles not sufficiently signed).

[85] State v. Wood, 84 Mo. 378. The soundness of this decision, however, is questionable.

[86] 5 Thomp. Corp. (2d. ed.), § 6534. See also People v. Jackson R. Co., 9 Mich. 285; People v. Hillsdale T. Co., 23 Wend (N. Y.) 2; State v. Royalton, &c. T. Co., 11 Vt. 431.

tained the right of way has been held not a sufficient misuser to cause a forfeiture.[87] Neither an unauthorized attempt to change the corporate name,[88] nor the use of an abbreviation instead of proper name,[89] is sufficient ground for quo warranto proceedings. Failure to run regular passenger trains, where, by reason of the construction and operation of a horse railroad, the income from such trains would not pay for the expense of operating them is not a cause of forfeiture, it appearing that the company is regularly engaged in the transportation of freight traffic over its road, and has carried all passengers who have sought passage;[90] nor is the obtaining of a charter from another state for a similar purpose[91] and bringing a suit in the federal court to test the constitutionality of a statute of its own state incorporating another company a cause of forfeiture;[92] nor forming an unauthorized agreement of consolidation with another corporation;[93] nor issuing stock below par where no interests are injuriously affected thereby.[94] And it has been held that quo warranto will not lie to prevent the use of a portion of a railroad which has been completed, merely because the project for building other portions

[87] See State v. Kill Buck, &c. Co., 38 Ind. 71; People v. Hillsdale, &c. Co., 2 Johns. (N. Y.) 190.

[88] O'Donnell v. Johns & Co., 76 Tex. 362, 13 S. W. 376. As to effect of unauthorized change of name, see Cincinnati Cooperage Co. v. Bate, 96 Ky. 356, 26 S. W. 538, 49 Am. St. 300, 10 Lewis' Am. R. & Corp. 653, and note.

[89] People v. Bogart, 45 Cal. 73.

[90] Commonwealth v. Fitchburg R. Co., 12 Gray (Mass.) 180. But compare ante § 60.

[91] Commonwealth v. Pittsburgh, &c. R. Co., 58 Pa. St. 26.

[92] Commonwealth v. Pittsburg, &c. R. Co., 58 Pa. St. 26. The court, per Sharswood, J., intimates that the case might be different if the suit were brought in the courts of a foreign sovereignty, but holds that the federal courts form a part of the courts of each state, administering the law as construed by its own tribunals.

[93] State v. Crawfordsville, &c. Co., 102 Ind. 283, 1 N. E. 395; Crawfordsville, &c. Co. v. State, 102 Ind. 435, 1 N. E. 864. It is held otherwise, however, where the consolidation is expressly prohibited. State v. Atchison, &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164.

[94] Howe v. Deuel, 43 Barb. (N. Y.) 504; Hastings v. Amherst, &c. R. Co., 9 Cush. (Mass.) 596; State v. Minnesota, &c. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510n.

authorized by the charter has been abandoned;[95] nor merely to vindicate private rights or redress private grievances.[96]

§ 63 (52). Waiver of forfeiture—Collateral proceedings.—No advantage can be taken in any collateral proceeding, of a forfeiture which has not been judicially established;[97] and the state may waive any breach involving a forfeiture of charter rights,[98] by implication as well[99] as by legislative enactment.[1] A waiver will not, however, revive a corporation after it has ceased to exist,

[95] Attorney-General v. Birmingham Junction R. Co., 8 Eng. L. & Eq. 243. But see ante, § 60. A sale of all the corporate property does not necessarily work a forfeiture of the corporate franchises, and where it is necessary for the protection of the interests of stockholders or third persons, a corporation which has disposed of all its property will be held to be still in existence. Langhorne v. Richmond City R. Co., (Va.) 19 S. E. 122; Price v. Holcomb, 80 Iowa 123, 56 N. W. 407.

[96] State v. Atchison, &c. R. Co., 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761 n. This case also holds that quo warranto will not lie to prevent the company from making an unlawful rate or charge where another ample and adequate remedy is provided, and the subject is further considered, with citation of authorities, in the note thereto.

[97] Danbury, &c. R. Co. v. Wilson, 22 Conn. 435, 449; New York, &c. R. Co. v. New York, &c. R. Co., 52 Conn. 274; Cincinnati, &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; Hodges v. Baltimore, &c. R Co., 58 Md. 603; Cleveland, &c. R. Co. v. Erie, 27 Pa. St. 380. See also Southern Pac. R. Co. v. Orton, 32 Fed. 457; Greenville v. Greenville, &c. Co., 125 Ala. 625, 27 So. 764; New Jersey So. R. Co. v. Long Branch Comrs., 39 N. J. L. 28; Asheville Division v. Aston, 92 N. Car. 578; Greenbrier Lumber Co. v. Ward, 30 W. Va. 43, 3 S. E. 227; 1 Thomp. Corp. (2nd ed.) §§ 6520, 6527.

[98] People v. Los Angeles, &c. R. Co., 91 Cal. 338, 27 Pac. 673; State v. Portland, &c. Co., 153 Ind. 483, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. 314; Farnsworth v. Lime, &c. R. Co., 83 Maine 440, 22 Atl. 375; State v. Bergen, &c. R. Co., 53 N. J. L. 108, 20 Atl. 762; People v. Ulster, &c. R. Co., 128 N. Y. 240, 28 N. E. 635; Hinchman v. Philadelphia, &c. R. Co., 160 Pa. St. 150, 28 Atl. 652; State v. Lincoln St. R. Co., 80 Nebr. 333, 114 N. W. 422, 14 L. R. A. (N. S.) 336; 5 Thomp. Corp. (2nd ed.) § 6445.

[99] People v Mississippi, &c. R. Co., 14 Ill. 440; Foster v. Pitch, 36 Conn. 236; New York, &c. R. Co., Petition of, 70 N. Y. 327; 5 Thomp. Corp. (2nd ed.) § 6545.

[1] Such a statute may revive and keep in force the original act of incorporation, and continue the ex-

where the constitution prohibits the granting of special charters,[2] though, possibly, a general act for the remission of all forfeitures incurred under the terms of the incorporating act would be valid.[3] It has been held that the passage of an act providing for the issue of bonds to be paid long after a forfeiture would, by the terms of the charter, have accrued, is a waiver of such forfeiture, and a repeal by implication of the clause in the charter providing for it.[4] So a legislative recognition of a de facto corporation after an accrued forfeiture has become known may constitute a waiver,[5] as well as a long-continued neglect on the part of the judicial department to enforce the forfeiture.[6] But where there has been no attempt legally to organize a corporation, no

istence of the corporation as it was before the forfeiture. Phillips v. Albany, 28 Wis. 340.

[2] Oroville, &c. R. Co v. Supervisors of Plumas Co., 37 Cal. 354; Brooklyn, &c. R Co., In re, 72 N. Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Prac. 14.

[3] See Maryland v. Baltimore, &c. R. Co., 3 How. (U. S.) 534, 11 L. ed. 714; Chicago, &c. R. Co. v. Adler, 56 Ill. 344; Wilson v. Ohio, &c. R. Co., 64 Ill. 542, 16 Am. Rep. 565.

[4] Foster v. Pitch, 36 Conn. 236. See also State v. Webb, 110 Ala. 214, 20 So. 462.

[5] Central & Georgetown R. Co. v. People, 5 Colo. 39; Enfield Bridge Co. v. Connecticut River Co., 7 Conn. 28; People v. Ottawa Hydraulic Co., 115 Ill. 281, 3 N. E. 413; Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co., 4 Gill & J. (Md.) 1; Briggs v. Cape Cod Ship Canal Co., 137 Mass. 71; New York, &c. R. Co., Petition of, 70 N. Y. 327; Baltimore, &c. R. Co. v. Marshall Co., 3 W. Va. 319. La Grange, &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420, empowering another company to buy the franchises of a railroad company is a waiver of accrued forfeiture for non-user of such franchises, and the new company takes by its purchase a right to complete and operate the purchased road under its original franchise. Hinchman v. Philadelphia, &c. R. Co., 160 Pa. St. 150, 28 Atl. 652. See also Comanche Co. v. Lewis, 133 U. S. 198, 10 Sup. Ct. 286, 33 L. Ed. 604; State v. Godwinsville, &c. Co., 44 N. J. L. 496, 501; Central Crosstown R. Co. v. Twenty-third St. R. Co., 54 How. Prac. (N. Y.) 168; Attorney-General v. Superior, &c., Co., 93 Wis. 604, 67 N. W. 1138.

[6] State v. Crawfordsville, &c. Tp. Co., 102 Ind. 283, 1 N. E. 395; People v. Oakland County Bank, 1 Dougl. (Mich.) 282; People v. Williamsburg, &c. Co., 47 N. Y. 586; State v. Janesville Water Co., 92 Wis. 496, 66 N. W. 512, 32 L. R. A. 391.

lapse of time confers any rights,[7] and where, according to the terms of the charter, the franchise has been absolutely forfeited by failure to perform certain conditions, mere subsequent recognition by the legislature will not waive the forfeiture.[8] Providing penalties for the acts which, by the terms of the charter would constitute a forfeiture, has been held to be a waiver,[9] but it is said that where there is a statute[10] which makes it the duty of the attorney-general, unless otherwise expressly directed by law, to seek the forfeiture of the charter of the corporation which has, by any act or omission, misuser or non-user, forfeited the same, the right of the state to demand a forfeiture of the charter of a railroad company which has sold its road and franchises to a foreign company in violation of the constitution, failed to keep up its organization, and allowed its road to become unsafe, is not waived by the provisions of a subsequent statute,[11] providing for quo warranto against a corporation carrying on business in violation of a constitutional provision[12] forbidding sale to or consolidation with a competing or foreign company, to enforce the penalties therefor, together with an injunction against future violation, and the appointment of a receiver.[13]

[7] People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. See also State v. Bailey, 19 Ind. 452; People v. Pullman Palace Car Co., 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366. Where the incorporation is merely irregular, a legislative recognition is equivalent to a charter. McAuley v. Columbus, &c. R. Co., 83 Ill. 348; Kanawha, &c. Co. v. Kanawha, &c. Co., Fed. Cas. No. 7606, 7 Blatch. (U. S.) 391; Cowell v. Colorado, &c. Co., 3 Colo. 82; Kellogg v. Union Co., 12 Conn. 7; Mead v. New York, &c. R. Co., 45 Conn. 199; Atlantic, &c. R. Co. v. St Louis, 66 Mo. 228.

[8] State v. Fourth, &c. Tp. Co., 15 N. H. 162, 14 Am. Dec. 690.

[9] State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; Baker v. Backus, 32 Ill. 79; Washington, &c. R. Co. v. State, 19 Md. 239; Commonwealth v. Breed, 4 Pick. (Mass.) 460; State v. Morris, 73 Tex. 435, 11 S. W. 392. But see Commercial Bank of Natchez v. State, 6 S. & M. (Mass.) 599; State Bank v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234 n.

[10] Rev. Stat. Tex. Art. 2805.

[11] Sayles Civil Stat. Art. 4247a, § 2.

[12] Const. Tex. Art. X, §§ 5, 6.

[13] East Line, &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690.

§ 64 (53). **Proceedings to forfeit—Quo warranto—Parties.**—At common law it was held that a forfeiture of charter franchises should be enforced by scire facias,[14] while quo warranto was the proper means of inquiring into an unauthorized assumption of corporate powers.[15] But the latter writ, or, in modern practice, an information in the nature of a quo warranto, may be used for the trial of abuse of powers as well as for inquiring into the usurpation of franchises.[16] When quo warranto is employed for the purpose of ousting individuals who have unlawfully usurped the franchise to be a corporation and have no corporate existence, it is generally held that it should be directed against the individuals assuming to act as a corporation,[17] for "a corporation," it is said, "cannot be brought into court to answer the allegation that it is not and never was a corporation";[18] and bringing a suit against the company by its assumed corporate name is held in many jurisdictions to be an admission of its existence as a corporation.[19] Moreover, it is said that the incorporators

[14] Ames v. Kansas, 111 U. S. 449, 4 Sup. Ct. 437; 28 L. ed. 482; Regents of University v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72, 111; State v. St. Paul, &c. R. Co., 35 Minn. 222, 28 N. W. 245; Rex v. Pasmore, 3 Term Rep. 199, 244.

[15] Authorities cited in last note, supra.

[16] Bruffett v. Great Western R. Co., 25 Ill. 353; Chesapeake, &c. Co. v. Baltimore, &c. R. Co., 4 Gill & J. (Md.) 1, 121; People v. Jackson, &c. R. Co., 9 Mich. 285; National Docks R. Co. v. Central R. Co., 5 Stew. (N. J.) 755; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 386, 395; People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211; State v. Boston, &c. R. Co., 25 Vt. 433; State v. Milwaukee, &c. R. Co., 45 Wis. 579; note to State v. Atchison, &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, 198; High Extr. Rem. § 647, 5 Thomp. Corp. (2nd ed.) § 5798.

[17] Wolfe v. Underwood, 97 Ala. 375, 12 So. 234; People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693; Chesshire v. People, 116 Ill. 493, 6 N. E. 487; Mud Creek, &c. Co. v. State, 43 Ind. 236; People v. Rensselaer, &c. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; State v. Cincinnati, &c. Co., 18 Ohio St. 262; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506; State v. South Park, 34 Wash. 162, 75 Pac. 636, 101 Am. St. 998.

[18] Mud Creek, &c. Co. v. State, 43 Ind. 236; Chesshire v. People, 116 Ill. 493, 6 N. E. 487.

[19] People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92; Commercial Bank of Nat-

should have their day in court, in the event that they do not constitute a legal person capable of appearing and answering.[20] But the proceedings should be against the corporation itself, where the purpose is to enforce a forfeiture of its charter, incurred by misuse or abuse of its powers, or to oust it from the exercise of unwarranted rights and privileges under its charter,[21] and it is said that the doctrine that the institution of the proceeding

chez v. State, 6 S. & M. (Miss.) 599, 614; People v. Rensselaer, &c. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33, 38. Contra People v. Bank of Hudson, 6 Cow. (N. Y.) 217; State v. Cincinnati Gas Light &c. Co., 18 Ohio St. 262. And see State v. Inner Belt R. Co., 74 Kans. 413, 87 Pac. 696. In the note to State v. Atchison, &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, 199, it is said that "this rule rests upon no sound reason," and it does seem like sacrificing the spirit to the letter, for, where it clearly appears from the information that its purpose is to challenge the legal existence of the corporation, or, in other words, the right of the incorporators to be a corporation, it is very technical to hold that the use of the corporate name is an admission of the corporate existence. It is more in consonance with the spirit of such proceedings, although it may not be entirely logical, to treat the name as descriptive and the information as calling upon the individuals to answer by what authority they use that name and exercise the rights of a corporation.

[20] State v. Independent School District, 44 Iowa 227; King v. City of London, Skin. 293, 310.

[21] Smith v. State, 21 Ark. 294; State v. Atchison, &c. R. Co. 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164 n, 32 Am. & Eng. R. Cas. 388; People v. Bank of Niagara, 6 Cow. (N. Y.) 196; People v. New York, &c. R. Co., 137 N. Y. 606, 33 N. E. 744, 66 Hun 633, 21 N. Y. S. 373; State v. Taylor, 25 Ohio St. 279. Judge Thompson states the rule as follows: "Where the charge is that the corporation exercises powers not given by its charter, or misuses or abuses its franchises, the action is against the corporation to oust it from the use of the usurped power, and the corporation is the proper party respondent and not the members. * * * But where the charge is that corporate powers are usurped by a body having no corporate existence, then the action is against the individuals composing the illegal corporation and they are the proper and sole parties respondent." 5 Thomp. Corp. 2d. ed.), § 5811. See also State v. Barron, 57 N. H. 498; People v. Rensselaer, &c. R. Co., 15 Wend. (N. Y.), 113, 30 Am. Dec. 33, and note; also article in 40 Alb. L. J. 10.

against the corporation eo nomine admits its legal existence rests upon no sound reason.[22]

§ 65 (54). Proceedings must generally be in court of law—Statutory provisions.—A proceeding to enforce a forfeiture or to deprive a de facto corporation of its usurped privileges must be brought in a court of law,[23] a court of equity having no jurisdiction in such cases unless it is conferred by statute.[24] In many of the states special provisions are made by statute for the prosecution of suits of this nature in certain specified courts.[25] The state

[22] See note in 8 Am. St. 199, and State v. Inner Belt R. Co., 74 Kans. 413, 87 Pac. 696.

[23] Attorney-General v. Luder lee Co., 104 Mass. 239, 6 Am. Rep. 227; Attorney-General v. Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; President, &c. v. Trenton Bridge Co., 13 N. J. Eq. 46; Attorney-General v. Utica Ins. Co., 2 Johns. Ch (N Y.) 371; People v. Equity, &c., 141 N. Y. 232, 36 N. E. 194; King v. Clarke, 1 East. 38, 43. Whether a corporation has been guilty of acts or omissions sufficient to constitute cause for forfeiture is generally a judicial and not a legislative question. Cooley's Const. Lim. *106; Mayor v. Pittsburgh, &c. R. Co., 2 Abb. U. S. 9; Regents v. Williams, 9 G. & J. (Md.) 365, 31 Am. Dec. 72; Vermont, &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 2.

[24] Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Bayless v. Orne, 1 Freem. Ch. (Miss.) 161; Belmont v. Erie R. Co., 52 Barb (N. Y.) 637; Western, &c. R. Co.'s Appeal, 104 Pa. St. 399; State v. Merchants' Ins., &c. Co., 8 Humph. (Tenn.) 234. See Heap v. Heap Manufacturing Co., 97 Mich. 147, 56 N. W. 349, note to State v. Atchinson, &c. R. Co., 8 Am. St. 164, 200; Cobe v. Guyer, 237 Ill. 516, 86 N. E. 1071; 5 Thomp. Corp. (2d ed.), § 6542.

[25] In our own country writs or informations in the nature of writs of quo warranto are filed in the highest courts of ordinary jurisdiction in several of the states, either by the attorney-general or the prosecutor. People v. Richardson, 6 Cow. (N. Y.) 102; Commonwealth v. Fowler, 10 Mass. 290; State v. Merry, 3 Mo. 278; State v. Foster, 2 Halst. (N. J.) 101; People v. Richardson, 4 Cow. (N. Y). 97, 102; Respublica v. Griffiths, 2 Dall. (Pa.) 112; State v. Charleston, 1 Const. R. (Treadway, S. Car.) 36. See Denike v. New York, &c. Co., 80 N. Y. 599. In California, this jurisdiction lies in the district courts. In Indiana an information may be filed in the circuit court by the prose-

§ 67 (56). **Repeal of charter—Reserved power.**—Where the state, either by constitutional provision,[34] by general statute,[35] or by special reservation introduced into the creative act, reserves the power to alter, amend or repeal the charter of a corporation, such charter is held not to constitute a contract between the state and the incorporators within the meaning of the federal constitution;[36] though in the absence of such reservation, the charter cannot be taken away excepting for acts of the corporation amounting to a forfeiture.[37] Where an unconditional reservation is made, the power to repeal may be exercised at the pleasure of the legislature,[38] and its exercise cannot be reviewed by the

note. In Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 388, it is held that the court may not only render a judgment of forfeiture, but may also appoint a receiver when asked for in the information.

[34] See ante, § 54; Chesapeake, &c. R. Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 313, 29 L. ed. 121. When the constitution of a state forbids the granting of irrevocable charters, this provision becomes a part of all charters granted, and under them subject to repeal, whether so expressed in the act of the legislature or not. Delaware, &c. R. Co. v. Tharp, 5 Harr. (Del.) 454.

[35] The right to alter and repeal may be reserved in a general statute so as to apply to charters subsequently granted. Thornton v. Marginal, &c. R. Co., 123 Mass. 32; State v. Brown, &c. Co. 18 R. I. 16, 25 Atl. 246, 17 L. R. A. 856. And an act reserving power to repeal or amend remains in force until expressly repealed. 1 Thomp. Corp. (2d. ed.), § 414. But the legislature may enter into an irrepealable contract with a corporation, notwithstanding a previous legislature has reserved the power to alter or repeal the charter. New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352.

[36] Mowrey v. Indianapolis, &c. R. Co., 4 Biss. (U. S.) 78, Fed. Cas. No. 9891; Pacific R. Co. v. Renshaw, 18 Mo. 210; Zabriskie v. Hackensack, &c. R. Co., 18 N. J. Eq. 178, 185, 90 Am. Dec. 617; Commonwealth v. Fayette Co. R. Co., 55 Pa. St. 452; Cross v. Peach Bottom R. Co., 90 Pa. St. 392; Wagner Free Inst. v. Philadelphia, 132 Pa. St. 612, 19 Atl. 297, 19 Am. St. 613; West Wisconsin R. Co. v. Trempealeau County, 35 Wis. 257. See also State v. Louisville, &c. R. Co., 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912 C, 1150 n.

[37] Miller v. State, 15 Wall. (U. S.) 478, 21 L. ed. 98; State v. Northern Cent. R. Co., 44 Md. 131, 164; Campbell v. Mississippi Union Bank, 6 How. (Miss.) 625, 653.

[38] Spring Valley Water-works v. Schottler, 110 U. S. 347, 4 Sup. Ct. 48, 28 L. ed. 173; Mayor v. Pittsburgh, &c. R. Co., 2 Abb. (U. S.)

courts, unless, possibly, where some principle of natural justice is violated.[39]

§ 68 (57). Repeal where conditional power is reserved.—But where only a conditional power to repeal the charter upon a failure of the corporation to comply with certain conditions is reserved, although the power may be exercised at once upon such failure,[40] and although the presumption will be in favor of the existence of the facts on which the validity of a repealing statute depends;[41] yet it has been held that the legislature is not the final judge as to whether such a failure has given it authority to repeal, and that its action may be set aside by the courts.[42] It

9; Mobile, &c. R. Co. v. State, 29 Ala. 573; Bruffett v. Great Western R. Co., 25 Ill. 353; Thornton v. Marginal, &c. R. Co., 123 Mass. 32; New York, &c. R. Co., Petition of, 70 N. Y. 327, 351; Western, &c. R. Co. v. Rollins, 82 N. Car. 523; 1 Thomp. Corp. (2d. ed.), § 414. See also Musgrove v. Vicksburg, &c. R. Co., 50 Miss. 670.

[39] Lothrop v. Stedman, 13 Blatch. (U. S.) 134, 42 Conn. 583, Fed. Cas. No. 8519; Sala v. New Orleans, 2 Woods (U. S.) 188, Fed. Cas. No. 12246. See also Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Sinking Fund Cases, 99 U. S. 700, 720, 25 L. ed. 496.

[40] Oakland R. Co. v. Oakland, &c. R. Co., 45 Cal. 365, 13 Am. Rep. 181; New York, &c. R. Co. v. Boston, &c. R. Co., 36 Conn. 196; Miners' Bank v. United States, 1 Greene (Iowa) 553; Myrick v. Brawley, 33 Minn. 377, 23 N. W. 549; Kennedy v. Strong, 14 Johns. (N. Y.) 128. But see Flint, &c. Co. v. Woodhull, 25 Mich. 99, 12 Am Rep. 233; Chesapeake, &c. Canal Co. v. Baltimore, &c. R. Co., 4 G. & J. (Md.) 1.

[41] Erie, &c. R. Co. v. Casey, 26 Pa. St. 287; State v. Curran, 7 Eng. (Ark.) 321. See also Williamsport Pass. R. Co. v. Williamsport, 120 Pa. St. 1, 13 Atl. 496.

[42] Commonwealth v. Pittsburgh, &c. R. Co., 58 Pa. St. 26; Erie, &c. R. Co. v. Casey, 26 Pa. St. 287. See also Myrick v. Brawley, 33 Minn. 377, 23 N. E. W. 549. Some cases hold that by accepting a charter containing a reservation by the legislature of power to repeal, upon the happening of a contingency, the corporation is estopped to question the authority of the legislature to determine whether the contingency has happened, though the question would otherwise be one for judicial determination. Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61; Lothrop v. Stedman, 42 Conn. 583; Carey v. Giles, 9 Ga. 253; Miners' Bank v. United States, 1 Greene (Iowa) 553; DeCamp v. Eveland,

may delegate the right to bring the action in its name,[26] but it may not authorize any person to declare a forfeiture without first obtaining the judgment of a court.[27]

§ 66 (55). Collateral proceedings—Pleadings and judgment in forfeiture proceedings.—No private individual can maintain a suit to enforce the forfeiture of a charter, unless specially authorized by the state to do so, nor can a mere ground or cause for forfeiture be successfully used by him as part of his cause of action in a collateral proceeding,[28] nor can acts amounting to a forfeiture be set up by plea or answer in any collateral action.[29] Pro-

cuting attorney, or by any person claiming an interest in the corporation which has abused its powers. Burns' R. S. 1914, §§ 1188, 1189; Danville, &c. Co. v. State, 16 Ind. 456; Board v. Hall, 70 Ind. 469. In New York, Tennessee, and Colorado, the remedy is by civil action under the several codes; People v. Cook, 8 N. Y. (4 Seld.) 67, 59 Am Dec. 451; State v. Turk, Mart. & Yerg. (Tenn.) 287; Attorney-General v. Leaf, 9 Humph. (Tenn.) 753; Central, &c. R. Co. v. People, 5 Colo. 39; Atchison, &c. R. Co. v. People, 5 Colo. 60. A forfeiture of corporate franchises granted by a city can be enforced only by a direct proceeding by quo warranto under the statutes. Citizens', &c. R. Co. v. Belleville, 47 Ill. App. 388. The information must clearly set forth a substantial cause of forfeiture. 5 Thomp. Corp. (2d. ed.), § 6542.

[26] State v. Smith, 32 Ind. 213; State v. Ireland, 130 Ind. 77, 29 N. E. 396; Western, &c. R. Co.'s Appeal, 104 Pa. St. 399. Where the common law rule has not been changed by the statute, suit must be brought by the attorney general on behalf of the state. Heap v. Heap Co., 97 Mich. 147, 56 N. W. 349; Bass v. Roanoke, &c. Co., 111 N. Carr. 439, 16 S. E. 402; State v. International Co., 89 Tex. 562, 35 S. W. 1067.

[27] A statute authorizing the secretary of state to declare the charter of a corporation forfeited if its taxes are not paid is invalid. Forfeiture can be made only after suit brought by the state for that purpose. Greenbrier, &c. Co. v. Ward, 36 W. Va. 573, 15 S. E. 89.

[28] North v. State, 107 Ind. 356, 8 N. E. 159; State v. Rio Grande R. Co., 41 Tex. 217; 5 Thomp. Corp. (2nd ed.) § 6520. Injunction will not lie at the suit of a private person to enforce the forfeiture of a charter granted to a corporation for public purposes. Hinchman v. Philadelphia, &c. R. Co., 160 Pa. St. 150, 28 Atl. 652; Twelfth St. Market Co. v. Philadelphia, &c. R. Co., 142 Pa. St. 580, 21 Atl. 902.

[29] Hammett v. Little Rock, &c. Co., 20 Ark. 204; Union Branch R. Co. v. East Tenn., &c. Co., 14 Ga.

ceedings to declare a forfeiture must be instituted in the state or country in which the corporation is created.[30] The information should, in most states, set forth specifically the facts upon which the claim of forfeiture of corporate rights is founded.[31] It has been held that a judgment recovered against a corporation pending an appeal from a judgment forfeiting its franchises will, where an appeal suspends the judgment of the trial court, bind the property of the corporation, although the judgment appealed from is afterward affirmed.[32] But, after dissolution, the general rule is that no judgment can be entered against the corporation even in a suit which was pending at the time of the dissolution.[33]

327; Logan v. Vernon, &c. R. Co., 90 Ind. 552; Thompson v. New York, &c. R. Co., 3 Sand. Ch. (N. Y.) 625; New York, &c. R. Co., Petition of, 70 N. Y. 327; La Grange, &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; Connecticut, &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. See Bass v. Roanoke Nav., &c. Co., 111 N. Car. 439, 16 S. E. 402, 19 L. R. A. 247 n.

[30] Society v. New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Importing, &c. Co. v. Locke, 50 Ala. 332; State v. Mobile, &c. R. Co., 108 Ala. 29, 18 So. 801; Carey v. Cincinnati, &c. R. Co., 5 Iowa 357, 367; Richardson v. Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; Howell v. Chicago, &c. R. Co., 51 Barb. (N. Y.) 378.

[31] State v. Southern Pac. R. Co., 24 Tex. 80. The state must charge and prove the abuse or misuse of its franchises relied on as ground of forfeiture. State v. Talbot (Mo. Sup.), 27 S. W. 366. But need not, it has been held, expressly charge that the acts complained of were prohibited by statute or that public injury resulted therefrom. Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 388. See however People v. Colorado Eastern R. Co., 8 Colo. App. 301, 46 Pac. 219. A full treatment of the pleadings and practice in such proceedings will be found in the note to People v. Rensselaer, &c. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33, 49-53.

[32] Texas Trunk R. Co. v. Jackson, 85 Tex. 605, 22 S. W. 1030; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615; Giles v. East Line, &c. R. Co. (Tex. Civ. App.), 26 S. W. 1111.

[33] First Nat. Bank v. Colby, 21 Wall. (U. S.) 609; 22 L. ed. 687; Saltmarsh v. Planters', &c. Bank, 17 Ala. 761; Terry v. Merchants', &c. Bank, 66 Ga. 177; Thornton v. Marginal, &c. R. Co., 123 Mass. 32. As to form of judgment of forfeiture, see Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366; People v. Rensselaer, &c. R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33, and

seems to us, however, that the legislature, having the right to reserve the power to repeal unconditionally, may reserve the right to repeal conditionally with power to determine whether or not the condition exists, for it is a general rule that where the legislature is authorized to determine whether a state of facts exists authorizing the exercise of power, its judgment that such a state of facts does exist is conclusive.[43] As such repeal may be regarded as only a ready substitute for a forfeiture for abuse of corporate powers upon quo warranto proceedings,[44] it has been suggested that the corporation should have an opportunity to be heard in its own defense before some judicial tribunal,[45] and not subjected to an ex parte judgment pronounced by one of the parties to the contract, which it is claimed has been violated.[46] But, since a judicial finding establishing the misuser or abuse of corporate powers would have the effect to dissolve the corporation, such a proceeding would render idle the reservation of the power of repeal.[47] This power is of value because it may be exercised when proceedings by quo warranto might not only prove ineffectual, but would involve risks, embarrassment and delay.[48] A legislative inquiry to ascertain if there has been a violation of its charter or any other default by a corporation chartered under a general statute reserving to the legislature the right to repeal charters of corporations of its class upon any such violation or

19 Barb. (N. Y.). 81. This we regard as the better rule. See 1 Thomp. Corp. (2d. ed.), § 415.

[43] Elliott Gen. Prac., § 148, and authorities last above cited. See also the more recent Pennsylvania case of Wagner Free Inst. v. Philadelphia, 132 Pa. St. 612, 19 Am. St. 613, and cases last cited in preceding note.

[44] Legislative power to declare a forfeiture is cumulative to and not a substitute for a judicial proceeding by quo warranto, and such proceedings may be brought when the legislature has failed to exercise its repealing power. State v. Southern, &c. R. Co., 24 Tex. 80.

[45] Mayor v. Pittsburgh, &c. R. Co., 2 Abb. (U. S.) 9. See Vermont, &c. R. Co. v. Vermont, &c. R. Co., 34 Vt. 2.

[46] Commonwealth v. New Bedford Bridge, 2 Gray (Mass.) 339.

[47] Erie, &c. R. Co. v. Casey, 26 Pa. 287; Miners' Bank v. United States, 1 Greene (Iowa) 553; Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61.

[48] Erie, &c. R. Co. v. Casey, 26 Pa. St. 287.

default, has been held not to be a "judicial act," such as the legislature is prohibited from performing by the constitutions of many of the states.[49]

§ 69. (58). Rule where power to repeal is not reserved.—Where the power to repeal has not been reserved a different rule applies. In such a case the charter can only be revoked for cause as established by the decree of a competent tribunal upon judicial inquiry,[50] and is not subject to legislative repeal for any alleged abuse of corporate franchises,[51] at least where the legislature is prohibited by the state constitution from exercising judicial powers.[52]

§ 70 (59). Effect of repeal.—The legislature may not, under the guise of authority to repeal the charter, invalidate contracts and vested rights of third parties;[53] nor, in general, will any action on its part affect the ownership of personal and real property acquired by the corporation during its lawful existence, or of rights or contract of choses in action, so acquired, which do not in their nature depend upon the general powers conferred by the charter.[54] The rights of the shareholders of such a cor-

[49] Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61. See post, § 69.

[50] Ante, §§ 65, 67.

[51] State v. Noyes, 47 Maine 189; Sturges v. Vanderbilt, 73 N. Y. 384; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Commonwealth v. Pittsburgh, &c. R. Co., 58 Pac. St. 26.

[52] Bruffett v. Great Western R. Co., 25 Ill. 353; University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72. But see Crease v. Babcock, 23 Pick. (Mass.) 334, 34 Am. Dec. 61. It has been held that a charter is perpetual and irrevocable if there is no law limiting it or providing for repeal. Snell v. Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858 n. See also Suburban, &c. Co. v. Inhabitants, &c. (N. J.), 41 Atl. 865; National, &c. Co. v. Kansas City, 65 Fed. 691.

[53] Miller v. State, 15 Wall. (U. S.) 478, 21 L. Ed. 98; Railroad Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Rice v. Minnesota, &c. R. Co., 1 Black (U. S.) 358, 17 L. ed. 147; Commonwealth v. Essex Co., 13 Gray (Mass.) 239, 253; Detroit v. Detroit, &c. Plank Road Co., 43 Mich. 140, 5 N. W. 275; Albany, &c. R. Co. v. Brownell, 24 N. Y. 345. But see Macon, &c. R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. 135.

[54] Greenwood v. Marginal, &c. R. Co., 105 U. S. 14, 26 L. ed. 961; per Miller, J.; New Orleans, &c.

poration to their interests in such property are not, as a rule, annihilated by such a repeal,[55] and where the legislature does not provide a special remedy, the courts may enforce those rights by the means within their power.[56] The repeal by the legislature of the charter of a corporation, however, destroys its ability to originate new transactions dependent on the power conferred by the charter, and leaves the incorporators with only such powers as may be exercised by unincorporated private persons under the general laws of the state.[57] But the legislature may charter a new corporation with authority to take so much of the property and franchises of the corporation whose charter is revoked as may be necessary to the public use, upon making compensation therefor,[58] and it has been held that the repeal of a corporation's charter vests in the state the right to all public works built by it for public use on lands taken in the name of the state (subject to the proprietary right of the shareholders to the assets), together with the right to manage them or regrant them at its election.[59]

R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244. See also Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. ed. 524; San Mateo v. Southern, &c. R. Co., 8 Sawy. (U. S.) 238, 279, 13 Fed. 722; Orr v. Bracken County, 81 Ky. 593; State v. Noyes, 47 Maine 189; Detroit v. Detroit, &c. Plank Rd. Co., 43 Mich. 140, 5 N. W. 275; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255 n, 7 Am. St. 684, 45 Hun 519, and note, Opinion of Justices, 66 N. H. 630, 33 Atl. 1076. Some of these cases, notably the New York and Maine cases, go still further and apply this rule to franchises.

[55] Greenwood v. Marginal, &c. R. Co., 105 U. S. 14, 26 L. ed. 961; Thornton v. Marginal Freight, &c. Co., 123 Mass. 32; Opinion of Justices, 66 N. H. 630, 33 Atl. 1076. And see Citizens' St. R. Co. v. City R. Co., 64 Fed. 651; Africa v. Knoxville, 70 Fed. 734; Dow v. Northern R. Co., 67 N. H. 1, 36 Atl. 510; New York v. Twenty-third St. R. Co. 113 N. Y. 311, 21 N. E. 60; Ingersoll v. Nassau, &c. Co., 157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236. An intent to interfere with vested rights, which would render the statute unconstitutional, will not be inferred unless plainly declared. West Jersey Traction Co. v. Camden, &c. Co., 52 N. J. Eq. 452, 29 Atl. 333.

[56] Greenwood v. Marginal, &c. R. Co., 105 U. S. 14, 26 L. ed. 961.

[57] Greenwood v. Marginal, &c. R. Co., 105 U. S. 14, 26 L. ed. 961.

[58] Greenwood v. Marginal, &c. R. Co., 105 U. S. 14, 26 L. ed. 961.

[59] Erie &c. R. Co. v. Casey, 26 Pa. St. 287.

§ 71 (60). **Repeal of by general laws.**—Where power to repeal is reserved, a special charter may be repealed by a general law,[60] even it has been held, where no reference is made to the charter repealed,[61] but a general law can have such an effect only where it is so opposed to the provisions of the charter that both acts may not stand together.[62] The repeal of a general incorporating act does not, however, affect the charter rights of a corporation previously organized under its provisions,[63] unless such is the intention of the legislature.[64]

§ 72 (61). **Charter is subject to general laws reserving power to repeal.**—A charter, unless otherwise provided, is subject to the general laws in force when it was granted,[65] and, therefore, a general law reserving the power to alter, amend or repeal corporate charters generally is taken as forming part of all charters afterwards granted.[66] For this reason, as already stated,[67] the amend-

[60] State v. Commissioners &c., 37 N. J. L. 288; Mechanics &c. Bank v. Bridges, 30 N. J. L. 112. That the charter may be revoked by a change in the constitution of the state, as well as by statute, where power to repeal has been reserved, see Lee & Co.'s Bank, Matter of, 21 N. Y. 9.

[61] State v. Commissioners &c., 37 N. J. L. 228. But see City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. 749; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352, same case as above.

[62] State v. Commissioners &c., 37 N. J. L. 228. See also Bangor R. Co. v. Smith, 47 Maine 34; Union Imp. Co. v. Commonwealth, 69 Pa. St. 140.

[63] Bibb v. Hall, 101 Ala. 79, 14 So. 98, 59 Am. & Eng. R. Cas. 62; Donworth v. Coolbaugh, 5 Iowa 300; Union Hebrew Assn. v. Benshimol, 130 Mass. 325; Bewick v. Alpena Harbor Co., 39 Mich. 700; Freehold &c. Assn. v. Brown, 29 N. J. Eq. 121.

[64] See Wilson v. Tesson, 12 Ind. 285; Bibb v. Hall, 101 Ala. 79, 14 So. 98, 59 Am. & Eng. R. Cas. 62.

[65] Pratt v. Atlantic &c. R. Co., 42 Maine 579.

[66] Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189. Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 19 Sup. Ct. 530, 43 L. ed. 840; Citizens' St. R. Co. v. Memphis, 53 Fed. 715; Griffin v. Kentucky Ins. Co., 3 Bush (Ky.) 592, 96 Am. Dec. 259; Commissioners v. Holyoke &c. Co., 104 Mass. 446, 6 Am. Rep. 247; Massachusetts General Hospital v. State Mut. L. A. Co., 4 Gray (Mass.) 227; State v. Person, 32 N. J. L. 134; Lee's Bank, In re, 29 N. Y. 9; Suydam v. Moore, 8 Barb. (N. Y.) 358.

[67] Ante, § 67.

ment or repeal of the charter where such a general law existed at the time it was granted is not, ordinarily, a violation of the provision of the constitution of the United States forbidding the impairment of the obligation of contracts. And the fact that part of such a general statute is incorporated into a charter, does not, by implication, repeal the rest of the statute.[68]

§ 73 (62). Expiration of charter.—The existence of railroad companies incorporated by special charters,[69] as that of other business corporations,[70] is frequently limited to a term of years; and some of the states having general laws for the formation of such corporations limit the time for which a corporation may be formed under them. Where there are no provisions for renewal of the corporation[71] or where no advantage is taken of such provisions, the corporation is ipso facto dissolved upon the expiration of the time for which it was chartered.[72] It is not necessary in such a case that a dissolution should be judicially decreed,[73] and the plea of nul tiel corporation may be interposed to any suits which it may bring,[74] and any member may, in a

[68] Pratt v. Atlantic &c. R. Co., 42 Maine 579. See also 1 Thomp. Corp. (2d. ed.), § 413.

[69] For instances of such charters of limited duration, see Charter of the Union Railroad Co. Local Laws Ind. 1839, p. 131; of Newbaugh and Vanderburgh Railroad Co. Local Laws Ind. 1850, p. 308.

[70] 1 Thomp. Corp. (2d. ed.), § 190.

[71] An extension of the life of a corporation by renewal is held not to be the creation of a new corporation. Chicago &c. R. Co. v. Doyle, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385, and other cases cited in opinion and note.

[72] Oakland R. Co. v. Oakland &c. R. Co., 45 Cal. 365, 13 Am. Rep. 181. See also Marion &c. Co. v. Perry, 74 Fed. 425, 33 L. R. A. 252; Asheville Division v. Aston, 92 N. Car. 578; note in 33 L. R. A. 576; Commonwealth v. Lykens Water Co., 110 Pa. St. 391, 2 Atl. 63; La Grange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 432; Combes v. Keyes &c. R. Co., 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. 839.

[73] Merrill v. Suffolk Bank, 31 Maine 57, 50 Am. Dec. 649; Bank of Gallipolis v. Trimble, 6 B. Mon. (Ky.) 599; Sturges v. Vanderbilt, 73 N. Y. 384, 390; LaGrange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420. See also Bird v. Gay, 162 Mich. 612, 127 N. W. 814.

[74] Brooklyn &c. R. Co., In re, 72 N. Y. 245; Krutz v. Paola Town Co., 20 Kans. 397. But see St. Louis

proper case, insist upon a distribution of its assets.[75] If the charter is to continue until a certain day, the corporation expires at the close of the preceding day.[76] But it has been held that a general statute limiting the life of corporations will not affect a corporation organized under a special charter, to which no particular reference is made in the general act.[77] If the charter of a company be suffered to expire it would seem that the legislature cannot then renew its charter so as to continue its existence as a corporate body, except by the consent of all the corporators.[78] This is intimated, rather than decided, in the case to which we have referred; but where one becomes a stockholder under a charter expressly limiting the duration of the corporation, and there is no reserved power of amendment or repeal, there is reason for saying that he cannot be compelled to remain or become a stockholder in what is virtually a new corporation by a renewal of the charter after the corporation had ceased to exist by reason of the expiration of the original charter. Yet it is generally held, as it should be, that a renewal even after the expiration of the

Gas Light Co. v. St. Louis, 11 Mo. App. 55, 84 Mo. 202.

[75] Greeley v. Smith, 3 Story (U. S.) 657, Fed Cas. No. 5748; Burns v. Metropolitan Bldg. Assn., 2 Mackey (D. C.) 7; Eagle Chair Co. v. Kelsey, 23 Kans. 632; Bank of Mississippi v. Wrenn, 11 Miss. 791; Mann v. Butler, 2 Barb. Ch. (N. Y.) 362; Sturges v. Vanderbuilt, 73 N. Y. 384.

[76] People v. Walker, 17 N. Y. 502.

[77] Steadman v. Merchants' &c. Bank, 69 Tex. 50, 6 S. W. 675; State v. Ladies of the Sacred Heart, 99 Mo. 533, 12 S. W. 293. See also State v. Stormont, 24 Kans. 686.

[78] Bailey v. Hollister, 26 N. Y. 112. See generally upon the subject of rights after charters expire, Union Pacific R. Co. v. Chicago &c. R. Co., 51 Fed. 309; Union Pacific R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265; Board v. Deposit Bank &c. 124 Fed. 18; Kansas &c. Co. v. Smith, 40 Kans. 192, 19 Pac. 636; Council Grove &c. R. Co. v. Lawrence, 3 Kans. App. 274, 45 Pac. 125; Detroit &c. Co. v. Macomb Circuit Judge, 109 Mich. 371, 67 N. W. 531. See also Home Bldg. Assn. v. Bruner, 134 Ky. 361, 120 S. W. 306. As to the effect of laws passed after the enactment of the charter but prior to acceptance, see Planters &c. Co. v. Tennessee, 161 U. S. 193, 16 Sup. Ct. 466, 40 L. ed. 667; Stone v. Wisconsin, 94 U. S. 674, 24 L. ed. 102; Attorney-General v. Wisconsin &c. R. Co., 35 Wis. 599.

original term is a continuation of the old charter or corporation and not the creation of a new one.[79] There are many decisions to this effect where the corporate term of existence was merely extended, no matter whether such extension was made before or after the expiration of the original term.[80]

[79] Chicago &c. R. Co. v. Doyle, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914B, 385n. See also Augusta &c. R. Co. v. Augusta, 100 Ga. 701, 28 S. E. 126; Ohio Valley &c. Co. v. Bruner, 148 Ky. 358, 146 S. W. 749.

[80] Frostburg Min. Co. v. Cumberland R. Co., 81 Md. 28, 31 Atl. 698, and other cases cited in note in Ann. Cas. 1914B, 390. But it may be otherwise where the statute shows a different intention. Commonwealth v. Cain, 14 Bush (Ky.) 525.

CHAPTER V.

FRANCHISES.

Sec.
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§ 75 (63). **Definition.**—In its broad signification the term "franchises" means "a special privilege conferred by government upon individuals, and which does not belong to the citizens of the country generally of common right,"[1] but the meaning of the term "corporate franchises" is not so comprehensive. We suppose that the term "corporate franchises" means such special rights and privileges as are conferred upon corporations by the legislative power.[2] We do not include in our definition corporate im-

[1] 3 Thomp. Corp. (2d. ed.), § 2860; Blackstone Comm. 37; Joyce Franchises, §§ 1, 2. "A franchise is a grant or special privilege conferred by the sovereign power of the State." People v. Union Gas &c. Co., 254 Ill. 395, 98 N. E. 768, Ann Cas. 1916B, 201, 204.

[2] In Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. 492, it is said that the term, in its appropriate sense, 'is confined to such rights and privileges as are conferred upon corporate bodies by legislative grant, and that a franchise is the right or privilege of being a

munities because immunities are not always franchises,[3] although they may sometimes be properly considered as such under the statute applicable to the particular instance. The franchises of a railroad corporation are such rights and privileges as are essential to the proper operation of a railroad and necessary to the

corporation and of doing such things, and such things, only, as are authorized by the charter. See also State v. Austin &c. R. Co., 94 Tex. 530, 62 S. W. 1050; People's Passenger R. Co. v. Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844. In Detroit &c. R. Co. v. Common Council, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809, 84 Am. St. 589, it is said that franchises are of three classes: 1. The right to organize and exist as a corporation. 2. The right to act generally. 3. The special privileges which are not possessed by individuals under general laws. Compare Crawford Elec. Co. v. Knox County Power Co., 110 Maine 285, 86 Atl. 119, Ann. Cas. 1914C, 933n. In State v. Business Men's Athletic Club, 178 Mo. App. 548, 163 S. W. 901, it is said that a corporate franchise is the right to exist as an entity for the purpose of doing things permitted by law while the things which it is authorized to do are its powers as distinguished from its franchises.

[3] In the case of Keokuk &c. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450, attention is directed to an apparent conflict in the decisions. We quote the following from the opinion in that case: "In Chesapeake &c. R. Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, it was held that an immunity from taxation enjoyed by the Covington & Ohio Railway Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that 'said purchaser shall forthwith be a corporation,' and 'shall succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale and conveyance.' It was held, following in this particular, Morgan v. Louisiana, 93 U. S. 217, that the words 'franchises, rights and privileges' did not necessarily embrace a grant of an exemption or immunity See also, Picard v. East Tenn. &c. R. Co., 130 U. S. 637, 9 Sup. Ct. 640. Upon the other hand, it was held in Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it 'all the rights, powers and privileges,' conferred upon another corporation named, if the latter corporation possesses by law such right of exemption, citing in support of this principle a number of prior cases. See also Wilmington &c. R. Co. v. Ashbrook, 146 U. S. 279, 297, 13 Sup. Ct. 72."

conduct of the business of a railroad company.[4] Merely transient or personal immunities do not, as we believe, fall within the legal meaning of the term. The distinction between transient immunities and permanent rights and privileges which constitute franchises is one of importance since some franchises may be transferable while mere immunities are not.

§ 76 (64). **Charter and franchise distinguished.**—A charter contains the grant of a franchise, but is not the franchise itself. The charter is the evidence that a franchise has been granted rather than the franchise, for that is the thing the charter grants. The constitutional inhibition against impairing the obligation of contract is not operative upon the charter but upon the contract which the charter contains, and protects franchises because they are valuable property or contract rights.[5]

[4] In the case of Morgan v. Louisiana, 93 U. S. 217, 233, 23 L. ed. 860, it was said: "Much confusion of thought has arisen in this case and in similar cases, from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked." See also Rochester R. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784; People v. State Tax Comrs., 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. 674; Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420n, 427 (distinguishing the "general" franchise to be a corporation from "special" franchises).

[5] Oakland R. Co. v. Oakland &c. Co., 45 Cal. 365, 13 Am. Rep. 181. See also Joyce on Franchises, §§ 4, 41, 46; 3 Thomp. Corp. (2nd ed.), § 2861. In Lord v. Equitable Life Assur. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420n, 427, it is said that the charter of a corporation is the law which

§ 77 (65). **Grant of corporate franchises.**—A corporate franchise using the term "franchise" as meaning a property right that are often called franchises may be granted by municipal corporations to railroad companies, but that which is a corporate franchise in the true sense of the term can only be granted by the state. A license to place a railroad track in a certain street is sometimes called a franchise, but this is, it seems to us, an erroneous use of the term. The right to use the street is a privilege or license, until acted upon, rather than a corporate franchise, except where it is conferred as a franchise by the charter or statute,[6] or if a franchise, it is a secondary or derivative one,[7]

gives it existence as such and can be repealed at the will of the legislature, while a "special franchise" is the right to use public property for a public use, but with private profit. Repeal of an ordinance granting right to lay double tracks in a street is held an unlawful impairment of the obligation of the contract, in Grand Trunk &c. R. Co. v. South Bend, 227 U. S. 544, 35 Sup. Ct. 303, 57 L. ed. 638, 44 L. R. A. (N. S.) 405. See also Russell v. Sebastian, 233 U. S. 195, 34 Sup. Ct. 517, 58 L. ed. 912, Ann. Cas. 1914C, 1282; Louisville v. Cumberland Tel. &c. Co., 224 U. S. 649, 659, 32 Sup. Ct. 572, 56 L. ed. 934; New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, Ann. Cas. 1915A, 906.

[6] McPhee, &c. Co. v. Union Pac. R. Co., 158 Fed. 5; Chicago, &c. Co. v. People, 73 Ill. 541; Metropolitan, &c. Co. v. Chicago, &c. Co., 87 Ill. 317; Belleville v. Citizens' R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Eichels v. Evansville, &c. Co., 78 Ind. 261, 41 Am. Rep. 561; People v. Ft. Wayne, &c. R. Co., 92 Mich. 522, 525, 52 N. W. 1010, 16 L. R. A. 752; Lincoln St. R. Co. v. Lincoln, 61 Nebr. 109, 84 N. W. 802; State v. Citizens' St. R. Co., 80 Nebr. 357, 114 N. W. 429. See also Metropolitan Home Tel. Co. v. Emerson, 202 Mass. 402, 88 N. E. 670. The right of way is called an easement in Mayor, &c. of Knoxville v. Africa, 77 Fed. 503, 507. See also New York Elec. Lines Co. v. Empire City Subway Co., 235 U. S. 179, 35 Sup. Ct. 72, Ann. Cas. 1915 A, 906. See generally Saginaw, &c. Co. v. Saginaw, 28 Fed. 529; Jersey City v. Jersey City, &c. R. Co., 20 N. J. Eq. 360; State v. Hilbert, 72 Wis. 184, 39 N. W. 326; Eichels v. Evansville &c. R. Co., 78 Ind. 261, 41 Am. Rep. 561; Elliott Roads and Streets (3d. ed.), §§ 933, 938. In one sense, however, such grant of such a right or privilege, when not a mere naked license may be called a secondary franchise.

[7] Saginaw v. Saginaw, &c. Co.,

and, at all events, the right to use city streets for a railroad must be granted either directly by the legislature or through the action of the municipality authorized by the legislature.[8]

§ 78 (66). **Consideration for the grant of a franchise.**—A franchise using the term "franchise" as meaning a property right vested in a corporation, is always supported by a consideration. This consideration may be the implied undertaking to perform corporate duties beneficial to the public, or it may be an express agreement to do or not to do a designated act. In this respect a franchise differs essentially from a bare license, for a bare license is not supported by any consideration. It is, therefore, entirely consistent with principle to hold that a bare or naked license is revocable and is not protected as a franchise. The license does not become a contract until it is accepted and acts are performed under it which vest the rights of the parties, while a franchise becomes effective upon the acceptance of the charter or the performance of such acts as are required to be performed as conditions precedent to the vesting of the rights granted.[9]

28 Fed. 529; Shreveport Trac. Co. v. Kansas City, &c. R. Co., 119 La. 759, 44 So. 457; State v. Hilbert, 72 Wis. 184, 39 N. W. 326.

[8] People's R. Co. v. Memphis R. Co., 10 Wall. (U. S.) 38, 51, 19 L. ed. 844; Pittsburgh, &c. R. Co. v. Hood, 94 Fed. 618; Farmer v. Myles, 106 La. Ann. 333, 30 So. 858; Adee v. Nassau Elec. R. Co., 65 App. Div. 529, 72 N. Y. S. 992; Potts v. Quaker City R. Co., 161 Pa. St. 396, 29 Atl. 108; Elliott Roads and Streets (3d. ed.), §§ 933, 934. See and compare Govin v. Chicago, 132 Fed. 848.

[9] Philadelphia, &c. Co.'s Appeal, 102 Pa. St. 123. See generally People's R. Co. v. Memphis R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 344; Henderson v. Central, &c. Co., 21 Fed. 358; Indianapolis, &c. Co. v. Citizens' Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539 n; Western, &c. Co. v. Citizens', &c. Co., 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, 10 L. R. A. 770 n, 25 Am. St. 462; Atchinson St. R. Co. v. Nave, 38 Kans. 744, 17 Pac. 587, 5 Am. St. 800; Detroit v. Detroit, &c. Co., 37 Mich. 558; People v. Mutual, &c. Co., 38 Mich. 154; Galveston City, &c. Co. v. Galveston City St. R. Co., 63 Tex. 529; Gulf City, &c. Co. v. Galveston, 65 Tex. 502; Great Central R. Co. v. Gulf, &c. R. Co., 26 Am. & Eng. R. Cas. 114.

§ 79 (67). Nature of a franchise further considered.—The right to exist as a corporation, that is, as a legal entity composed of individuals united under a common name, with the capacity both of self-perpetuation and of exercising certain of the powers and privileges of a natural person, such as the power to sue and be sued, to hold and convey property, to make by-laws for the control of its business and to enter into contracts in the corporate name, is often spoken of as the company's franchise.[10] On the other hand, the word "franchises" is frequently used to designate those special privileges and powers conferred upon a corporation for the furtherance of some public work, such as the right to construct a railroad upon lands taken by the right of eminent domain, and "those rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like."[11] In so far as the word is used to designate powers which an individual may not exercise without a special grant of authority from the legislature[12] (for example, eminent domain), a franchise has, ordi-

[10] Blackstone Comm. 37; Iron Silver Mine Co. v. Cowie, 31 Colo. 450, 72 Pac. 1067; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081. The right to carry on business in the corporate name, to make contracts, to sue and be sued, and to acquire and hold property as a corporate body, and to be exempt from liability for the debts of its stockholders, and solely liable for the debts and liabilities contracted by it, with such other rights as enable the corporation to act as a person or legal entity, are called ordinary franchises, and may be exercised in any jurisdiction where such exercise is not expressly prohibited. Prerogative franchises, such as the exercise of the right of eminent domain, arise from a special grant, and can only be exercised by either an individual or a corporation by authority of such a grant and within the jurisdiction of the state by which the grant is made. See 3 Thomp. Corp. (2d. ed.), § 2862.

[11] Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Lawrence v. Morgan Louisiana, &c. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; Vermont v. Boston, &c. R. Co., 25 Vt. 433. The right to take tolls is a special franchise. Beekman v. Saratoga, &c. R. Co., 3 Paige (N. Y.) 45.

[12] To the effect that franchises

narily, no transferable value,[13] and, though it may be valued for taxation separately from the capital stock and property,[14] it cannot, as a rule, be transferred by sale,[15] mortgage,[16] or assign-

to build, own and manage a railroad are not necessarily corporate nor unassignable, see Ragan v. Aiken, 77 Tenn. 609, 42 Am. Rep. 684; Bank of Middlebury v. Edgerton, 30 Vt. 182.

[13] 3 Thomp. Corp. (2d. ed.), § 2872.

[14] Wilmington, &c. R. Co. v. Board, &c., 72 N. Car. 10; Franchise taxation, 3 Thomp. Corp. (2d. ed.), § 2920 et seq. See also Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. 130; Horn, &c. Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. ed. 164.

[15] Thus it has been held that no transfer of the property and franchises of a corporation will invest the purchasers with corporate existence. New Orleans, &c R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Memphis, &c. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 8 Am. St. 492; Rollins v. Clay, 33 Maine 132; Commonwealth v. Smith, 92 Mass. 448, 87 Am. Dec. 672; Middlesex R. Co. v. Boston, &c. R. Co., 115 Mass. 347; Chaffee v. Ludeling, 27 La. Ann. 607; Black v. Delaware, &c. Co., 24 N. J. Eq. 455; Coe v. Columbus, &c. Co., 10 Ohio St. 372, 75 Am. Dec. 518 n; Atkinson v. Marietta &c. R. Co., 15 Ohio St. 21, 35; Gulf, &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156.

[16] Richardson v. Sibley, 93 Mass. 65, 87 Am. Dec. 700; Daniels v. Hart, 118 Mass. 543; Black v. Delaware, &c. Co., 22 N. J. Eq. 130, 396; Woodruff v. Erie R. Co., 25 Hun (N. Y.) 246; Lauman v. Lebanon Val. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Frazier v. East Tennessee, &c. R. Co., 88 Tenn. 138, 12 S. W. 537. Contra, Shepley v. Atlantic, &c. R. Co., 55 Maine 395; Meyer v. Johnston, 53 Atl. 237. The franchise of being a corporation is not included in a mortgage of all the property and franchises of a railroad, unless by positive provision of law. Memphis, &c. R. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; New Orleans, &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244. 3 Thomp. Corp. (2d. ed.), §§ 2901, 2910. See Snell v. Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858n; Threadgill v. Pumphrey, 87 Tex. 573, 30 S. W. 356. But see as to franchises that pass to purchaser at foreclosure sale where there is authority to mortgage, Vicksburg v. Vicksburg, &c. Co., 202 U. S. 453, 26 Sup. Ct. 660, 663, 50 L. ed. 1102.

ment,[17] nor be sold on execution,[18] unless the legislature has provided for such a transfer in the charter or in some general statute.[19] Where such provision is made, the grantee receives the franchise indirectly from the legislature by virtue of the power given to the corporation.[20]

§ 80 (68). **Franchise of being a corporation—Primary and secondary or general and special franchises.**—Confusion often results from the failure to discriminate between the franchise of being a corporation and the franchise of acquiring rights and exercising corporate functions as a corporation. The difference between the franchise of being a corporation and the franchise

[17] Memphis, &c. R. Co. v. Railroad Commissioners, 112 U. S. 609, 619, 50 Sup. Ct. 299, 28 L. ed. 837; Richardson v. Sibley, 93 Mass. 65; Bowen v. Leace, 5 Hill (N. Y.) 221; Hurlbut v. Carter, 21 Barb. (N. Y.) 221; Frazier v. East Tennessee &c. R. Co., 88 Tenn. 138, 12 S. W. 537, 40 Am. & Eng. R. Cas. 358; Commonwealth v. Smith, 10 Allen (Mass) 448, 87 Am. Dec. 672. "As the franchise and corporation cannot exist independently, it is uniformly held that the franchise is not assignable." People v. Union Gas, &c. Co., 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916 B, 201, 204.

[18] Randolph v. Larned, 27 N. J. Eq. 557. But see State v. Rives, 5 Ired. L. (N. Car.) 297; Lawrence v. Morgan's, &c. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265. Property essential to the exercise of franchise may not be separated from it and sold on execution. East Alabama R. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136; Indianapolis, &c. Co. v. State, 105 Ind. 37, 4 N. E. 316; Louisville, &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435 n; Youngman v. Elmira, &c. R. Co., 65 Pa. St. 278; Baxter v. Nashville, &c. Turnpike Co., 10 Lea (Tenn.) 488.

[19] Mahaska, &c. R. Co. v. Des Moines Valley R. Co., 28 Iowa 437; East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; State v. Richmond &c. R. Co., 72 N. Car. 634; State v. Sherman, 22 Ohio St. 411, 428. Where such acts are done without authority, the legislature may, by ratifying and confirming them, render them valid. Shaw v. Norfolk, &c. R. Co., 5 Gray (Mass.) 162, 179; Branch v. Jesup 106 U. S. 468, 1 Sup. Ct. 495; 27 L. ed. 279; Pollard v. Maddox, 28 Ala. 321; Shaw v. Norfolk, &c. R. Co., 5 Gray (Mass.) 162; Richards v. Merrimack, &c. Co., 44 N. H. 127, 136; Hall v. Sullivan R. Co., 21 Law. Rep. 138; Waterman Corp., § 159.

[20] 3 Thomp. Corp. (2d. ed.), § 2866.

of exercising rights as a corporation is important. A corporation, or, more accurately, perhaps, the corporators may be invested with the franchise of existing as a corporation and yet not endowed with the right to do acts it claims power to do. Thus, a water company may be invested with the franchise of being a corporation and yet not possess the franchise of furnishing a city with water.[21] In another case the question was as to the right to acquire and hold property, and the distinction between the capacity to acquire property and the franchise to be a corporation was clearly drawn.[22] The question received very full con-

[21] Andrews v. National Foundry, &c. Works, 61 Fed. 782. In the opinion in that case it was said: "By its act of incorporation, the Oconto Water Company came into being, endowed not with the right to establish and maintain waterworks in Oconto, but with capacity to receive and exercise that right." This illustrates the doctrine we are endeavoring to make clear, namely, that the franchise of being a corporation is essentially different from a right to receive property or the capacity to perform duties. Doubtless the power and capacity may often be implied from the charter or statute creating the corporation, but they are not to be implied from the bare franchise of being a corporation. See also Crawford Elec. Co. v. Knox County Power Co., 110 Maine 285; 86 Atl. 119, Ann. Cas. 1914 C, 933 n, 937.

[22] Southern, &c. Co. v. Orton, 32 Fed. 457, 473. Judge Sawyer, in the course of his very able opinion, said: "The creative act necessarily extends only to the bringing into being of an artificial person, with the capacities stated, among which is, 'a capacity to receive and enjoy in common grants and privileges and immunities;' that is to say, a capacity to receive and enjoy such grants, privileges and immunities as may be made either at the time of the creation or any other time. The creation of the being, with the capacity to receive grants, is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person, has been created, with a capacity to do, by its corporate name, such things as the legislative power may permit, and receive such grants of such rights and privileges, and of such property, as the legislature itself, or private persons with the legislative permission may give. But I do not understand that every right, privilege or grant that can be conferred upon a corporation must be given simultaneously with the creative act of incorporation. On the contrary, I suppose the artificial be-

sideration in still another case, and the rule was well stated by the court and its position enforced with great strength.[23] Indeed, there is good authority for saying that the franchise to become and exist as an artificial being or corporation vests in the corporators, while the franchise to act in a certain way and exercise the privileges granted for that purpose vests in the corporation.[24]

ing must be created with a capacity to receive before anything can be received. The right to be a corporation is itself a separate, distinct and independent franchise, complete within itself, and a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons. But because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself—not of the essence of the corporation." See also Central Trust Co. v. Western N. C. R. Co., 89 Fed. 24.

[23] In the case of Coe v. Columbus, &c. Co., 10 Ohio St. 372, 75 Am. Dec. 518, speaking of the distinction referred to in the text, the court said: "This distinction has been clearly pointed out in a recent case, in which it is said: 'Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding and conveying property, and suing and being sued, by a certain name. Such an artificial being only the law can create; and when created it cannot transfer its own existence into another body, nor can it enable natural persons to act in its name, save as its agents or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation, is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable.' Hall v. Sullivan R. Co., 21 Law Rep. 138, 140, 1 Brun. Col. Cas. 613, Curtis, J. Very similar language is used in a recent case in Vermont. Bank of Middlebury v. Edgerton, 30 Vt. 182, 190." The same general doctrine is asserted in Grand Rapids, &c. Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Fort Worth, &c. Co. v. Rosedale, &c. Co., 68 Tex. 169, 176, 4 S. W. 534.

[24] Rogers v. Nashville &c. R. Co.,

The right to be or exist as a corporation is often called its primary franchise as distinguished from the right to do or exercise a certain right or privilege, which, under this classification, is called a secondary franchise.[25] So, the general right to live and do business by the exercise of the corporate powers granted by the state has been called a "general franchise" as distinguished from the grant of a right such as the right of way over a city street with privilege to operate a railroad thereon or any similar right to use public property for a public use, but with private profit, which has been called a "special franchise."[26]

91 Fed. 299; Fietsam v. Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. 492; State v. Topeka Water Co., 61 Kans. 547, 558, 60 Pac. 337, 341. So, in Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 619, 5 Sup. Ct. 299, 303, 28 L. ed. 837, it is said: "The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation." But see Knoup v. Piqua Branch, 1 Ohio St. 614; Young v. Webster City R. Co., 75 Iowa 140, 39 N. W. 234.

[25] San Joaquin &c. Irr. Co. v. Merced Co., 2 Cal. App. 593, 84 Pac. 285; State v. Topeka Water Co., 61 Kans. 547, 60 Pac. 337, 341; 3 Thomp. Corp. (2d ed.), §§ 2862, 2863, Joyce Franchises, § 8. There are very material differences between the two and the distinction, no matter what nomenclature is used, is important. For instance the one may be granted without the other or one may be taken away when the other can not be, one may be given or permitted in a foreign jurisdiction and the other not, and one may be the subject of taxation and the other not. So, as already shown, one may belong to the corporators and the other to the corporation. See generally Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. ed. 965; Thompson v. Schenectady R. Co., 124 Fed. 274, and other cases cited in the text books above referred to; Bank of California v. San Francisco, 142 Cal. 276, 75 Pac. 832, 64 L. R. A. 918, 100 Am. St. 130; Virginia &c. Toll Road Co. v. People, 22 Colo. 429, 432, 45 Pac. 398, 37 L. R. A. 711n; Crawford Elec. Co. v. Knox County Power Co., 110 Maine 285, 86 Atl. 119, Ann. Cas. 1914C, 933, 935, 936.

[26] People v. State Tax Comrs., 174 N. Y. 417, 435, 67 N. E. 69, 63 L. R. A. 884, 105 Am. St. 674; Lord v. Equitable Life &c. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420n. "The term 'franchise' has a dual meaning. Its scope and meaning must be determined by its application. There is a wide difference between a franchise which inheres in the right to exist as a corporation and a franchise to exercise certain special privileges as such; for instance, the right to oc-

§ 81 (69). Difference between a franchise and a license.—A distinction must be kept in mind between a charter franchise constituting a contract on the part of the state in consideration of certain duties which, by accepting the charter, the corporation undertakes to perform, and a mere legislative permission or license, which is revocable at the pleasure of the grantor. A supplement to a charter,[27] or a general statute or ordinance,[28] which confers new rights or privileges for an indefinite time without the imposition of any new burdens, generally amounts to a mere license. A mere naked license is revocable at the pleasure of the legislature, but where there is money expended upon the faith that a permanent right is granted, it seems to us that the license is not revocable. This opinion is, we know, opposed by eminent judges and authors, but it seems to us to rest on sound and solid principle.[29] Of course, the doctrine we favor cannot prevail where there is no grant of a permanent right and the parties understand, or are bound to know, that a mere temporary privilege is granted, but where the privilege is in its nature permanent and is acted upon as such by the parties in good faith, and money is expended in the just belief that the right is of a per-

cupy or cross public highways and to construct in or across them and operate thereon a public utility." State v. Black Diamond Co., 97 Ohio St. 24, 119 N. E. 195, L. R. A. 1918E, 353, 357.

[27] Philadelphia &c. R. Co.'s Appeal, 102 Pa. St. 123. See Johnson v. Crow, 87 Pa. St. 184; Christ Church v. County of Philadelphia, 24 How. (U. S.) 300, 16 L. ed. 602.

[28] Southwark R. Co. v. Philadelphia, 47 Pa. St. 314; Branson v. Philadelphia, 47 Pa. St. 329.

[29] That an ordinance granting a right to use a city street is an irrevocable contract when accepted and acted on, see Asheville St. R. Co. v. Asheville, 109 N. Car. 688, 14 S. E. 316; Arcata v. Arcata &c. Co., 92 Cal. 639, 28 Pac. 676; Belleville v. Citizens' R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Williams v. Citizens' R. Co., 130 Ind. 71, 73, 29 N. E. 408, 409, 15 L. R. A. 64, 3 Am. St. 201; Elliott Roads and Streets (3d. ed.), § 938. Professor Hare, referring to the Pennsylvania cases cited in the following note, says: "These decisions are obviously sound. An individual who gives a license which cannot be enjoyed without the expenditure of money may fairly be presumed to intend that it shall be irrevocable, but no such inference can be drawn where the state or city is dealing with a highway, and ought to retain the power of supervision and control." 1 Hare Am. Const. Law, 666.

manent nature, the party making the expenditure is entitled to protection.[30]

§ 82 (70). Sale of corporate property essential to exercise of franchises—Limitation of right to sell.—According to the greater weight of authority, a railroad corporation may not transfer any of its property or privileges which are essential to a fulfillment of the purposes for which it was chartered, except by legislative authority. Property not held for strictly corporate purposes, that is property not necessary to enable the corporation to exercise its corporate functions and perform its corporate duties may be sold; but property necessary for corporate use cannot be sold or transferred where its sale would render the corporation unable to perform its corporate duties. In other words, a corporation cannot sell or transfer its property in cases where such a sale or transfer would disable it from performing its public and corporate duties and exercising its corporate functions except in cases where there is legislative authority to make such sales or transfers.[31]

[30] Some of the cases hold that such a license is revocable, although the grantee has made valuable improvements in the belief that the privilege will not be recalled. Branson v. Philadelphia, 47 Pa. St. 329; Monongahela &c. Co. v. Coons, 6 Watts & S. (Pa.) 101; Southwark R. Co. v. Philadelphia, 47 Pa. St. 314; Johnson v. Crow, 87 Pa. St. 184. But there is conflict on this point. Campbell v. Indianapolis &c. R. Co., 110 Ind. 490, 11 N. E. 482; People v. Chicago &c. Co., 18 Ill. App. 125; State v. Noyes, 47 Maine 189; Commonwealth v. Proprietors &c., 2 Gray (Mass.) 339; People v. O'Brien. 111 N. Y. 1, 7 Am. St. 684; Elliott Roads and Streets, §§ 1050, 1051. See also Twin Village Water Co. v. Demariscotta Gas &c. Co., 98 Maine 325, 56 Atl. 1112, note in Ann. Cas. 1916B, 211, 212, 213.

[31] York &c. R. Co. v. Williams, 17 How. (U. S.) 30, 15 L. ed. 27; Pearce v. Madison &c. Co., 21 How. (U. S.) 441, 16 L. ed. 80; Pullan v. Cincinnati &c. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Pennsylvania Co v. St. Louis &c. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Oregon v. Oregonian &c. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Central Transportation Co. v. Pullman &c. Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Atlantic &c. Co. v. Union Pacific &c. Co., 1 Fed. 745; Cumberland Tel. Co. v. Evansville, 127 Fed. 187; Singleton v. Southwestern R. Co.,

§ 83 (71). **Effect of attempt to sell or encumber franchise.**—It is well settled that a corporation cannot alienate or mortgage its primary franchise or right to be a corporation without constitutional or statutory authority to do so.[32] Though all of the property of the corporation should pass into the hands of a purchaser, he would not by such purchase, necessarily, become entitled to the franchises,[33] in the absence of any law giving authority to dispose of the corporate rights and privileges; for an authority to mortgage or otherwise transfer the property will not necessarily confer power to dispose of the franchises.[34] It is, of course,

70 Ga. 464, 48 Am. Rep. 574 n; Hays v. Ottawa &c. Co., 61 Ill. 422; State v. Dodge City &c. R. Co., 53 Kans. 377, 36 Pac. 747, 42 Am. St. 295; Richardson v. Sibley, 93 Mass. 65, 87 Am. Dec. 700; Commonwealth v. Smith, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672; Richards v. Merrimack R. Co., 44 N. H. 136; Black v. Delaware &c. Co., 22 N. J. Eq. 130; Logan v. North Carolina R. Co., 116 N. Car. 940, 21 S. E. 959; Stewart's Appeal, 56 Pa. St. 413; Pittsburgh &c. Co. v. Allegheny County, 63 Pa. St. 126; Johnson Co. v. Miller, 174 Pa. St. 605, 34 Atl. 316, 52 Am. St. 833; Philadelphia v. Philadelphia &c. R. Co., 177 Pa. St. 292, 35 Atl. 610, 34 L. R. A. 564; Vermont &c. Co. v. Vermont &c. Co., 34 Vt. 1; Roper v. McWhorter, 77 Va. 214. See also Attorney-General v. Haverhill Gas &c. Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266, and note on p. 1271; note in L. R. A. 1917 D, 707; 3 Thomp. Corp. (2d ed.), § 2425. The general doctrine was thus stated in Black v. Delaware &c. Co., 22 N. J. Eq. 130: "It may be considered as settled that a corporation can not lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority." But some courts have held that special franchise or rights on property obtained from a municipality may be sold or assigned. See Knoxville v. Africa, 77 Fed. 501; American Loan &c. Co. v. General Elec. Co., 71 N. H. 192, 51 Atl. 660; Commercial Elec. &c. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592.

[32] Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Southern R. Co. v. Mitchell, 139 Ala. 629, 37 So. 85; Organ v. Memphis &c. R. Co., 51 Ark. 235, 11 S. W. 96; Archer v. Terre Haute &c. R. Co., 102 Ill. 493; 3 Thomp. Corp. (2d ed.), §§ 2900, 2901, and numerous cases there cited.

[33] Bruffett v. Great Western R. Co., 25 Ill. 353, 357; Clarke v. Omaha &c. R. Co., 4 Nebr. 458; Pierce v. Emery, 32 N. H. 484; Atkinson v. Marietta &c. R. Co., 15 Ohio St. 21.

[34] People v. Commercial Tel. &c.

competent for the legislature to confer power to sell and convey corporate franchises, but the power is not an incidental one and cannot exist in the absence of a statute conferring it. The attempt to sell a corporate franchise without statutory authority would be ineffective, and would pass no title, but the question as to who may take advantage of the attempt to sell where the power does not exist is one upon which there is some diversity of opinion. But, in most of the states, railroad corporations are given power by statute to mortgage, or sell, their franchises as well as their tangible property, subject to certain restrictions.[35]

§ 84 (72). **Judicial sale of franchises.**—As a general rule, corporate franchises cannot be sold on a judgment or decree unless the statute authorizes a sale.[36] But where power is conferred

Co., 277 Ill. 265, 115 N. E. 379, L. R. A. 1917 D, 704 n; McAllister v. Plant, 54 Miss. 106; Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461. See Philadelphia v. Western U. Tel. Co., 11 Phila. 327; Cumberland Tel. Co. v. Evansville, 127 Fed. 187, and note in 35 Am. St. 390. But compare Threadgill v. Pumphrey, 87 Tex. 573, 30 S. W. 356. And see as to alienability of street privileges or franchises, Lawrence v. Hennessy, 165 Mo. 659, 65 S. W. 717; Rutherford v. Hudson River Trac. Co., 73 N. J. L. 227, 63 Atl. 84; Boise Artesian &c. Water Co. v. Boise City, 230 U. S. 84, 33 Sup. Ct. 987, 57 L. ed. 1400.

[35] See note in L. R. A. 1917D, 709. In the United States it would be difficult to find a railroad that has not mortgaged its road and franchise, and in most instances under express legislative authority.

[36] Gue v. Tidewater &c. Co., 24 How. (U. S.) 257, 16 L. ed. 635; Meyer v. Johnston, 53 Ala. 237; Wood v. Truckee &c. Co., 24 Cal. 474; James v. Pontiac Road Co., 8 Mich. 91; Plymouth &c. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526; Wellsborough v. Griffin, 57 Pa. St. 417; Youngman v. Railroad Co., 65 Pa. St. 278; Ammant v. President &c., 13 Serg. & R. (Pa.) 212; Leedom v. Plymouth &c. Co., 5 Watts & S. (Pa.) 265; Miller v. Rutland &c. R. Co., 36 Vt. 452. See Railroad v. James, 6 Wall. (U. S.) 750, 18 L. ed. 854; Richardson v. Sibley, 93 Mass. 65, 87 Am. Dec. 700; Stewart v. Jones, 40 Mo. 140; State v. Rives, 5 Ired. (N. Car.) 297; Coe v. Cincinnati &c. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Coe v. Peacock, 14 Ohio St. 187; Foster v. Fowler, 60 Pa. St. 27; State v. Black Diamond Co., 97 Ohio St. 24, 119 N. E. 195, L. R. A. 1918 E, 352.

upon a corporation to mortgage all its property and franchises a sale upon a decree foreclosing such a mortgage will convey to the purchaser all such franchises as are necessary to the use and enjoyment of the property bought by him at such sale.[37] The franchise to be a corporation does not pass to the purchaser unless a clear provision of positive law makes it transferable. The franchise of being a corporation is a peculiar one, and, as we have seen, is essentially different from other corporate franchises; so peculiar is it that ordinarily it is not assignable and, indeed, is never assignable except when made so by statute.[38] The right to sell corporate franchises being statutory the general rule is that the sale must be conducted in substantial conformity to the requirements of the statute, and where a mode is provided for

[37] In New Orleans &c. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244, the court said: "When there has been a judicial sale of railroad property under mortgage authorized by law, covering its franchise, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passes to the purchaser." Memphis &c. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. ed. 1102 (but not the primary franchise or right to exist as a corporation); Chaffee v. Ludeling, 27 La. Ann. 607; Detroit v. Mutual &c. Co., 43 Mich. 594, 5 N. W. 1039; Metz v. Buffalo &c. Co., 58 N. Y. 61, 17 Am. Rep. 201; People v. Brooklyn &c. Co., 89 N. Y. 75; Atkinson &c. Co. v. Marietta &c. Co., 15 Ohio St. 21. See also Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 404, 405, 48 L. ed. 629.

[38] Memphis &c. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Willamette &c. Co. v. Bank, 119 U. S. 191, 7 Sup. Ct. 187, 30 L. ed. 384; Vicksburg v. Vicksburg Water Works Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. ed. 1102; Snell v. Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Commonwealth v. Smith, 92 Mass. 448, 87 Am. Dec. 672; Grand Rapids &c. Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585; Metz v. Buffalo &c. R. Co., 58 N. Y. 61, 17 Am. Rep. 201; People v. Cook, 110 N. Y. 443, 18 N. E. 113; Eldridge v. Smith, 34 Vt. 484; Adams v. Boston &c. Co., 4 Nat. Bank Reg. (314) 99; Sweatt v. Boston &c. Co., 5 Nat. Bank Reg. 234; notes in 35 Am. St. 399, and 103 Am. St. 555; Hall v. Sullivan &c. Co., 1 Brun (C. C.) 613. But compare Denison &c. R. Co. v. St. Louis &c. R. Co., 30 Tex. Civ. App. 474, 72 S. W. 201.

making the sale it is exclusive and must be pursued.[39] The purchaser at a valid judicial sale ordinarily takes all the property and franchises of the corporation in cases where the sale of such property and franchises is authorized by statute, but is not bound for the debts of the corporation.[40] The franchises which pass by the sale are, however, such only as by law can be sold and transferred. Purchasers at such a sale may organize a new corporation, and generally the new corporation will succeed to the franchises of the old (provided, of course, there was authority to sell the franchises) except the franchise to be a corporation. That franchise does not come from the sale but from the sovereign.

§ 85 (73). **Sequestration.**—The process of sequestration is a writ or commission issued to some officer or person empowering him to enter into possession of property and receive the rents, revenues or profits thereof, and to apply them as the court may order or adjudge.[41] The statutes in most of the states have supplanted the old chancery doctrine; in others its existence has been denied upon the ground that the courts did not possess inherent equity powers, in others the doctrine has been modified, and in some others prevails without substantial change.[42] In

[39] James v. Pontiac &c. Co., 8 Mich. 91. See generally Stamford Bank v. Ferris, 17 Conn. 259; Titcomb v. Union Marine &c. Co., 8 Mass. 326; Howe v. Starkweather, 17 Mass. 240.

[40] Stewart &c. Co.'s Appeal, 72 Pa. St. 291; Vilas v. Milwaukee &c. Co., 17 Wis. 497; Smith v. Chicago &c. Co., 18 Wis. 17.

[41] Hinde's Ch. Pr. 127; Ballentine's Law Dic.

[42] Cypress Shingle Co. v. Lorio, 46 La. Ann. 441, 15 So. 95; McKim v. Odom, 3 Bland Ch. (Md.) 407; Jones v. Boston &c. Co., 21 Mass. 507, 16 Am. Dec. 358; Grew v. Breed, 53 Mass. 363, 46 Am. Dec. 687; Cook v. Detroit &c. R. Co., 45 Mich. 453; McKusick v. Seymour, 48 Minn. 172, 50 N. W. 1114; Hospes v. Northwestern &c. Co., 48 Minn. 174. 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; Mann v. Pentz, 3 N. Y. 415; Bangs v. McIntosh, 23 Barb. (N. Y.) 591; Clarkson v. DePeyster, 3 Paige (N. Y.) 320; Devoe v. Ithaca &c. Co., 5 Paige (N. Y.) 521; Judson v. Rossie Galena R. Co., 9 Paige (N. Y.) 598, 38 Am. Dec. 569; Steiner's Appeal, 27 Pa. St. 313; Reid v. Northwestern &c. Co., 32 Pa. St. 257; Penrose v. Erie &c. Co., 56 Pa. St. 46, 93 Am. Dec. 778; Foster v. Fowler, 60 Pa. St. 27; Germantown

many respects decrees appointing receivers for railroad corporations accomplish essentially the same results as those accomplished by sequestration, and the process of sequestration is seldom employed in jurisdictions where the authority to appoint receivers is broad and comprehensive.[43] As is the case where receivers are appointed the appointment of a sequestrator does not, as a general rule, end the corporate existence, but the sequestrator takes possession of the corporate property and employs the corporate franchises in conducting business. If the debts are discharged in full the property and franchises, as a rule, revert to the corporation.[44] The money received by the sequestrator of a corporation is to be distributed among the creditors in substantially the same manner as in the case of the insolvency of a natural person.[45]

§ 86 (74). Seizure of corporate franchise under power of eminent domain.—Although a corporation may have a property interest in its franchises, such that they may not be taken from it by

&c. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Muncy Creek &c. Co. v. Hill, 84 Pa. St. 459; Ammant v. New Alexandria &c. Co., 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593 n; Earl of Kildare v. Eustace, 1 Vern. 419; Lowten v. Mayor, 2 Mer. 393; Johnson v. Chippendall, 2 Sim. 55; Francklyn v. Colhoun, 3 Swanst. 276.

[43] In addition to those cases cited in preceding note relative to process of sequestration we cite Ford v. Plankinton Bank, 87 Wis. 363, 58 N. W. 766; Neall v. Hill, 16 Cal. 145, 150, 76 Am. Dec. 508 n; Loder v. New York &c. Co., 4 Hun (N. Y.) 22; Mott v. Union Bank, 38 N. Y. 18; Donnelly v. West, 17 Hun (N. Y.) 564; Rodbourn v. Utica &c. R. Co., 28 Hun (N. Y.) 369; Rankine v. Elliott, 16 N. Y. 377; Foster v. Townshend, 68 N. Y. 203; Bloom v. Burdick, 1 Hill (N. Y.) 130, 37 Am. Dec. 299n; Morgan v. Turner, 4 Tex. Civ. App. 192, 23 S. W. 284, 23 S. W. 284; Craddocks v. Ins. Co., 5 Phila. 249; London &c. Co. v. Morphy, 10 Ont. 86, 12 Am. & Eng. Corp. Cas. 53.

[44] Mann v. Pentz, 3 N. Y. 415; Kincaid v. Dwinelle, 59 N. Y. 548; Hollingshead v. Woodward, 35 Hun (N. Y.) 410; Parry v. American Opera Co., 12 Civ. Pro. (N. Y.) 194; Angell v. Silsbury, 19 How. Prac. (N. Y.) 48.

[45] Steiner's Appeal, 27 Pa. St. 313. The sequestrator may be empowered to sell the corporate property, or he may be authorized to use the property and franchises until enough money is earned to satisfy the claims of creditors.

the legislature and conferred upon another company without compensation,[46] yet they are subject to the power of eminent domain and may be taken under that power whenever the interests of the public require it.[47] Property of this kind, however, is so far favored in law that authority to take the franchise of a corporation will not be implied from a grant of power to take property, conferred in general terms,[48] unless the taking be necessary to carry out the purposes of the charter containing such grant.[49] The intention to grant such power must appear by express words,[50] or by necessary implication.[51]

§ 87 (75). **Dissolution by authorized sale of franchises—Special franchise may survive dissolution.**—The power of the legislature to authorize the sale of all corporate franchises is, as we have seen, undoubted, and when a sale is made pursuant to a valid statute of all franchises it has been held that the corporate existence necessarily terminates.[52] We suppose that the author-

[46] Boston Water Power Co. v. Boston &c. R. Co., 23 Pick. (Mass.) 360.

[47] Richmond R. Co. v. Louisa R. Co., 13 How. (U. S.) 71, 14 L. ed. 55; New York &c. R. Co. v. Boston &c. R. Co., 36 Conn. 196; Newcastle R. Co. v. Peru R. Co., 3 Ind. 464; Northern R. Co. v. Concord &c. R. Co., 27 N. H. 183; Jersey City &c. R. Co. v. Jersey City &c. R. Co., 20 N. J. Eq. 61; Beekman v. Saratoga R. Co., 3 Paige Ch. (N. Y.) 45, 22 Am. Dec. 679 n; post, § 1216.

[48] Buffalo, Matter of, 68 N. Y. 167.

[49] Mobile &c. R. Co. v. Alabama Midland R. Co., 87 Ala. 501, 6 So. 404; Milwaukee &c. R. Co. v. Faribault, 23 Minn. 167; Boston &c. R. Co., In re, 53 N. Y. 574; Little Miami &c. R. Co. v. Dayton, 23 Ohio St. 510.

[50] Clarence R. Co. v. Great North &c. R. Co., 4 Q. B. 46.

[51] Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255 n. To justify such a taking there must be a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be created by the company itself for its own convenience or for economy. Sharon R. Co., Appeal of, 122 Pa. St. 533, 17 Atl. 234, 9 Am. St. 133 n; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150. See generally post, § 1216.

[52] Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651; Memphis &c. R. Co. v. Railroad Commissioners, 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 831; Snell v. Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858n;

ized sale of part of the corporate franchises would not necessarily and of itself work a dissolution of the corporation, but each case must, as we believe, be determined upon the statute authorizing the sale. If the franchise of being a corporation is authorized to be sold, then a sale pursuant to the statute would terminate the corporate existence, but an authorized sale of the franchise to do certain acts not constituting the whole of the corporate franchises would not have that effect. It has also been held that some so-called franchises, such, for instance, as the right of a street railway company to use the streets of a city, may be granted for a longer period than the charter life of the company and may survive its dissolution.[53] But where no time is fixed the prevailing rule is that a special franchise does not outlive the life of the municipality granting it,[54] nor the life of the corporation to which it is granted.[55]

citing State v. Sherman, 22 Ohio St. 411; Pierce v. Emery, 32 N. H. 484; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 71. But see People v. Union Gas &c. Co., 254 Ill. 395, 98 N. E. 768, Ann. Cas. 1916B, 201.

[53] See Greenwood v. Union Freight Co., 105 U. S. 13, 26 L. ed. 961; New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 395, 22 Sup. Ct. 410, 46 L. ed. 610; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 628, 26 L. R. A. 673; Citizens' St. R. Co. v. City R. Co., 64 Fed. 647; Milhau v. Sharp, 27 N. Y. 611; People v. National Trust Co., 82 N. Y. 283; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 225, 7 Am. St. 717; Hall v. Sullivan R. Co., 1 Brunner's (C. C.) 613. And compare also Davis v. Memphis &c. R. Co., 87 Ala. 633, 6 So. 140; Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N. W. 1081 (a quasi-public corporation is generally allowed to operate a reasonable time after the expiration of its franchise where no provision is made for continuance of the service and the public would suffer from its discontinuance). Ordinarily, however, it is said, "in the absence of controlling language to the contrary, the life of the grant is the period fixed for the life of the corporation." Govin v. Chicago, 132 Fed. 848, 855. But this case was reversed in Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801. Compare, however, Cleveland v. Cleveland Elec. R. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854; People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

[54] People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

[55] Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801; People v. Central Union Tel. Co., 232

Ill. 260, 83 N. E. 829; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996. See also St. Clair County Turnpike Co. v. People, 96 U. S. 63, 24 L. ed. 651. It seems that the state may grant a perpetual franchise, but a municipality, ordinarily at least, has no such power. Louisville v. Cumberland Tel. &c. Co., 224 U. S. 649, 56 L. ed. 934; Detroit v. Detroit City Ry. Co., 56 Fed. 867; Logansport R. Co. v. Logansport, 114 Fed. 688, 192 U. S. 604, 48 L. ed. 584; Boise City &c. Water Co. v. Boise City, 123 Fed. 232; Omaha Elec. &c. Co. v. Omaha, 179 Fed. 455. See also Boston Elec. Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N. E. 346; East Ohio Gas Co. v. Akron, 81 Ohio St. 33, 90 N. E. 40, 26 L. R. A. (N. S.) 92 n, 18 Ann. Cas. 332. But compare Seattle v. Columbia &c. R. Co., 6 Wash. 379, 33 Pac. 1048. It has been held that, although the grant is in terms perpetual, it may be upheld with this provision eliminated. Levis v. Newton, 75 Fed. 884. But this seems erroneous, or at least not beyond question. Wellston v. Morgan, 59 Ohio St. 147, 52 N. E. 127.

CHAPTER VI.

STOCK.

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§ 90 (76). **Definition.**—Capital stock has been defined as "the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of

the corporation and for the benefit of corporate creditors."[1] The term is often used to denote the capital or property of the corporation,[2] but, strictly speaking, the capital stock is not identical with the corporate property or capital.[3] It represents, rather, the capital or property of the corporation to the extent required by its charter,[4] and may be said, in one sense at least, to describe or evidence the interest of the stockholders in the corporation and to consist of the sum of all the shares.[5] It remains fixed and cannot exceed the amount authorized by the charter or stat-

[1] Cook Corporations (7th. ed.), § 9. See also Sanger v. Upton, 91 U. S. 60, 23 L. ed. 220; Farrington v. Tennessee, 95 U. S. 686, 24 L. ed. 560. See also St. Louis &c. R. Co. v. Loftin, 30 Ark. 695; State v. Norwich &c. R. Co., 30 Conn. 290; 4 Thomp. Corp. (2d ed.), § 3404. Other definitions are given in the following recent cases: Stamford Trust Co v. Yale &c. Co., 83 Conn. 43, 75 Atl. 90; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; State v. Clement Nat. Bank, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912 D, 22 n.

[2] So used in State v. Norwich &c. R. Co., 30 Conn. 290; New Haven v. City Bank, 31 Conn. 106; People v. Commissioners, 23 N. Y. 192, 220, 222, opinion of Comstock, C. J.; People v. Coleman, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762n.

[3] Stock dividends and their restraint, 7 Am. Bar. Assn. 257; Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 648, 29 L. ed. 830; Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 4, 14 So. 490; State v. Morristown Fire Assn., 23 N. J. L. 195; Burrell v. Bushwick R. Co., 75 N. Y. 216; State Bank v. Milwaukee, 18 Wis. 281, 295. See also Bank of Commerce v. Tennessee, 104 U. S. 495, 26 L. ed. 811; Ohio &c. R. Co. v. Weber, 96 Ill. 443; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; American Life Ins. Co v. Ferguson, 66 Ore. 417, 134 Pac. 1029; State v. Cheraw &c. R. Co., 16 S. Car. 528.

[4] See Hannibal &c. R. Co. v. Shacklett, 30 Mo. 550; Williams v. Western Union Tel. Co., 93 N. Y. 162, 188; Tradesman &c. Co. v. Wheel Co., 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. 943.

[5] See Tennessee v. Whitworth, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. ed. 830; People v. Chicago &c. Co., 130 Ill. 268, 22 N. E. 798; Greenleaf v. Board, 184 Ill. 226, 56 N. E. 295, 75 Am. St. 168; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 31 S. W. 486; Tradesman &c. Co. v. Knoxville &c. Co., 95 Tenn. 634, 32 S. W. 1097, 31 L. R. A. 593, 49 Am. St. 943; ("Capital stock paid" in means amount subscribed by stockholders). "Stock dividends and their restraint," 7 Am. Bar Assn. 263. But see Wilkes-Barre &c. Bank v. Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111.

ute and articles of incorporation, while the capital or property may vary greatly in value from time to time and may exceed the amount of capital stock authorized by the charter.[6] This excess over and above the amount of the required and authorized capital stock, arising generally out of the transaction of the corporate business and consisting of profits, may be divided among the stockholders by way of dividends in the discretion of the directors, and does not constitute part of the capital stock,[7] although, until a division is made, or, at least, until a dividend is declared, it remains the property of the corporation.[8] For these reasons it seems clear that the terms "capital" and "capital stock" are not synonymous, yet they are frequently so used, and the term "capital stock" has often been held to embrace all the property or cap-

[6] Commercial Fire Ins. Co. v. Board of Revenue, 99 Ala. 4, 14 So. 490; Barry v. Merchants' &c. Co., 1 Sandf. Ch. (N. Y.) 280; Cook v. Marshall, 191 Pa. St. 315, 34 Atl. 314; Tradesman &c. Co. v. Knoxville &c. Co., 95 Tenn. 634, 32 S. W. 1097, 49 Am. St. 943; Wells v. Green Bay &c. Canal Co., 90 Wis. 442, 64 N. W. 69.

[7] Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; Williams v. Western Union Tel. Co., 93 N. Y. 162; People v. Coleman, 126 N. Y. 433, 27 N. E. 818; State Bank v. Milwaukee, 18 Wis. 281. But see Phelps v. Farmers' &c. Bank, 26 Conn. 269.

[8] The interest of a stockholder may, however, exceed in value the nominal or par value of his shares. In a sense, therefore, his actual interest may not depend entirely upon the amount of stock or capital stock authorized. The real value of his shares, which measures his interest, is more often determined by the actual value of all the property of the corporation. Jones v. Terre Haute &c. R. Co., 57 N. Y. 196, and in the recent case of People v. Coleman, it is said that the capital stock of the company and the capital stock (or, more properly, the share stock) of the shareholders are two different things; that the property of the corporation may consist of capital stock, which is the fund required to be paid in and kept intact as the basis of the business enterprise, its surplus, and its franchise, neither of which is part of its capital stock; and that the capital stock, or share stock, of the stockholders "covers, embraces, represents, all three in their totality." People v. Coleman, 126 N. Y. 433, 438, 27 N. E. 818, 12 L. R. A. 762 n. See also Coit v. North Carolina &c. Co., 14 Fed. 12; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 31 S. W. 486,

ital of the corporation, particularly when found in a statute clearly evincing an intention upon the part of the legislature to include all corporate property within the meaning of the term.[9]

§ 91 (77). **Classes of stock.**—Corporate stock—using that term in the sense in which it is generally used in this connection—may be divided into two principal classes, common and preferred, the common stock being subject to a priority as to the payment of dividends in favor of the preferred stock. Other kinds of stock, mostly in the nature of preferred stock, are also frequently issued, such as guaranteed, interest-bearing, income, or debenture stock. And "special stock," having certain peculiarities distinguishing it from ordinary stock, is also authorized in some cases. The different kinds of stock and the distinctions between them will, however, be considered in subsequent sections.

§ 92 (78). **Shares of stock—Certificates.**—The common stock is divided into shares, each of which gives to the owner a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon dissolution.[10] The ownership of these shares is usually evidenced by certificates which set forth the number owned and the amount actually paid thereon, or that they are paid up, if such is the case.[11] The possession of such a certificate, however, does not

29 L. R. A. 73; Raleigh &c. R. Co. v. Wake County, 87 N. Car. 414, 17 Am. & Eng. R. Cas. 466.

[9] Security Co. v. Hartford, 61 Conn. 89, 23 Atl. 699; Ohio &c. R. Co. v. Weber, 96 Ill. 443; Philadelphia v. Ridge Ave. R. Co., 102 Pa. St. 190.

[10] Oakbank Oil Co. v. Crum, L. R. 8 App. Cas. 65; Fisher v. Essex Bank, 5 Gray (Mass.) 373. See also Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525; Field v. Pierce, 102 Mass. 253, 261; Bent v. Hart, 10 Mo. App. 143; Jones v. Concord &c. R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. 650; Plimpton v. Bigelow, 93 N. Y. 592, 599; Bradley v. Bauder, 36 Ohio St. 28, 35, 38 Am. Rep. 547; Monongahela &c. Co. v. Pittsburgh &c. Co., 196 Pa. St. 25, 46 Atl. 99, 79 Am. St. 685; Brightwell v. Mallory, 10 Yerg. (Tenn.) 196; Harrison v. Vines, 46 Tex. 15, 21.

[11] 4 Thomp. Corp. (2nd ed.), § 3480; Cook Corporations (7th. ed.), § 14. The certificate is the evidence of the ownership of the stock and not the stock it-

necessarily constitute the holder an owner of the shares it represents,[12] and a person whose name appears in the list of stockholders in the company's books[13] will usually be entitled to transfer his stock,[14] to receive dividends,[15] and to vote in corporation meetings,[16] and may be held liable as a stockholder,[17] even though a certificate has not been issued to him,[18] or he has pledged[19] or assigned it. But the possession of a certificate, made out in the holder's name, or indorsed with a power of attorney to transfer the stock on the company's books,[20] is prima

self. Higgins v. Lawringle, 154 Ill. 301, 40 N. E. 362; Hawley v. Brumagin, 33 Cal. 394; Winslow v. Fletcher, 53 Conn. 390, 4 Atl. 250, 52 Am. Rep. 122; Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. 832.

[12] Baker v. Woolston, 27 Kans. 185.

[13] Vail v. Hamilton, 85 N. Y. 453, 20 Hun 355. See Hawley v. Upton, 102 U. S. 314, 26 L. ed. 179; New Hampshire &c. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300.

[14] National Bank v. Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039; Cincinnati &c. R. Co. v. Pearce, 28 Ind. 502; First Nat. Bank v. Gifford, 47 Iowa 575; Butterfield v. Spencer, 1 Bosw. (N. Y.) 1.

[15] McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341; Ellis v. Proprietors, 2 Pick. (Mass.) 243.

[16] Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; State v. Ferris, 42 Conn. 560; Beckett v. Houston, 32 Ind. 393.

[17] Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Agricultural Bank v. Wilson, 24 Maine 273. See Henkle v. Salem Mfg. Co., 39 Ohio St. 547.

[18] Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Fulgam v. Macon &c. R. Co., 44 Ga. 597; Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015; Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90. See also Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710, Ann. Cas. 1917 E, 191.

[19] Vail v. Upton, 85 N. Y. 453, 20 Hun 355.

[20] As to the effect of such a blank indorsement, see Fraser v. Charleston, 11 S. Car. 486; Leavitt v. Fisher, 4 Duer (N. Y.) 1. As to the other modes of transfer, see Cook Corporations (7th. ed.), § 375. Under the law of Massachusetts, shares of stock may be effectually transferred by delivery of the certificate with a power of attorney to transfer the same on the books of the company, signed in blank. Andrews v. Worcester &c. R. Co., 159 Mass. 64, 33 N. E. 1109.

facie evidence of the holder's title to the shares it represents.[21] And the owner of stock has a right to receive a certificate as a voucher for his title, if he asks for it.[22] But the books of the company are generally the final evidence as to who are stockholders,[23] and a certificate, apart from the ownership of the shares it represents, may be said to be worthless.[24]

§ 93 (79). Certificates—How far negotiable—Shares are personal property.—It follows, from what has been stated, that such certificates are not strictly negotiable,[25] but the shares which they

[21] Walker v. Detroit Transit &c. Co., 47 Mich. 338, 11 N. W. 187. That it is only a convenient evidence of the holder's title, see Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193; In re Putman, 193 Fed. 464; Cincinnati &c. R. Co. v. Pearce, 28 Ind. 502; Slipher v. Earhart, 83 Ind. 173; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; United States Radiator Co. v. State, 208 N. Y. 144, 101 N. E. 783, 46 L. R. A. (N. S.) 585 n.

[22] National Bank v. Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336, 347; Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193; Rio Grande &c. Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; 4 Thomp. Corp. (2d. ed.), § 3455 et seq.

[23] Dows v. Naper, 91 Ill. 44, 71 Am. Dec. 337; New Albany &c. R. Co. v. McCormick, 10 Ind. 499; Morrill v. Little Falls &c. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; New Hampshire &c. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300. See generally as to when and how far this rule is applicable, 3 Elliott Ev., § 1946. See also Chesapeake &c. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890. While between the parties a provision requiring the transfer of stock on the corporation books is inoperative, yet as against the corporation and others the assignment is imperfect and executory until perfected on the books of the corporation. Noble v. Turner, 69 Md. 519, 16 Atl. 124; Topeka Mfg. Co. v. Hale, 39 Kans. 23, 17 Pac. 601.

[24] Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

[25] Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 960; East Birmingham &c. Co. v. Dennis, 85 Ala. 565, 5 So. 679, 2 L. R. A. 836, 7 Am. St. 73; Clark v. American Coal Co., 86 Iowa 436, 53 N. W. 291, 17 L. R. A. 557; Sewall v. Boston Water-power Co., 86 Mass. 277, 81 Am. Dec. 701; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107; Mechanics' Bank v. New York &c. R. Co., 13 N. Y.

represent may be sold[26] as any other personal property,[27] and the certificates will pass as incident to the shares. But holders of stock who transfer their corporate certificates to others by indorsement in blank or by delivery when so indorsed, and corporations who issue certificates[28] which state on their face that the shares are fully paid up and which contain no notice of the

599, 627; Knox v. Eden &c. Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. 700. See also Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. 158, and notes.

[26] Stock may be sold on execution in nearly all the states.

[27] Nearly all of the states provide by statute that shares of stock shall be personal property. Such a provision is merely declaratory of the common law. Mohawk &c. R. Co. v. Clute, 4 Paige Ch. (N. Y.) 384, 393; 2 Cook Corporations (7th. ed.), § 331; 8 Thompson Corp., § 3465. The rule is the same where all the corporate property is real estate. Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 585. See generally to the effect that shares are personal property, Seward v. Rising Sun, 79 Ind. 351, 13 Am. & Eng. R. Cas. 315; Jellenik v. Huron &c. Co., 82 Fed. 778; Berney Nat. Bank v. Pinckard, 87 Ala. 577, 6 So. 364, 30 Am. & Eng. Corp. Cas. 52; Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 Pac. 658, 9 Am. St. 245; Southwestern R. Co. v. Thomason, 40 Ga. 408; Watson v. Molden, 10 Idaho 570, 79 Pac. 503; Cooper v. Corbin, 105 Ill. 224, 13 Am. & Eng. R. Cas. 394; Fahrig v. Milwaukee &c. Co., 113 Ill. App. 525; Allen v. Pegram, 16 Iowa 163; Weaver v. Barden, 49 N. Y. 286; Bradley v. Bander, 36 Ohio St. 35, 38 Am. Rep. 547; Budd v. Multnomah St. R. Co., 12 Ore. 272, 7 Pac. 99, 53 Am. Rep. 355; Lipscomb's Admr. v. Condon, 56 W. Va. 392, 49 S. E. 92, 67 L. R. A. 670.

[28] Where spurious and fraudulent certificates of stock are issued by the officers of a corporation under its seal and their genuineness affirmed by such officers in answer to inquiries from an intending purchaser, the corporation is liable on such certificates to a bona fide purchaser for value. Fifth Ave. Bank v. Forty-second St. &c. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331 n, 33 Am. St. 712; Mutual Life Ins. Co. v. Forty-second St. &c. R. Co., 74 Hun 505, 26 N. Y. S. 545; Citizens' Nat. Bank v. Cincinnati &c. R. Co., 29 Wkly. Law Bul. 15. See Ryder v. Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251. But where the certificates were issued in pursuance of a fraudulent scheme to which the assignor was a party, the assignee acquires no rights superior to those of his assignor. Brown v. Duluth &c. R. Co., 53 Fed. 889.

claims of the corporation[29] are held so far estopped[30] by the apparent ability to convey a good title to the shares which their

[29] Where no lien upon shares is given to the company by the charter or by a general law for debts or unpaid calls due the company, the ecertificate should set out the claim of lein so as to notify all purchasers. 4 Thomp. Corp. (2d. ed.), § 4004. Where the certificate states that it represents paid-up stock, the corporation can not deny that fact after it has passed into the hands of a bona fide purchaser. Steacy v. Little Rock &c. R. Co., 5 Dill. (U. S.) 348, Fed. Cas. No. 13329; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814; 1 Cook Corporations (7th ed.), § 50. And it seems that the purchaser may assume that stock is paid up, when he purchases in the open market, in the absence of anything to give him notice to the contrary, and he will be protected. Foreman v. Bigelow, 4 Cliff. (U. S.) 508, Fed. Cas. No. 4934; Cleveland &c. Co. v. Texas &c. R. Co., 27 Fed. 250; Dupont v. Tilden, 42 Fed. 87; Keystone Bridge Co. v. McCluney, 8 Mo. App. 496; West Nashville &c. Co. v Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. 340, 6 Am. St. 835; Cook Stock and Stockholders, §§ 50, 257. Contra Meyers v. Seeley, 10 Nat. Bank Reg. 411. Certificates of stock ordinarily contain no representations as to whether any equities attach to the shares which they represent, and it is said that a certificate of stock is not negotiable paper and whoever takes it takes it subject to its equities and burdens, and it is not necessary that the certificate contain a statement of the limitations and burdens which the law casts upon all such paper. The omission of such a statement is not a waiver by the corporation of the benefits thereof; and, though the purchaser be ignorant of such equities and burdens, his ignorance does not enable him to hold the paper discharged therefrom. Wherever such paper is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute, whether the party lives in or out of the state. Hammond v Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 960; Craig v. Hesperia &c. Co., 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. 316; Hollins v. St. Paul &c. R. Co., 29 N. Y. St. 208, 9 N. Y. S. 909.

[30] Even though certificates are altogether spurious, the company issuing them can be compelled to indemnify one who purchases them in good faith from the person to whom it issued them. Kisterbock's Appeal, 127 Pa. 601, 18 Atl. 381, 14 Am. St. 868. See also Thomp. Corp. (2d. ed.), § 4145 et seq. The corporation will be estopped to deny that stock is fully paid after certificates which were paid in property that the corporation was authorized to take in payment for stock have passed into the hands of bona fide purchasers, al-

acts have conferred upon the holder of the certificates,[31] that such certificates are said to possess quasi negotiability.[32] Where, however, a corporation is organized under a public law which provides that the corporation shall have a lien upon all the stock or property of its members invested therein for any indebtedness of such members to the corporation, such law is notice to the world; and, in the absence of any representations as to such lien on the part of the corporation, a purchaser of such stock will

though the property was overvalued. Dupont v. Tilden, 42 Fed. 87. In Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. 222, 7 R. & Corp. L. J. 196, the court says: "We think it is a safer and more reasonable rule to hold that a person taking on pledge a certificate of stock newly issued in his name by an officer of a corporation as security for the private debt of the officer should be required to investigate the title to the stock if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued."

[31] Walker v. Detroit Transit R. Co., 47 Mich. 338, 347, 11 N. W. 187; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Tayler v. Great Indian &c. R. Co., 4 DeG. & J. 559; Cook Corporations (7th. ed.), § 416; 4 Thomp. Corp. (2d. ed.), § 3481. The English courts, however, refuse to follow the American rule as to the quasi negotiability of certificates even where they are issued by an American corporation. Colonial Bank v. Cady, 63 Law T. 27.

[32] Daniel Nego. Instru., § 1708. An owner of stock who permitted a certificate to be issued to another for stock which he had transferred to such other person without consideration, and who takes a blank assignment of such certificate, can hold the stock as against an attaching creditor of that other person. Andrews v. Worcester &c. R. Co., 159 Mass. 64, 33 N. E. 1109. They have, however, been held to be so far non-negotiable instruments that a bona fide purchaser of such certificates standing on the company's books in the name of the former owner, regularly indorsed by him in blank, and stolen from the present owner without his fault, gets no title. East Birmingham Land Co. v. Dennis, 85 Ala. 565, 5 R. & Corp. L. J. 296, 2. L. R. A. 836. See also Masury v. Arkansas Nat. Bank, 93 Fed. 603; Sherwood v. Meadow Valley &c. Co., 50 Cal. 412; Barstow v. Savage &c. Co., 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; Knot v. Eden &c. Co., 148 N. Y. 441, 42 N. E. 988, 31 L. R. A. 779, 51 Am. St. 700.

take it subject to such lien.[33] Agreements between the corporation and its stockholders that the stock shall be non-assessable have been upheld, as between them, in numerous cases, but creditors may attack such agreements in a proper case.[34]

§ 94 (80). **New certificates in place of lost—Fraud.**—"A bond of indemnity may be required by a corporation as a condition of issuing new certificates of stock for those that have been lost, where the owner is an assignee and has never had possession of the old certificates, and the lapse of time is not so great as to preclude danger of their reappearance."[35] A purchaser of corporate stock receiving new certificates therefor, signed by the proper officers, although issued through their fraud, is, if he acts in good faith, and without notice, entitled to be protected as a bona fide purchaser. He owes no duty, ordinarily, to the corporation to see to it that the seller surrenders any old certificates and transfers them on the books of the corporation,[36] and the

[33] Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 960.

[34] Both of these propositions are either expressly decided or conceded in the following cases: Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Dickerman v. Northern Trust Co., 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 319; Lum v. American Wheel &c. Co., 165 Cal. 657, 133 Pac. 303, Ann. Cas. 1915A, 816, and note; Wall v. Basin Min. Co., 16 Idaho 317, 101 Pac. 733, 22 L. R. A. (N. S.) 1013 and note. Additional authorities will be found in the notes referred to. See also post §§ 105, 106.

[35] Guilford v. Western Union Tel. Co., 43 Minn. 434, 46 N. W. 70. See also State v. New Orleans &c. Exch., 114 La. 324, 38 So. 204; Butler v. Glen Cove Starch Co., 18 Hun (N. Y.) 47; Travers v. North Carolina R. Co., 133 N. Car. 322, 45 S. E. 651; Galveston City Co. v. Sibley, 56 Tex. 269. Where, on application to a company to register a transfer of stock, the company sent a letter giving notice of it to the holder of stock on the register, and stating that, unless she advised them to the contrary, the stock would be transferred in their books; and she failed to answer the letter; and the company subsequently registered the transfer,—she was held not estopped from showing that her signature to the transfer was a forgery, and demanding to have her name replaced on the register as holder of the stock. Barton v. London &c. R. Co., L. R. 24 Q. B. D. 77.

[36] Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L.

corporation may be held liable to damages for the fraud of its officers in issuing such stock, where it cannot be compelled to issue valid shares in place of those fraudulently issued for the reason that this would cause an overissue of its capital stock.[37] On the other hand, it has been held that if a purchaser exhibits to the corporation a forged assignment of stock, and thus obtains a new certificate, which he sells, he may become liable to the corporation which he has deceived by impliedly representing that the signature is genuine,[38] and it has also been held that one who receives stock from an agent to secure the agent's own private debt, knowing that the surrender of the old certificate is a prerequisite to the issue of the new, without making any inquiry as to whether it has been surrendered, is not a bona fide purchaser and cannot hold the corporation liable in damages.[39] The issue of new certificates of stock in place of other certificates, properly issued, which have been lost, does not, however, constitute an overissue of stock.[40]

R. A. 716, 15 Am. St. 185. See also American Wire Nail Co. v. Bayless, 91 Ky. 94, 15 S. W. 10; Salisbury Mills v. Townsend, 109 Mass. 115; New York &c. R. Co. v. Schuyler, 34 N. Y. 30. But see Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. ed. 385. This case is severely criticised in 29 Alb. Law. Jour. 364, and in Lowell Transfer of Stock, § 112, n. 2. See further upon the general subject, 4 Thomp. Corp. (2d ed.), § 3566, et seq.

[37] Western Un. Tel. Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. 586; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231; Tome v. Parkersburg R. Co., 39 Md. 36, 17 Am. Rep. 540; Western &c. R. Co. v. Franklin Bank, 60 Md. 36; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Titus v. Great Western &c. Co., 61 N. Y. 237; Cleveland &c. R. Co. v. Robbins, 35 Ohio St. 483; Kisterbochs' Appeal, 127 Pa. St. 601, 18 Atl. 381, 14 Am. St. 868.

[38] Boston &c. R. Co. v. Richardson, 135 Mass. 473.

[39] Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. 222. See also Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. ed. 385; Hall v. Rose Hill &c. Co., 70 Ill. 673; Seligson v. Brown, 61 Tex. 114, 10 Am. & Eng. Corp. Cas. 143.

[40] Allen v. South B. R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. 185; Kinnan v. Forty-second St. R. Co., 1 Misc. 457, 21 N. Y. S. 789, affirmed in 140 N. Y. 183, 35 N. E. 498.

§ 95 (81). **Preferred stock.**—Preferred stock is usually issued in exchange for common stock as an inducement for the shareholders to advance money to meet certain exigencies which arise in prosecuting the corporate enterprises; or as security to the holders of stock in the more prosperous of two consolidating companies; or in exchange for mortgage bonds of the corporation.[41] But authority to issue such stock and sell it upon the market is frequently given by statute, and it seems that, as it is not against public policy and amounts virtually to a mere contract on the part of the stockholders as to how they shall divide the profits, they may agree in the beginning and provide in the by-laws for the classification of the stock into common and preferred, when where the statute is silent upon the subject,[42] or issue it thereafter with unanimous consent of the stockholders.[43] It has been held that it cannot be issued to raise money to pay a dividend on the common stock.[44] To induce investors to take the stock it is usually provided that the holder shall be entitled to payment of a certain dividend out of the accrued profits not necessary for the operation of the road or for repairs,[45] or reason-

[41] A mortgagee who exchanges his bonds for preferred stock is no longer a creditor, but becomes a stockholder, with a stockholder's rights and liabilities. St. John v. Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743. His claims are subject to all mortgages executed before or after his stock was issued. King v. Ohio &c. R. Co., 12 Chi. Leg. News 219, 2 Fed. 36; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. ed. 769.

[42] Hamlin v. Toledo &c. R. Co., 78 Fed. 664, 670, 36 L. R. A. 826; Cratty v. Peoria &c. Assn., 219 Ill. 516, 76 N. E. 707; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Kent v. Quicksilver Mining Co., 78 N. Y. 159; South &c. Brewery Co., R. L. R. 31, Ch. Div. 261; Lindley Companies, § 396; 1 Cook Corp. (7th. ed.), § 268; 4 Thomp. Corp. (2d. ed.), § 3586. But see Guinness v. Land Corp., L. R. 22, Ch. Div. 349; Ashbury v. Watson, L. R. 30, Ch. Div. 376, 16 Am. & Eng. Corp. Cas. 383.

[43] Toledo &c. R. Co. v. Continental Trust Co., 95 Fed. 497; Higgins v. Sansingh, 154 Ill. 301, 40 N. E. 362; Knoxville &c. R. Co. v. Knoxville, 98 Tenn. 1, 37 S. W. 883, Ann. Cas. 1916 D, 476; Gordon v. Richmond &c. R. Co., 78 Va. 501, and post, § 102.

[44] Hoole v. Great Western R. Co., L. R. 3, ch. 262.

[45] It has been held that earnings should go toward the payment of a floating debt in preference to the payment of dividends on the pre-

able improvements,[46] before dividends are paid to the holders of common stock,[47] and this is the reason it is called preferred stock. It usually gives priority of dividends but not priority of assets or capital.[48]

§ 96 (82). When preferred stock may be issued—Rights and remedies of dissenting stockholders.—Such stock, at least when not provided for when the company is organized, can only be issued where the power to issue it is conferred by charter or by statute,[49] unless it is issued by agreement of all the stockholders.[50] It is held in a recent case, however, that it may be

ferred stock. Chaffee v. Rutland R. Co., 55 Vt. 110. See Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362. But as to the payment of a debt not yet due, see Hazeltine v. Belfast &c. R. Co., 79 Maine 411, 10 Atl. 328, 1 Am. St. 330.

[46] New York &c. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. ed. 363, reversing 15 Fed. 575, where it was held that payment of dividends could be enforced before the improvements contemplated were made.

[47] Totten v. Tison, 54 Ga. 139; Bates v. Androscoggin &c. R. Co., 49 Maine 491; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Prouty v. Michigan &c. R. Co., 1 Hun (N. Y.) 655; Chaffee v. Rutland R. Co., 55 Vt. 110; Henry v. Great Northern &c. R. Co., 4 Kay & J. (Eng. Ch.) 1; Cook Corp. (7th. ed.), § 270.

[48] Jones v. Concord &c. R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. 650. But it may also give priority as against holders of the common stock.

[49] Sturge v. Eastern &c. R. Co., 7 De G., M. & G. 158; Bard v. Banigan, 39 Fed. 13; Williston v. Michigan &c. R. Co., 95 Mass. 400; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Campbell v. American &c. Co., 122 N. Y. 455, 25 N. E. 853, 11 L. R. A. 596. The power will not be extended by implication. Covington &c. Co. v. Sargent, 1 Cin. Super. Ct 354, Melhado v. Hamilton, 28 L. T. (N. S.) 578, 29 L. T. (N. S.) 364; Harrison v. Mexican R. Co., L. R. 19 Eq. Cas. 358. Power granted to a railroad company to do all the lawful acts incident to its corporate existence, with "such additional powers as may be convenient for the due and successful execution of the powers granted," does not authorize it to guarantee a specific dividend on its stock, as a premium to induce a subscription even though the guaranty be partly in consideration of services rendered the company. Elevator Co. v. Memphis &c. R. Co., 85 Tenn. 703, 4 Am. St. 798, 5 S. W. 52.

[50] Harrison v. Mexican R. Co., 44 L. J. (Ch.) 403; Higgins v. Lan-

issued unless prohibited.[51] A stockholder may waive objections to such an issue, and long acquiescence will be construed to be such a waiver.[52] "A privilege given by a railroad company to its stockholders to exchange common stock for preferred stock must be exercised within a reasonable time, and a tender of common stock and the additional sum required for an exchange, made thirty-three years after the privilege was conferred, is not made within a reasonable time."[53] It has been held that the directors cannot issue such stock under an authorization to the corporation to do so.[54] but this decision seems of doubtful soundness, and, in any event, such an issue is susceptible of ratification by a sub-

singh, 154 Ill. 301, 40 N. E. 362; Kent v. Quicksilver Mining Co., 78 N. Y. 159, 178. See also Pollitz v. Wabash R. Co., 150 App. Div. 709, 135 N. Y. S. 785. Some cases have held that under a power to increase the capital stock and to borrow money such stock could be issued by a majority vote. Hazlehurst v. Savannah &c. R. Co., 43 Ga. 13 (1875); West Chester &c. R. Co. v. Jackson, 77 Pa. St. 321; Gordon v. Richmond &c. R. Co., 78 Va. 501, 22 Am. & Eng. R. Cas. 33; Rutland &c. R. Co. v. Thrall, 35 Vt. 536. But this has been denied. Kent v. Quicksilver Mining Co., 78 N. Y. 159. It has been held that the power to issue preferred stock is given by the grant of a right to raise funds by a sale of stock. Chaffee v. Rutland &c. R. Co., 55 Vt. 110, 16 Am. & Eng. R. Cas. 408. See also State v. Cheraw &c. R. Co., 16 S. Car. 524.

[51] Continental Trust Co. v. Toledo &c. R. Co., 86 Fed. 929, citing and relying on Hamlin v. Toledo &c. R. Co., 78 Fed. 664, 36 L. R. A. 826. See last preceding section on this subject. But see Mercantile Trust Co. v. Baltimore &c. R. Co., 82 Fed. 360.

[52] Branch v. Atlantic &c. R. Co., 3 Woods (U. S.) 481, Fed. Cas. No. 1807; Taylor v. South &c. R. Co., 13 Fed. 152; Hoyt v. Quicksilver Mining Co., 17 Hun (N. Y.) 169; Kent v. Quicksilver Min. Co., 78 N. Y. 159. See Banigan v. Bard, 134 U. S. 291, 10 Sup. Ct. 565, 33 L. ed. 932; Hazlehurst v. Savannah &c. R. Co., 43 Ga. 13; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156, 163, and compare American Tube Works v. Boston &c. Co., 139 Mass. 5, 29 N. E. 63; National Bank v. Drake, 29 Kans. 311, 44 Am. Rep. 646.

[53] Holland v. Cheshire R. Co., 151 Mass. 231, 24 N. E. 206, 8 R. & Corp. L. J. 49. See also Pearson v. London &c. R. Co., 14 Sim. 541.

[54] McLaughlin v. Detroit &c. R. Co., 8 Mich. 99.

sequent vote of the stockholders.[55] A dissenting stockholder may enjoin an unauthorized issue of preferred stock,[56] or may have it set aside by suit brought within a reasonable time.[57]

§ 97 (83). Holder of preferred stock not a creditor—His rights and remedies.—The holder of preferred stock is not a creditor of the corporation,[58] but simply a shareholder with a superior right to receive dividends when the profits are insufficient to pay them to all the holders of stock,[59] and he can claim the payment of

[55] McLaughlin v. Detroit &c. R. Co., 8 Mich. 99.

[56] Sturge v. Eastern R. Co., 7 DeG., M. & G. 158; Moss v. Syers, 32 L. J. Ch. 711; Hutton v. Scarborough &c. Co., 4 DeG., J. & S. 672; Kent v. Quicksilver &c. Co., 78 N. Y. 159.

[57] A long delay in bringing suit or other acquiescence may confirm the issue. Taylor v. South &c. R. Co., 4 Woods (U. S.) 575, 13 Fed. 152 (10 years); Banigan v. Bard, 134 U. S. 291, 10 Sup. Ct. 565, 33 L. ed. 932; Hazlehurst v. Savannah &c. R. Co., 43 Ga. 13; Kent v. Quicksilver Mining Co., 78 N. Y. 159 (4 years). One accepting such stock can not question its validity in a suit for the purchase price, if the other stockholders do not complain. Evansville &c. R. Co. v. Evansville, 15 Ind. 395, 415. See also Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279. But compare Reed v. Boston &c. Co., 141 Mass. 454, 5 N. E. 852; Anthony v. Household &c. Co., 16 R. I. 571, 18 Atl. 176, 5 L. R. A. 575.

[58] Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. ed. 769; Bailey v. Railroad Co., 1 Dill. (U. S.) 174, Fed. Cas. No. 736; National Elec. Signaling Co. v. Fessenden, 207 Fed. 915; Grover v. Cavanaugh, 40 Ind. App. 340, 82 N. E. 104; Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362; Field v. Lamson &c. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136, and note; McLaughlin v. Detroit &c. R. Co., 8 Mich. 100; Taft v. Hartford &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Chaffee v. Rutland &c. R. Co., 55 Vt. 110; Birch v. Cropper, 61 Law T. 621. See also Smith v. Alabama &c. Assn., 123 Ala. 538, 26 So. 232; Guaranty Trust Co. v. Galveston City R. Co., 107 Fed. 311; People v. St. Louis &c. R. Co., 176 Ill. 512, 52 N. E. 292; note in 73 Am. St. 228; 4 Thomp. Corp. (2d. ed.), § 3607. But see Emerson v. New York &c. R. Co., 14 R. I. 555, 16 Am. & Eng. R. Cas. 404; Burt v. Rattle, 31 Ohio St. 116. See generally Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am St. 212, and note.

[59] St. John v. Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743; Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. ed. 769; Bates v. Androscoggin &c. R. Co., 49

dividends only out of the net earnings.[60] The ownership of such stock usually confers upon the holder a right to vote it at meetings of the shareholders; but it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote as stockholders at such meetings.[61] The directors may be compelled by suit to pay dividends on preferred stock before otherwise disposing of net earnings,[62] subject to a reason-

Maine 491; Taft v. Hartford &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Chaffee v. Rutland &c. R. Co., 55 Vt. 110; State v. Cheraw &c. R. Co., 16 S. Car. 524, and other authorities cited in last preceding note. Held subject to the statutory liability of a stockholder in Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743. It has also been held that preferred stock can not be charged as a liability in determining whether the indebtedness of a railroad company is so great as to justify it in refusing to run separate passenger trains. People v. St. Louis &c. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656.

[60] Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362; Lockhart v. Van Alstyne, 31 Mich. 76; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 233; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Henry v. Great Northern &c. R. Co., 1 De Gex & J. 606. But see Cotting v. New York &c. R. Co., 54 Conn. 156, 5 Atl. 851; Totten v. Tilson, 54 Ga. 139. And sometimes the statute otherwise provides. Williams v. Parker, 136 Mass. 204. See also Rogers v. Citizens' Nat. Bank, 93 Md. 613, 49 Atl. 843. As to what are net earnings, see St. John v. Erie R. Co., 10 Blatchf. (U. S.) 271, Fed. Cas. No. 12226, affirmed in 22 Wall. 136; Union Pac. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274; Warren v. King, 108 U. S. 389, 398, 27 L. ed. 769; Phillips v. Eastern R. Co., 138 Mass. 122; Van Dyck v. McQuade, 86 N. Y. 38.

[61] Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496. To same effect is State v. Swanger, 190 Mo. 561, 89 S. W. 872, 2 L. R. A. (N. S.) 121 n, 4 Ann. Cas. 563. See also note in 73 Am. St. 239.

[62] Bailey v. Hannibal &c. R. Co., 1 Dill (U. S.) 174, Fed. Cas. No. 736; Mackintosh v. Flint &c. R. Co., 32 Fed. 350; Bates v. Androscoggin &c. R. Co., 49 Maine 491; Hazeltine v. Belfast &c. R. Co., 30 Am. & Eng. R. Cas. 528, 79 Maine 411, 1 Am. St. 330; Barnard v. Vermont &c. R. Co., 89 Mass. 512; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157, 180; Dickinson v. Chesapeake &c. R. Co., 7 W. Va. 390. See also Storrow v. Texas &c. Assn., 87 Fed. 612; Cotting v. New York &c. R. Co., 54 Conn. 156, 5 Atl. 851.

able discretion on their part as to making improvements,[63] and, possibly, as to the liquidation of a floating debt,[64] yet no suit can be maintained, as a rule, against the corporation for a preferred dividend until profits with which to pay it have accrued and it has been declared.[65] But if such accrued profits be appropriated to the payment of dividends on common stock while the guaranteed dividends on preferred stock remain unpaid, payment of such common dividends may be enjoined.[66] Or, if the payment is actually made, the holder of preferred stock is entitled to interest on his accrued dividends from the date of this misappropriation.[67] If from a lack of net profits with which to pay the guaranteed dividends upon preferred stock they should remain unpaid for a time, the holders are entitled to payment of arrears before any dividends are declared on common stock,[68] unless dif-

[63] New York &c. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. ed. 363. It is suggested that where arrears are not collectible the corporation should not be allowed to retain profits for the making of improvements before paying dividends on preferred stock, as such power would give the corporation an opportunity to defeat the preference by waiting to declare a dividend until the profits sufficed for dividends on all the capital stock. 1 Cook Corp. (7th. ed.), § 272.

[64] Chaffee v. Rutland &c. R. Co., 55 Vt. 110; Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362. See Hazeltine v. Belfast &c. R. Co., 79 Maine 411, 10 Atl. 328, 1 Am. St. 330, 30 Am. & Eng. R. Cas. 528.

[65] Taft v. Hartford &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Webb v. Earle, L. R. 20 Eq. 556. The declaration of such a dividend is very largely within the discretion of the directors as long as they act in good faith. Field v. Lamson, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136, and note.

[66] Union Pac. R. Co. v. United States, 99 U. S. 402, 25 L. ed. 274; Prouty v. Michigan Southern &c. R. Co., 1 Hun (N. Y.) 655; Taft v. Hartford &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575.

[67] Prouty v. Michigan &c. R. Co., 1 Hun (N. Y.) 655; Henry v. Great Northern R. Co., 4 K. & J. 1. See also Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157, 4 Am. & Eng. R. Cas. 265.

[68] Bailey v. Hannibal &c. R. Co., 1 Dill. (U. S.) 174, Fed Cas. No. 736, 17 Wall. (U. S.) 96, 21 L. ed. 611; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 233; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Henry v. Great Northern R. Co., 1 DeG. & J. 606 (1857); Matthews v. Great Northern &c. R. Co., 28 L. J. Ch. 375 (1859). But

ferent provision is made by statute or otherwise.[69] It should be observed, however, that nearly all the matters stated in this section may be determined by some statute, or, in some instances, by the contract; and, even though stock is designated as preferred stock, the mere name does not make it such if it does not possess the characteristics and qualities of preferred stock.[70]

§ 98 (84). **Rights of preferred stockholders after payment of guaranteed dividend—Future dividends.**—After the holders of preferred stock have received the dividend guaranteed to them, the net profits remaining on hand may be devoted to the payment of dividends on the common stock alone, until the holders of such stock have received a dividend equal to that paid on the preferred stock, after which all stock shares equally in any additional dividends which the net earnings on hand may suffice to pay.[71] Such is the general rule in the absence of anything to the contrary, but the matter is frequently determined by statute or

see contra Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362; Gordon v. Richmond &c. R. Co., 78 Va. 501. See where there was a reduction of stock because of losses, Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N. S.) 1034.

[69] See Dent v. London &c. Co., L. R. 16, Ch. Div. 344; Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 362, where a by-law was held to have controlling influence. See Companies Clauses, Act of 1863, 26 and 27 Vict., ch. 16, § 14, for statute provision limiting the fund for the payment of preferred dividends to the profits of the current year.

[70] Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. 212 n. See also for cases in which the stock was held not to be preferred and the holder was held to be a creditor rather than a stockholder, or the like; Totten v. Tison, 54 Ga. 139; Savannah Real Estate &c. Co. v. Silverberg, 108 Ga. 281, 33 S. E. 908; Cratty v. Peoria &c. Assn., 219 Ill. 516, 76 N. E. 707; Burt v. Rattle, 31 Ohio St. 116.

[71] Sternbergh v. Brock, 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 1081, 133 Am. St. 877 (citing text); Bailey v. Hannibal &c. R. Co., 1 Dillon (U. S.) 174, Fed. Cas. No. 736, 17 Wall. (U. S.) 96, 21 L. ed. 611; Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 64 Atl. 829, 7 A. & E. Ann. Cas. 613; Allen v. Londonderry &c. R. Co., 25 W. R. 524. See also Coggeshall v. Georgia Land &c. Co., 14 Ga. App. 637, 82 S. E. 156. But compare Scott v. Baltimore &c. R. Co., 93 Md. 475, 49 Atl. 327.

provision in the by-laws and certificates. The preferred shareholders are not entitled to have the profits reserved to pay their dividends which may accrue in the future. An assignment of the stock carries with it all arrears of dividends,[72] not expressly separated and reserved to the grantor,[73] unless the dividend has been declared before the transfer.[74]

§ 99. **Deferred dividends—Stock reduction.**—The reduction, on account of business losses, of preferred stock, distributed ratably among its holders, does not affect their right, when profits are subsequently earned, to the arrears or deferred dividends where the stock is cumulative, but the surplus of capital remaining after such reduction cannot be used for that purpose so as to give the preferred stockholders a preference[75] out of the capital.

§ 100 (85). **Rights of preferred stockholders on dissolution.**—Unless a preference in repayment of capital invested has been specially contracted for[76] or is given by statute,[77] the holder of preferred stock shares equally with common shareholders in a distribution of assets upon dissolution.[78] His claims are subject

[72] Manning v. Quicksilver Min. Co., 24 Hun (N. Y.) 360; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449.

[73] Jermain v. Lake Shore &c. R. Co., 91 N. Y. 483.

[74] Ohio, City of, v. Cleveland &c. R. Co., 6 Ohio St. 490.

[75] Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N. S.) 1034 n, 112 Am. St. 607, 6 Ann. Cas. 213.

[76] Bangor &c. Co., Re, L. R. 20 Eq. 59; Bridgewater Nav. Co., Re, L. R. 39 Ch. Div. 1, 58 Law T. 476, 26 Am. & Eng. Corp. Cas. 386. That it may be so contracted for unless prohibited, see Guaranty Trust Co. v. Galveston &c. R. Co., 107 Fed. 311; Continental Trust Co. v. Toledo &c. R. Co., 86 Fed. 929 (as where it is made a lien on the property and earnings); Wilson v. Parvin, 119 Fed. 652; Kent v. Honsinger, 167 Fed. 619 (same).

[77] McGregor v. Home Ins. Co., 33 N. J. Eq. 181.

[78] McGregor v. Home Ins. Co., 33 N. J. Eq. 181; Bridgewater Nav. Co., Re, 58 Law T. 476; Birch v. Cropper, 61 Law T. 621; Griffith v. Paget, L. R. 6, Ch. Div. 511. See also Lloyd v. Penna Electric &c. Co., 75 N. J. Eq. 263, 72 Atl. 16, 21 L. R. A. (N. S.) 228 n, 20 Ann. Cas. 119. But see Gordon v. Richmond &c. R. Co., 78 Va. 501, 22 Am. & Eng. R. Cas. 33. So, when

to those of creditors for debts contracted subsequently to the issue of his stock,[79] and, in general, unless otherwise provided by statute, he has no greater rights as against creditors than common stockholders in the way of priority over other creditors in the distribution of its assets.[80] This results from the rule that he is a stockholder and not a creditor.[81]

§ 101 (86). Guaranteed, interest-bearing, income and debenture stock.—An agreement on the part of the corporation to pay a specified dividend or interest on its stock absolutely and at all events, whether any profits are earned or not, would be contrary to public policy and void,[82] and it has been held that a railroad company cannot, without legislative authority, contract to pay interest on its stock before the road is completed or any income

the capital stock is reduced the preferred stock may be reduced equally with the common. Barrow &c. Co., Re, 59 Law T. 500; Great Western &c. Co., Re, 56 L. J. Ch. 3; Bannatyne v. Direct &c. Co., 55 Law T. 716. Unless it is preferred as to assets as well as dividends. Quebrada R., Re. 60 Law T. 482. But see American Pastoral Co., Re, 62 Law T. 625. See generally note in 73 Am. St. 243.

[79] Warren v. King, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. ed. 769; St. John v. Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743; King v. Ohio, &c. R. Co., 2 Fed. 36; Birch v. Cropper, 61 Law T. 621. See also Ellsworth v. Lyons, 181 Fed. 55.

[80] Rider v. John D. Delker, &c. Co., 145 Ky. 634, 140 S. W. 1011, 39 L. R. A. (N. S.) 1007 n; Fryer v. Wiedemann, 148 Ky. 379, 146 S. W. 752, 39 L. R. A. (N. S.) 1011; Weaver Power Co. v. Elk Mountain Mill Co., 154 N. Car. 77, 69 S. E. 747 (so holding even where the stock certificate gave him "a preferred lien on the assets of the company." This was held to give him a preference over the common stockholders on liquidation, but not over creditors).

[81] See ante, § 97. This section is quoted in Heller v. Nat. Marine Bank, 89 Md. 602, 43 Atl. 800, 44 L. R. A. 438, 443, 73 Am. St. 212 n. See also Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362.

[82] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Chase v. Vanderbilt, 62 N. Y. 307; Ohio College v. Rosenthal, 45 Ohio St. 183, 12 N. E. 665; State v. Cheraw, &c. R. Co., 16 S. Car. 524; Elevator Co. v. Memphis, &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798; Crawford v. Northeastern, &c. R. Co., 3 Jur. (N. S.) 1093. See also Jorguson v. Apex Gold Mines Co., 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637 n.

received.[83] But in Massachusetts, the statute provides for "special stock," upon which a semi-annual dividend or interest is payable absolutely and as a debt, without regard to the corporate earnings,[84] and, even in the absence of express legislative authority, a corporation has the same power to guaranty dividends and provide for interest out of the profits that it has to issue preferred stock, for such guaranteed or interest-bearing stock is vir-

[83] Painesville, &c. R. Co. v. King, 17 Ohio St. 500, 534, 49 Am. Dec. 478. See also Troy, &c. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; Pittsburgh, &c. R. Co. v. Allegheny Co., 63 Pa. St. 126. But we believe that a railroad company ordinarily has power, for the purpose of getting subscriptions and money to build the road, to issue interest-bearing stock or to agree to pay interest until the road is built or until some other designated time, at least where the interest, although accrued, is not to be paid until the road is in operation and sufficient profits are made. Thus, in the case of Evansville, &c. R. Co. v. Evansville, 15 Ind. 395, 415, the court said: "The work of constructing a railroad sometimes requires years for its completion, and dividends to stockholders seldom, if ever, accrue before the road is fully completed. If interest were not allowed upon the stock, those who invest their funds at the beginning would receive nothing more than those who take their stock when the work may be nearly completed. We see nothing against the law or public policy in this arrangement. The construction of a railroad requires a large outlay of capital, much of which must be furnished before the work can progress to any considerable extent. If interest is allowed on the stock from the time it is paid for, there is an inducement for capitalists to invest early and furnish the means to successfully carry on the enterprise." To the same effect are the decisions in Richardson v. Vermont, &c. Co., 44 Vt. 613, 618; Wright v. Vermont, &c. R. Corp., 12 Cush. (Mass.) 68; Barnard v. Vermont, &c. R. Co., 7 Allen (Mass.) 512; Ohio v. Cleveland, &c. R. Co., 6 Ohio St. 489; Rutland, &c. Co. v. Thrall, 35 Vt. 536; Milwaukee, &c. R. Co. v. Field, 12 Wis. 340. See also Waterman v. Troy &c. R. Co., 8 Gray (Mass.) 433. See also People v. Preston, 140 N. Y. 549, 35 N. E. 979, 24 L. R. A. 57; Miller v. Pittsburgh &c. R. Co., 40 Pa. St. 237, 80 Am. Dec. 570.

[84] American Tube Works v. Boston, &c. Co., 139 Mass. 5, 29 N. E. 63; Reed v. Boston, &c. Co., 141 Mass. 454, 5 N. E. 852, 12 Am. & Eng. Corp. Cas. 153; Williams v. Parker, 136 Mass. 204, 6 Am. & Eng. Corp. Cas. 566. See also Gordon v. Richmond, &c. R. Co., 78 Va. 501.

tually preferred stock and nothing more.[85] It will generally be construed to mean that the interest or dividend is payable only out of the profits and upheld on that ground,[86] but much, of course, will necessarily depend upon the language used, and where the interest is guaranteed absolutely and the corporation also agrees to liquidate the principal at a specified time, or the like, so that the so-called stock is in reality an interest-bearing debenture the relation created thereby will be that of debtor and creditor and the holder will not be merely a shareholder as he would be if it were preferred or interest-bearing stock payable only out of the profits.[87] Its validity, therefore, would depend upon some other power than the power to issue preferred stock.[88] Sometimes an agreement is made between two corporations whereby one guarantees to the other a certain specified annual dividend on its capital stock. Such an agreement is held to be a guarantee to the corporation and not to the stockholders sev-

[85] Taft v. Hartford, &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Miller v. Ratterman, 47 Ohio St. 141, 24 N. E. 496; Henry v. Great Northern &c. R. Co., 4 K. & J. 1. See also note in 73 Am. St. 227, 228, 235, and In re Fechheimer Fisbel Co., 212 Fed. 357. Except that the dividends are more clearly cumulative and more clearly show that the holder is entitled to arrears as soon as the profits are earned and the dividend declared. Boardman v. Lake Shore, &c. R. Co., 84 N. Y. 157; Field v. Lamson, &c. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136; Henry v. Great Northern, &c. R. Co., 4 K. & J. 1.

[86] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Waterman v. Troy, &c. R. Co., 8 Gray (Mass.) 433; Scott v. Central R. Co., 52 Barb. (N. Y.) 45; Taft v. Hartford, &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575; Field v. Lamson, &c. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136, and note. See also Barnard v. Vermont, &c. R. Co., 7 Allen (Mass.) 512; Richardson v. Vermont, &c. R. Co., 44 Vt. 613.

[87] Burt v. Rattle, 31 Ohio St. 116; Totten v. Tison, 54 Ga. 139; West Chester, &c. R. Co. v. Jackson, 77 Pa. St. 321.

[88] Quoted in Heller v. National Marine Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 443, 73 Am. St. 212 n, where it is said that ordinarily preferred stock does not constitute a lien upon the franchise and property, but that merely calling it preferred stock does not necessarily have the effect of making it ordinary preferred stock, and that the statute may make it a lien, although the term "preferred stock" is used.

erally, and the directors have power to modify the terms of such guaranty, and their action in so doing will not be disturbed by the courts where they have acted fairly and in good faith.[89]

§ 102 (87). **Increase and reduction of capital stock.**—A corporation can neither increase nor reduce its fixed capital stock without legislative authority.[90] The power to increase it can not, ordinarily, be implied from the power to reduce it,[91] nor can the power to reduce it be implied from the mere power to increase it.[92] And when the statute confers the power to increase or decrease the capital stock the statutory method of procedure should be substantially followed.[93] Unless otherwise provided, the

89 Flagg v. Manhattan R. Co., 10 Fed. 413, 20 Blatch. (U. S.) 142; Beveridge v. New York, &c. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. A guarantee of a specified dividend upon the stock of another company absolutely and without regard to profits was held unauthorized and not enforceable in Elevator Co. v. Memphis, &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798. It has also been held that a railroad company has no implied power to guarantee the interest and dividends on stocks and bonds of a summer hotel, although the business of the railroad might thus be increased. Western, &c. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887, and note.

90 Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Railway Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Winters v. Armstrong, 37 Fed. 508; Peck v. Elliott, 79 Fed. 10; Tschumi v. Hills, 6 Kans. App. 549, 51 Pac. 619; Oldtown R. Co. v. Veazie, 39 Maine 571; Mechanic's Bank v. New York, &c. R. Co., 13 N. Y. 599, 617; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Cooke v. Marshall, 191 Pa. St. 315, 43 Atl. 314, 64 L. R. A. 413. See also Leurey v. Bank of Baton Rouge, 131 La. 30, 58 So. 1022, Ann. Cas. 1913E, 1168, and note. But the authorized issue of bonds convertible into stock may, in effect, amount to authority to increase the capital stock to that extent. Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637; Ramsey v. Erie R. Co., 38 How. Prac. (N. Y.) 193, 216. See also Van Allen v. Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515.

91 Lexington, &c. R. Co. v. Chandler, 13 Met. (Mass.) 311; Sutherland v. Olcott, 95 N. Y. 93.

92 Seignouret v. Home Ins. Co., 24 Fed. 332, 10 Am. & Eng. Corp Cas. 131, 25 Am. L. R. 29; Sutherland v. Olcott, 95 N. Y. 93. See also Smith v. Goldsworthy, 4 Q. B. (4 Ad. & E. N. S.) 430.

93 Spring Co. v. Knowlton, 103

power so given can only be exercised by the stockholders, and not by the directors.[94] But the stockholders may be estopped by their acquiescence, in such a case, from questioning the legality of an increase or decrease made by the directors.[95] When the capital stock is increased new shares of stock are generally issued and sold, but the existing shareholders ordinarily have the first right to take their proportionate part of the new stock,[96] al-

U. S. 49, 26 L. ed. 347; Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417, 32 L. ed. 779; Fishback v. Fond du Lac, &c. R. Co., 158 Fed. 88; Grangers', &c. Co. v. Kamper, 73 Ala. 325, 6 Am. & Eng. Corp. Cas. 497; Smith v. Franklin Park Land, &c. Co., 168 Mass. 345, 47 N. E. 409; State v. McGrath, 86 Mo. 239; Knowlton v. Congress Spring Co., 57 N. Y. 518; Wheeler, In re, 2 Abb. Pr. N. S. (N. Y.) 361. But compare Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227, 34 Am. & Eng. Corp. Cas. 624. The general rule is that if the stock is an over-issue so that there is an entire want of power the holder does not become a stockholder, and is not liable as such, but if there is power to issue it, mere informalities or irregularities will not vitiate it and one who receives it may become liable as a stockholder. This distinction is drawn in Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968, where the authorities are reviewed and distinguished.

[94] Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Pollitz v. Wabash R. Co., 167 Fed. 145; Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Wolf v. Chicago, &c. Co., 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369; McNulta v. Corn Belt Bank, 164 Ill. 427, 45 N. E. 954, 56 Am. St. 203; Percy v. Millaudon, 9 La. 326 (6 Mart. N. S. 616), 7 Am. Dec. 196; Gill v. Balis, 72 Mo. 424. But see Sutherland v. Olcott, 95 N. Y. 93.

[95] Chicago City R. Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Payson v. Stoever, 2 Dill. (U. S.) 428, Fed. Cas. No. 10863; Sewell's Case, L. R. 3 Ch. 131. See also Columbia Nat. Bank v. Matthews, 85 Fed. 934; Barrows v. Natchang, &c. Co., 72 Conn. 658, 45 Atl. 951; Veeder v. Mudgett, 95 N. Y. 309.

[96] Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Jones v. Morrison, 31 Minn. 140, 6 N. W. 854; Humboldt, &c. Assn. v. Stevens, 34 Nebr. 528, 52 N. W. 568, 33 Am. St. 654; Jones v. Concord, &c. R. Co., 67 N. H. 119, 38 Atl. 120, 68 Am. St. 650; Way v. American, &c. Co., 60 N. J. Eq. 263, 47 Atl. 44; Cunningham's Appeal, 108 Pa. St. 546; Stokes v. Continental Trust Co., 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969 n, 9 Ann. Cas. 738, and note. The authorities are elaborately reviewed in the opinion in the case last above cited. See also Glenn

though they have no right to demand a gratuitous distribution of it to them[97] and may lose their right to take precedence of other purchasers by failing to act within the time specified, or within a reasonable time.[98] The capital stock may also be increased, when authorized, by means of stock dividends.[99] The ordinary method of reducing the capital stock is by refunding to each stockholder a proportionate part of the surplus over and above the amount of the capital stock as reduced.[1] So, a corporation

v. Kittanning Brewing Co., 259 Pa. St. 510, 103 Atl. 340, L. R. A. 1918D, 738, and note Ann. Cas. 1918D, 769: It has, however, been questioned whether this rule applies to a railroad company existing independently of the stockholders with its economy and modes of action defined by statute. And it does not apply to old shares purchased by the corporation and reissued. State v. Smith, 48 Vt. 266; nor it seems, to original shares of authorized stock remaining undisposed of. Curry v. Scott, 54 Pa. St. 270, 275, or stock issued to purchase property which will become part of the common property. Meredith v. New Jersey, &c. Co., 55 N. J. Eq. 211, 37 Atl. 539, (affirmed 56 N. J. Eq. 454, 41 Atl. 1116); Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325.

97 Miller v. Illinois, &c. R. Co., 24 Barb. (N. Y.) 312, 330; Brown v. Florida, &c. R. Co., 19 Fla. 472.

98 Hart v. St. Charles St. R. Co., 30 La. Ann. 1, 758; Baltimore City Pass. R. Co. v. Hambleton, 77 Md. 341, 26 Atl. 279. See also Crosby v. Stratton, 17 Colo. 212, 68 Pac. 130; Terry v. Eagle Lock Co., 47 Conn. 141; Brown v. Florida, &c. R. Co., 19 Fla. 472; Sewall v. Eastern R. Co., 9 Cush. (Mass.) 5; Hammond v. Edison, &c. Co., 131 Mich. 79, 90 N. W. 1040, 100 Am. St. 582.

99 4 Thomp. Corp. (2d ed.), § 3629; See also Lantz v. Moeller, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N. S.) 68, and note, where many additional authorities are cited and reviewed. In one sense, perhaps, a stock dividend does not increase the capital stock as the theory is that, while it may increase the number of shares, the aggregate interest of the stockholders is the same as before; in other words, it simply dilutes the existing share to the extent that new shares are issued. Williams v. Western Union Tel. Co., 93 N. Y. 162. Therefore it is not taxable under the Federal Income Tax Law as income of a stockholder. Eisner v. Mecomber (U. S.), 40 Sup. Ct. 189.

1 Seeley v. New York Exchange Bank, 8 Daly (N. Y.) 400, affirmed in 78 N. Y. 608; Strong v. Brooklyn &c. R. Co., 93 N. Y. 426; Currier v. Lebanon &c. Co., 56 N. H. 262. See also 4 Thomp. Corp. (2d. ed.), § 3864. But a stockholder in a bank which reduces its capital stock to the extent that its capital has become impaired on account of bad debts, to prevent an assessment upon the stockholders, cannot com-

may effect a reduction by purchasing and cancelling its own shares, where it has authority to do so.[2] This, however, will not necessarily operate as a reduction, unless so intended, for they may be resold and reissued.[3] And the mere power to reduce the capital stock does not authorize the corporation to purchase the shares of particular shareholders, over the objection of others, on such terms or in such a way as to benefit the former at the expense of the latter.[4] Nor is the "writing off" of a loss, which the corporation has suffered, such a reduction as is generally authorized.[5]

§ 103 (88). **Watered stock.**—What is known as "watered stock" is fictitiously paid-up stock or stock which does not repre-

pel a distribution of money afterward realized on the "bad debts," as in case of a reduction where the capital is unimpaired. McCann v. First Nat. Bank, 112 Ind. 354, 14 N. E. 251.

[2] Chicago &c. R. Co. v. Marseilles, 84 Ill. 145; Williams v. Savage &c. Co., 3 Md. Ch. 418; Berger v. United States Steel Corp., 63 N. J. Eq. 809, 53 Atl. 68; Taylor v. Miami &c. Co., 6 Ohio 176; State v. Smith, 48 Vt. 266; Gatling Gun &c., Re, 62 L. T. R. 312; British &c. Trustee &c. v. Couper (1894), A. C. 399. See article in 8 So. Law Rev. U. S. 369; Tulare &c. Dist. v. Waweah &c. Co., 112 Cal. xvii, 44 Pac. 662.

[3] State Bank v. Fox, 3 Blatchf. (U. S.) 431; Bank v. Wickersham, 99 Cal. 655, 34 Pac. 444; Clapp v. Peterson, 104 Ill. 26; Jefferson v. Burford (Ky.), 17 S. W. 855; Commonwealth v. Boston &c. R. Co., 142 Mass. 146, 7 N. E. 716; City Bank v. Bruce, 17 N. Y. 507; Vail v. Hamilton, 85 N. Y. 453. See also Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657; Leonard v. Draper, 187 Mass. 536, 73 N. E. 644; Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. 569; Berger v. United States Steel Corp., 63 N. J. Eq. 809, 53 Atl. 68; San Antonio Hdw. Co. v. Sanger (Tex. Civ. App.), 151 S. W. 1104.

[4] Chetlain v. Republic Life Ins. Co., 86 Ill. 220; Gill v. Balis, 72 Mo. 424; Currier v. Lebanon &c. Co., 56 N. H. 262. See also Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542; Coquard v. St. Louis Cotton Compress Co. (Mo.), 7 S. W. 176. In a somewhat similar case where the majority attempted a fraudulent reduction of stock at the expense of the minority, although the authorized form was followed, the court annulled the entire transaction. Theis v. Durr, 125 Wis. 651, 104 N. W. 985, 1 L. R. A. (N. S.) 571n, 110 Am. St. 880.

[5] Ebbow Vale &c. Co., In re, L. R. 4 Ch. Div. 832; Seignouret v. Home Ins. Co., 24 Fed. 332.

sent its face or par value in money or money's worth added to the assets of the corporation,[6] but which is issued as a bonus or exchanged for money, property, services,[7] or demands upon the company[8] of a less value than the par value of the stock.[9] Such issues of stock are frequently said to be contrary to public policy,[10] and a fraud upon those who take it as full paid stock,[11]

[6] Handley v. Stutz, 139 U. S. 417, 418, 11 Sup. Ct. 530, 35 L. ed. 227; Cook Corporations (7th. ed.), § 28. See also State v. Citizens' Light &c. Co., 172 Ala. 232, 55 So. 193; Lantz v. Moeller, 76 Wash. 429, 136 Pac. 687, 50 L. R. A. (N. S.) 68, and note.

[7] Capital stock to an amount far beyond the actual cost of the road is frequently issued to the construction company in payment for building it and this method is not subject to condemnation. Cook Corp. (7th. ed.), § 29.

[8] Such stock is frequently issued in the shape of a stock dividend when no corresponding amount has been added to the value of the company's property.

[9] Sturges v. Stetson, 1 Biss. (U. S.) 246, Fed. Cas. No. 13568; Tobey v. Robinson, 99 Ill. 222, 228; Oliphant v. Woodburn &c. Co., 63 Iowa 332, 19 N. W. 212; Barnes v. Brown, 80 N. Y. 527, 534. But see Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Lorillard v. Clyde, 86 N. Y. 384. Mere inflation, or gratuitous distribution of stock upon no increase of value in the corporate property, is condemned by law. Williams v. Western Union Tel. Co., 93 N. Y. 162.

[10] Sturges v. Stetson, 1 Biss. (U. S.) 246, Fed. Cas. No. 13568; Oliphant v. Woodburn Coal &c. Co., 63 Iowa 332, 19 N. W. 212; State v. Atchinson &c. R. Co., 24 Nebr. 143, 38 N. W. 43; Morrow v. Iron &c. Co., 87 Tenn. 262, 10 S. W. 495, 5 R. & Corp. L. J. 206. Quo warranto does not lie against a corporation in Minnesota merely because it issues its stock below par. State v. Minnesota &c. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510n. But such act is said to be clearly ultra vires. Fisk v. Chicago &c. R. Co., 53 Barb. (N. Y.) 513. And it is held that a forfeiture may be decreed for ultra vires acts which are detrimental to the interests of the public. People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; People v. Improvement Co., 103 Ill. 491; State v. People's &c. Assn., 42 Ohio St. 579; Commonwealth v. Delaware &c. Canal Co., 43 Pa. St. 295. See also Holman v. State, 105 Ind. 569, 5 N. E. 702. And the constitutions and laws of many of the states provide that railroad corporations shall not issue stock excepting for money or its equivalent actually received. And the modern railroad commission and public utilities laws usually regulate the matter. See also Fitzpatrick v. Dispatch &c. Co., 83 Ala. 604, 2 So. 727, 19 Am. & Eng. Corp. Cas. 423.

[11] Barnes v. Brown, 80 N. Y. 527.

and are sometimes said to be cause for the forfeiture of the company's charter. In Louisiana the constitution provides that this penalty shall follow such action.[12]

§ 104 (89). **Watered stock not absolutely void.**—The stock so issued is not, however, absolutely void, where it is not an overissue, even though there is a constitutional provision declaring fictitious issues void, if there is a consideration to support it, as where it is sold below par, or issued in payment for work or property of less than its face value.[13] The general rule, however, is that if it is an overissue in excess of the amount limited by charter, it is ultra vires and void even in the hands of a bona fide purchaser.[14] And the stock, if issued gratuitously,[15] or such a proportion of it as will reduce the face value of the shares held

[12] Const. La., § 266.

[13] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Coit v. Gold Amalgamated Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. ed. 420; Memphis &c. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. ed. 595; Gasquet v. Cresent City &c. Co., 49 Fed. 496; Northern Trust Co. v. Columbia &c. Co., 75 Fed. 936; Dickerman v. Northern Trust Co., 80 Fed. 450; Lindsey v. Pasco Power &c. Co., 203 Fed. 251; Stein v. Howard, 65 Cal. 616, 4 Pac. 662; California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190; Peoria R. Co. v. Thompson, 103 Ill. 187; Knapp v. Publishers, 127 Mo. 53, 29 S. W. 885; Lorillard v. Clyde, 86 N. Y. 384; Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145; Ambrose &c. Co., In re, L. R. A. 14 Ch. Div. 390, 394. But see New Castle &c. R. Co. v. Simpson, 21 Fed. 533, 23 Fed. 214; Sturges v. Stetson, 1 Biss. (U. S.) 246, Fed. Cas. No. 13568; Fisk v. Chicago &c. R. Co., 53 Barb. (N. Y.) 513.

[14] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Granger &c. Ins. Co. v. Kamper, 73 Ala. 325; McChord v. Ohio &c. R. Co., 13 Ind. 220; Ryder v. Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251; Pruitt v. Oklahoma &c. Baking Co., 39 Okla. 509, 135 Pac. 730; Kampman v. Tarver, 87 Tex. 491, 29 S. W. 768; First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. 841, and note. See, however, where it is merely spurious and not an overissue, American Wire Nail Co. v. Bayless, 91 Ky. 94, 15 S. W. 10; Manhattan Beach Co. v. Harned, 27 Fed. 484, 23 Blatchf. (U. S.) 494; note in 87 Am. St. 849, 850, 856; New York &c. R. Co. v. Schuyler, 38 Barb. (N. Y.) 534.

[15] Gilman &c. R. Co. v. Kelly, 77 Ill. 426. See also Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. ed. 516; Donald v. American &c. Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116.

to the sum paid for the stock,[16] may, it has been held, where it is sold below par, be at the suit of a dissenting stockholder,[17] recalled for cancellation from the person to whom it is issued,[18] or from his grantee with notice,[19] though not, it would seem, from a bona fide purchaser for value.[20] Participating stockholders[21] and their transferrees with notice[22] are estopped to complain of the transaction,[23] at least when not absolutely void as an overissue, as is the corporation itself, in the absence of fraud.[24]

[16] Sturges v. Stetson, 1 Biss. (U. S.) 246, Fed. Cas. No. 13568; Fosdick v. Sturges, 1 Biss. (U. S.) 255, Fed. Cas. No. 4956.

[17] Since each shareholder may insist that every other shareholder shall contribute his ratable part of the company's capital for the common benefit, he may maintain a suit to cancel an unauthorized issue of shares purporting to be paid-up, when they, in reality, are not. See 5 Fletcher Cyc. Corp., § 3517 et seq. See also Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048; Kimball v. New England &c. R. Co., 69 N. H. 485, 45 Atl. 253; note in 87 Am. St. 855, also showing when corporation may maintain such a suit.

[18] Gilman &c. R. Co. v. Kelly, 77 Ill. 426.

[19] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Boulton Carbon Co. v. Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649.

[20] 1 Cook Corporations, (7th. ed)., § 31.

[21] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Wood v. Corry &c. Co., 44 Fed. 146; Richardson v. Chicago &c. Co., 131 Cal. xviii, 63 Pac. 74; Callahan v. Windsor, 78 Iowa 193, 42 N. W. 652; World &c. Co. v. Hamilton &c. Co., 123 Mich. 620, 82 N. E. 528; Gold Co., In re, L. R. 11, Ch. Div. 701, 712. Dissenting Stockholders may have relief. Taylor v. Philadelphia &c. R. Co., 7 Fed. 381; Parsons v. Joseph, 92 Ala. 403, 8 So. 788; Perry v. Tuscaloosa &c. Co., 93 Ala. 364, 9 So. 217. If they act promptly. Taylor v. South &c. R. Co., 13 Fed. 152.

[22] Syracuse &c. R. Co., In re, 91 N. Y. 1; Foster v. Seymour, 23 Fed. 65; Ffooks v. Southwestern R. Co., 1 Sm. & G. 142.

[23] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; St. Louis &c. R. Co. v. Tiernan, 37 Kans. 606, 15 Pac. 544, where the giving of $3,600,000 of stock and payment of $200,000 to directors of the company for an old road-bed which cost them $15,000, when all the stockholders and directors knew all the facts, was held to give the corporation no cause to complain, 40 Am. & Eng. R. Cas. 525, 544. See also Arkansas &c. Co. v. Farmers' &c. Co., 13 Colo. 587, 22 Pac. 954; First Nat. Bank v. Gustin &c. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676n, 18 Am. St. 510.

[24] See Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. ed. 423. See also

§ 105 (90). Rights of creditors and liabilities of holders of watered stock.—But the creditors of the corporation may generally compel the persons receiving stock to pay the par value in full,[25] or such part thereof as may be necessary to pay their claims.[26] It is held, however, by the Supreme Court of the United States, in a comparatively recent case, which has met with some criticism, that "an active corporation may, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained," and that it may give the purchaser paid-up stock as a bonus without making him liable on such stock.[27]

generally as to where there is or is not an estoppel. First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. 841, 856-860.

[25] Upton v. Tribicock, 91 U. S. 45, 23 L. ed. 203; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363; Flinn v. Bagley, 7 Fed. 785; Stutz v. Handley, 41 Fed. 531; Mann v. Cooke, 20 Conn. 178; Hickling v. Wilson, 104 Ill. 54; Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214; Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521; Skrainka v. Allen, 76 Mo. 384; Fisher v. Seligman, 7 Mo. App. 383; Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466, 499. But in Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. ed. 88, it was held that a railroad company in financial straits could settle with a creditor by giving him stock at twenty cents on the dollar, and that other corporate creditors could not afterwards hold him liable for the additional eighty cents.

[26] Scovill v. Thayer, 105 U. S. 143, 155, 26 L. ed. 968. Where a director takes shares of the capital stock as a bonus for his influence, he becomes subject to the liabilities of a shareholder who has taken stock but has not paid for the same, and a contract between him and the company that the stock shall not be assessable cannot relieve him of the liability. Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. ed. 516; Allen v. Fairbanks, 45 Fed. 445; Haldeman v. Ainslie, 82 Ky. 395; McAvity v. Lincoln &c. Co., 82 Maine 504, 20 Atl. 82. But see Christensen v. Quintard, 29 N. Y. S. 61, where it is held that a reduction of forty per cent. in the price of stock and bonds was a donation by the corporation to induce him to take the stock, and a judgment creditor cannot claim it in payment of his debt. See also Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648.

[27] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227. See also Hospes v. Northwestern &c. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; Coe v. East & W. R. Co., 52 Fed. 531. See criticism in 2 Thomp. Corp. (1st ed.),

§ 106 (91). Stock paid for by overvalued property—Sale of stock on market.—Where the stock is paid for in property at a fraudulent overvaluation, the corporate creditor may usually compel a rescission of the sale in toto,[28] and the restoration of the stock or its actual value,[29] unless he knew of the manner in which payment was made for the stock before he became a creditor.[30] It has also been stated broadly that the creditor must affirm in toto or rescind in toto and that he cannot hold the owner of such stock liable as for an unpaid subscription.[31] But most of the cases relied upon in support of this doctrine are cases in which the stock was not issued upon an ordinary subscription, but in payment for the construction of the road, or the like,[32] and, whatever may be the rule in such cases, it seems unjust and in violation of true principle, to extend it to ordinary subscriptions.[33] It is a questionable doctrine at the best, and, upon prin-

§ 2092. And see also Jackson v. Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449.

[28] Currie's Case, 3 DeG., J. & S. 367; Phelan v. Hazard, 5 Dill. (U. S.) 45, Fed. Cas. No. 11068; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Van Cott v. Van Brunt, 82 N. Y. 535. See also Las Ovar Co. v. Davis, 35 App. D. C. 372.

[29] In Iowa (Osgood v. King, 42 Iowa 478), and in Missouri (Schickle v. Watts, 94 Mo. 410, 7 S. W. 274) it is held that the court will decree the payment of the difference between the value of the property or labor given in exchange for stock and its par value, even where no fraud is proven, but this is against the weight of authority. See also Libby v. Tobey, 82 Maine 397, 19 Atl. 904.

[30] Bank of Fort Madison v. Alden, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. ed. 725; Nicrosi v. Calera Land Co., 115 Ala. 429, 22 So. 147; Ten-Eyck v. Pontiac &c. R. Co., 114 Mich. 494, 72 N. W. 362; 4 Thomp. Corp. (2d ed.), § 3913.

[31] 1 Cook Corp. (7th. ed.), § 46; See 7 A. L. R. 972n, for cases on both sides. Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20. In Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. ed. 104, the stock was not shown to be of any value and the court said that the creditors were not, therefore, wronged. In Anderson's Case, L. R. 7 Ch. Div. 75, the court said that the contract was for paid-up stock and to hold the owner liable as a "contributory" would be to make a new contract.

[32] Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. ed. 104; Van Cott v. Van Brunt, 82 N. Y. 535; Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145.

[33] See Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. ed. 1111; Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363; Elyton

ciple, a subscriber who fraudulently pays his subscription in grossly overvalued property, or property which is practically worthless or of so little value that the transaction should be presumed to be fraudulent, and receives paid-up stock therefor, ought not to be allowed to take advantage of his own fraud and thus occupy a better position than one who has paid cash and acted in good faith, but should, on the contrary, be held liable to creditors whom he has misled for the entire subscription, where the property is worthless, and, it would seem, for the difference between the value of the property and the par value of the stock, in other cases, if the corporation is insolvent.[34] But, in the absence

&c. Co. v. Birmingham &c. Co., 92 Ala. 407, 9 So. 129, 12 L. R. A. 307, 25 Am. St. 65; Garrett v. Kansas &c. Co., 113 Mo. 330, 20 S. W. 965, 35 Am. St. 713; Macbeth v. Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am. St. 670; Gogebic &c. Co. v. Iron Chief &c. Co., 78 Wis. 427, 47 N. W. 726, 23 Am. St. 417. These cases would also seem to deny the universal application of the alleged rule stated in Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968, and other cases cited in a previous note, that the transaction must first be set aside as fraudulent in a proceeding for that purpose before the subscriber can be held liable in any event, and we see no reason for such rule in the code states where the same court has both law and equity jurisdiction and can give full relief in one proceeding.

[34] Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585; 36 L. ed. 363; Coleman v. Howe, 154 Ill. 458, 39 N. E. 725, 45 Am. St. 133; Osgood v. King, 42 Iowa 478; Jackson v. Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449; Chisholm v. Forny, 65 Iowa 333, 21 N. W. 644; Boulton &c. Co. v. Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649; Peninsular &c. Bank v. Black &c. Co., 105 Mich. 535, 63 N. W. 514; First Nat. Bank v. Gustin &c. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. 510; Clayton v. Oregon &c. Co., 109 N. Car. 385, 14 S. E. 36. See also Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521; McAvity v. Lincoln Pulp &c. Co., 82 Maine 504, 20 Atl. 82; Douglass v. Ireland, 73 N. Y. 100; Gamble v. Queens &c. Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527. The whole subject is well considered in the recent case of McBeth v. Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am. St. 670, and note, and it is there held that the creditor or one standing in his stead may maintain a suit in equity as for an unpaid subscription and compel the stockholder to respond for the difference between the actual value of the property and the par value of the stock. See also Elyton Land Co. v. Birmingham &c. Co., 92 Ala. 407, 9 So. 129, 25 Am. St. 65; Sprague v. Nat. Bank, 172 Ill. 149, 50 N. E. 19, 64 Am. St.

of fraud, paid-up stock may be paid for in property such as the corporation may use, and it will make no difference that the property afterwards turns out to be of less value than was supposed.[35] The court, in such a case, "will treat that as payment which the parties have agreed should be payment."[36] And it has been held that the fact that one to whom such stock is issued returns a portion of it as a gift to the corporation to sell below par and place the proceeds in the corporate treasury does not necessarily prove that the property was overvalued.[37] A corporation may also distribute to its shareholders, or sell on the market, shares of stock which it has purchased under legislative authority,[38] or which have been forfeited to it for non-payment of calls.[39]

§ 107 (92). **Sale and transfer of stock.**—Shares of stock (unless declared by statute to be real estate) are personal property,[40]

17; Chisholm v. Forny, 65 Iowa 333, 21 N. W. 664; Wishard v. Hansen, 99 Iowa 307, 68 N. W. 691, 61 Am. St. 238; Barron v. Burrill, 86 Maine 66, 29 Atl. 939, and note to Buck v. Ross, 68 Conn. 29, 35 Atl. 763, 57 Am. St. 67, 68. But compare Colonial Trust Co. v. McMillan, 188 Mo. 547, 87 S. W. 933, 107 Am. St. 335.

[35] Coit v. North Carolina Gold &c. Co., 14 Fed. 12, affirmed in 119 U. S. 343; Clow v. Brown, 134 Ind. 287, 31 N. E. 361; Young v. Erie &c. Co., 65 Mich. 111, 31 N. W. 814; Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Schenck v. Andrews, 57 N. Y. 133; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630; Drummond's Case, L. R. 4 Ch. Ap. 772.

[36] Phelan v. Hazard, 5 Dill. (U. S.) 45, Fed. Cas. No. 11068, 6 Cent. L. J. 109; Peck v. Coalfield Coal Co., 11 Ill. App. 88; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Brant v. Ehlen, 59 Md. 1.

[37] Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288. See also Davis v. Montgomery &c. Co., 101 Ala. 121, 127, 8 So. 496, 48 Am. St. 17. But compare Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551; Alling v. Ward, 30 Am. & Eng. Corp. Cas. 133.

[38] Commonwealth v. Boston &c. R. Co., 142 Mass. 146, 7 N. E. 716.

[39] Otter v. Brevoort &c. Co., 50 Barb. (N. Y.) 247; People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344, 371; Ramwells Case, 50 L. J. (Ch.) 827.

[40] Ante, § 93; note to Klaus, In re, 26 Am. L. Reg. (N. S.) 98, 104. And as such they are generally held in America to be included in the phrase "goods, wares and merchandise" in the statute of frauds. Baltzen v. Nicolay, 53 N. Y. 467; Hinchman v. Lincoln, 124

and are subject to purchase and sale by natural persons as other personal property, and the right of the shareholder to sell and transfer his stock cannot be taken away or unduly restrained by a by-law of the corporation.[41] But reasonable regulations may be made regarding the formalities of transfer and registration,[42] and such matters are frequently provided for in the charter or by statute.[43] The transfer, in order to relieve the trans-

U. S. 38, 8 Sup. Ct. 369, 31 L. ed. 337; North v. Forest, 15 Com. 400; Pray v. Mitchell, 60 Maine 430; Boardman v Cutter, 128 Mass. 388; Tisdale v. Harris, 20 Pick. (Mass.) 9; Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190. But see Vawter v. Griffin, 40 Ind. 593, 602; Green v. Brookins, 23 Mich. 48, 9 Am. Rep. 74; Gadsden v. Lance, 1 McMull. Eq. (S. Car.) 87, 37 Am. Dec. 548. Statute does not apply to agreement to take back or repurchase. Fitzpatrick v. Woodruff, 96 N. Y. 561; Richter v. Frank, 41 Fed. 859; Thorndike v. Locke, 98 Mass. 340; Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. 500; Fay v. Wheeler, 44 Vt. 292.

[41] Morgan v. Struthers, 131 U. S. 246, 252, 9 Sup. Ct. 726, 33 L. ed. 132; Gould v. Head, 41 Fed. 240, 247; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Moore v. Bank, 52 Mo. 377; Feckheimer v. Nat. Bank, 79 Va. 80; Klaus, In re, 67 Wis. 401, 29 N. W. 582. See also Victor G. Bloede Co. v. Bloede, 84 Md. 129, 57 Am. St. 373, and note. Such a by-law would be in restraint of trade and contrary to public policy But an agreement between members not to sell except on certain conditions may be valid if not in unreasonable restraint of trade. 1 Cook Corporations (7th. ed.), § 332. See also Dane v. Young, 61 Maine 160; Metropolitan &c. Bank v. St. Louis &c. Co., 36 Fed. 722; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271, and note. The right to sell and transfer stock of a railroad company cannot be exercised to the prejudice of the public in a manner prohibited by law, and illegal agreements for "corners" in stock and the like will not be enforced. Pennsylvania R. Co. v. Commonwealth (Pa.), 7 Atl. 368; Town Council v. Elliott, 5 Ohio St. 113; Sampson v. Shaw, 101 Mass. 145; Leonard v. Poole, 114, N. Y. 371, 21 N. E. 707. But see Havemeyer v. Havemeyer, 11 J. & S. (N. Y.) 506, 13 J. & S. (N. Y.) 464, 86 N. Y. 618. As to such contracts and wager or gambling contracts generally, see 1 Cook Corp. (7th ed.), §§ 333, 341, 348.

[42] Planters' &c. Co. v. Selma Sav. Bank, 63 Ala. 585; Dane v. Young, 61 Maine 160; Bishop v. Globe &c. Co., 135 Mass. 132, 5 Am. & Eng. Cas. 161. See also note in 57 Am. St. 379.

[43] Fractor's &c. Co. v. Marine &c. Co., 31 La. Ann. 149; Merrill v. Call, 15 Main 428; Shepherd's Case, L. R. 2 Eq. 564; Smith v. Canada Car Co., 6 Upper Can. Pr. 107.

feror from further liability, must usually be absolute,[44] and to a person capable of succeeding to his liabilities.[45] Where the shares are not fully paid-up a transfer to an insolvent person, or "man of straw," for the purpose of avoiding liability, cannot be made so as to relieve the transferor from liability to creditors upon his stock.[46] But, as a general rule, a regular transfer of shares of corporate stock will not be disturbed by the courts unless it is satisfactorily shown that it was conditional, designed to serve as collateral or pledge to secure a payment, or was simulated and not intended to transfer the ownership.[47] Stock can generally be completely transferred only on the books of the corporation, and the company is entitled to require proof of the right of the holder of certificates to demand such a transfer.[48] If

[44] National Bank v. Case, 99 U. S. 628, 25 L. ed. 448; Billings v. Robinson, 94 N. Y. 415; Veiller v. Brown, 18 Hun (N. Y.) 571.

[45] See notes in 51 L. R. A. (N. S.) 1051, 1052 and in 30 L. R. A. (N. S.) 283, and see observation and cases cited in Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465, 467, 41 L. ed. 844.

[46] Bowden v. Johnson, 107 U. S. 251, 2 Sup. Ct. 246, 27 L. ed. 386; McDonald v. Dewey, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. ed. 1128, 6 Ann. Cas. 419; Rider v. Morrison, 54 Md. 429; Marcy v. Clark, 17 Mass. 330; McClaren v. Franciscus, 43 Mo. 452; Gaff v. Fiesher, 33 Ohio St. 107; Aultman's Appeal, 98 Pa. St. 505; Dauchy v. Brown, 24 Vt. 197; Mandion v. Firemen's Ins. Co., 11 Rob. (La). 177; Nathan v. Whitlock, 9 Paige (N. Y.) 339.

[47] Small v. Saloy, 42 La. Ann. 183, 7 So. 450. See also Farmers', &c Co. v. Chicago, &c. R. Co., 163 U. S. 31, 16 Sup. Ct. 917, 41 L. ed. 60.

[48] Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Buttrick v. Nashua, &c. R. Co., 62 N. H. 413, 13 Am. St. 578; Bayard v. Farmers', &c. Bank, 52 Pa. St. 232; Davis v. Bank of England, 2 Bing. 393. Transfers of stock in corporations organized under Ky. Gen. Stat., ch. 56, are valid against creditors as well as between the parties, although not recorded in the books of the company. Thurber v. Crump, 86 Ky. 408, 6 S. W. 145. One acting as the agent of a trust company, to enable it to perpetrate a fraud or wrong on the rights of a stockholder, and who has thus acquired possession of certificates of stock, cannot compel a transfer of the stock to him on the books of the corporation. Gould v. Head (C. C. D. Colo.), 7 R. & Corp. L. J. 402, 41 Fed. 240. If the corporation refuses to make the transfer, upon proper request, the party entitled to have it made has his remedy, although there is consid-

it negligently or wrongfully permits stock to be transferred to one having no right to the same, it will be liable to the rightful owner.[49] "The act of a corporation in transferring shares of

erable conflict among the authorities as to whether it is by mandamus, by suit in equity, or by an action at law for damages. See 2 Cook Corporations (7th. ed.), §§ 389-392; Green Mount &c. Co. v. Bulla, 45 Ind. 1; St. Lawrence, &c. Co., Re, 44 N. J. L. 529; Cushman v. Thayer, &c. Co., 76 N. Y. 365, 32 Am. Rep. 315; Doty v. First Nat. Bank, 3 N. Dak. 9, 53 N. W. 77. 17 L. R. A. 259: Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291; State v. Cheraw, R. Co., 16 S. Car. 524; Rio Grande, &c. Co. v. Burns, 82 Tex. 50, 17 S. W. 1043.

[49] Woodhouse v. Crescent Mut. Ins. Co., 35 La. Ann. 238; Pratt v. Boston, &c. R. Co., 126 Mass. 443; Crocker v. Old Colony R. Co., 137 Mass. 417; Livezey v. Northern Pac. R. Co., 157 Pa. St. 75, 27 Atl. 762; Midland R. Co. v. Taylor, 8 H. L. Cases 751, affirming Taylor v. Midland R. Co., 29 L. J. Ch. 731, ante, § 94. Where an executor surrenders stock to a reorganization committee of a corporation, taking therefor negotiable certificates redeemable after a reorganization by a new issue of stock and, after his removal from the executorship, transfers the certificates, which, after several transfers, are taken up by the corporation and new stock issued to the holders in lieu thereof, the corporation is liable to the legatees for the value of the stock at the time of the transfer on the books of the company. Mobile & O. R. Co. v. Humphries, 67 Miss. 35, 7 So. 522, 19 Am. St. 262. If a corporation negligently cancels a person's stock and issues certificates therefor to a third party, the true owner may bring action against the corporation to compel replacement of his stock or its value. St. Romes v. Levee Steam Cotton-Press Co., 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. ed. 289. An agent with power of attorney authorizing him to sell and transfer stock and other securities and property, caused stock belonging to the principal to be transferred to himself on the books of the company, without the knowledge of the principal. The court held that the corporation was liable to the original stockholder. Tafft v. Presidio, &c. R. Co., 84 Cal. 131, reversing 22 Pac. 485, 24 Pac. 436, 11 L. R. A. 125, 18 Am. St. 166, where it was held that the power was sufficient to authorize a transfer to the agent, and the fact that such agent was a director of the corporation would not charge it with notice. A corporation may also be liable to the transferee where it represents that a forged certificate is genuine. Mutual Life Ins. Co. v. Forty-second St., &c. Co., 74 Hun 505, 26 N. Y. S. 545, explaining Fifth Ave. Bank v.

stock without the authority of the owner is not ratified by the latter's having told another agent than the one on whose application the transfer was made that he would not hold him responsible for delivering the certificates to the agent who applied for the transfer."[50]

§ 108 (93). Who may own and transfer shares.—Married women are generally enabled to become the owners of shares of stock, by the statutes of the various states,[51] and also to a limited degree in England.[52] Purchases and sales of stock by an infant are voidable at any time during infancy,[53] or within a reasonable time after becoming of age,[54] as are his other contracts. The corporation, it has been held, is bound to know of the inability of a person who is non compos mentis to make a valid transfer, and may become liable if it permits a registry.[55] A sale of stock by a drunken person will be set aside, unless fairly made and for a sufficient consideration.[56] An unrecorded transfer, made in good faith before assignment by an insolvent, will be protected.[57] But if the transferee delay unreasonably to claim his stock,

Forty-second St., &c. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am St. 712.

[50] Quay v. Presidio, &c. R. Co., 82 Cal. 1, 22 Pac. 925.

[51] Whitters v. Sowles, 38 Fed. 700, construing law of Vermont. A married woman has the legal capacity to receive a transfer of stock in moneyed corporations though the consideration may have been paid entirely by the husband. Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290, 33 L. ed. 531. The wife's capacity to hold and transfer stock is generally determined by the law of her domicile, but that of the domicile of the corporation should also be consulted. Hill v. Pine River Bank, 45 N. H. 300; Cook Corporations (7th. ed.), § 319.

[52] Cook Corporations (7th. ed.), § 319.

[53] Birkenhead, &c. R. Co. v. Pilcher, 5 Exch. 24. Voidable and not void. Smith v. Nashville, &c. R. Co., 91 Tenn. 221, 18 S. W. 546; Lumsden's Case, L. R. 4 Ch. App. C. 31.

[54] Dublin &c. R. Co. v. Black, 8 Exch. 181. But if he does not so disaffirm within a reasonable time (in this case ten months) he will be bound. Ebbett's Case, L. R. 5 Chan. App. C. 302. Even a sale by transfer of the certificate is not binding on an infant. Smith v. Baker, 42 Hun 504.

[55] Chew v. Bank of Baltimore, 14 Md. 299.

[56] Thacrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. ed. 486.

[57] Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351.

it may be awarded to the assignee.[58] An officer or director of the company may buy and sell its stock like any other person, if he acts in good faith and does not mislead the person with whom he deals,[59] and he is not bound to disclose information received by him as such officer.[60] A partner may also sell and transfer partnership stock,[61] but a joint owner cannot transfer the interest of the other joint owner of stock registered in the name of both.[62] Stock may be bought or sold by means of an agent,[63] and the principal will be bound by the acts of the agent done in excess of his authority, if the agent was clothed with apparent authority and the limitations imposed were unknown to the person dealing with him in good faith.[64]

[58] Shipman v. Aetna Ins. Co., 29 Conn. 245.

[59] Trisconi v. Winship, 43 La. Ann. 45, 33 Am. & Eng. Corp. Cas. 271; Board v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Crowell v. Jackson, 53 N. J. L. 656, 23 Atl. 426; Carpenter v. Danforth, 52 Barb. (N. Y.) 581; Cawley, In re, L. R. 42 Ch. Div. 209; But see Grant v. Atrill, 11 Fed. 469; Prewett v. Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. 586; Fisher v. Budlong, 10 R. I. 525; Gilbert's Case, L. R. 5 Ch. App. C. 559; South London &c. Co., In re, L. R. 39 Ch. Div. 324, 60 L. T. R. N. S. 68. See also Steinfeld v. Nielsen, 15 Ariz. 424, 139 Pac. 879.

[60] Board &c. v. Reynolds, 44 Ind. 509.

[61] Quiner v. Marblehead Social Ins. Co., 10 Mass. 476.

[62] Comstock v. Buchanan, 57 Barb. (N. Y.) 127; Standing v. Bowring, L. R. 27 Ch. Div. 341. In most of the states, a joint-tenancy can only be created by an express statement or a manifest intention to create an estate limited to the survivor.

[63] 1 Cook Corporations (7th. ed.), ch. 19. An agent has no further real interest in stock standing in his name than he has in any other property of his principal in his hands. Cook Corporations (7th. ed.), ch. 19, § 321.

[64] McNeil v. Tenth National Bank, 46 N. Y. 325, 7 Am. Rep. 341; Strange v. Houston &c. R. Co., 53 Tex. 162, where the owner of a certificate of stock in an incorporated company, placed his certificate, with a blank transfer indorsed thereon, in the hands of an agent for sale, the agent filled the blank with his own name, and afterward indorsed thereon a transfer from himself to a bona fide purchaser, and it was held that such purchaser took a good title to the stock.

§ 109 (94). **Purchase and sale by trustees and fiduciaries.**—The common-law rule is that guardians, executors and trustees may not use trust funds for the purchase of shares of stock,[65] nor sell shares which form a part of the trust estate,[66] except as empowered to do so by the statute,[67] or by the instrument creating the trust, or directed to do so by a court of chancery.[68] It is held under the English Companies Act of 1845, paragraph 18, that when the names of the executors of a deceased shareholder in a company are placed on the register of shareholders in respect of shares, which belonged to their testator, they become joint-shareholders in their individual capacity, although they may be described as executors in the register; and, consequently, the shares can only be transferred by means of a transfer executed by all of them.[69] If a sale of shares held in trust be made by the trustee without authority he may be compelled to restore the stock with dividends, or to pay over the amount received therefor with interest, at the election of the cestui que trust.[70] And the same rule is enforced where the stock is sold in breach of the trust and converted to the use of the trustee, even though he was

[65] Trafford v. Boehm, 3 Atk. 440 (1746). See also In re Decker, 37 Misc. 527, 76 N. Y. S. 315.

[66] Bohlen's Estate, 75 Penn. St. 304.

[67] See 22 and 23 Victoria, ch. 35, sec. 32, 23 and 24 Victoria, ch. 38.

[68] This is the rule of law in many of the states at the present time. Tucker v. State, Hart, 72 Ind. 242; Kimball v. Reding, 31 N. H. 352, 64 Am. Dec. 333; Ward v. Kitchen, 30 N. J. Eq. 31; King v. Talbot, 40 N. Y. 76; Ihmsen's Appeal, 43 Pa. St. 431; Allen v. Gaillard, 1 S. Car. (Rich. N. S.) 279. This rule stated in the text obtains generally in the United States and England. 1 Cook Corporations (7th. ed.), § 222. Some of the states have upheld the rule that trustees may invest the trust funds in stocks without special authority. Lamar v. Micou, 112 U. S. 452, 5 Sup. Ct. 221, 28 L. ed. 751, and 114 U. S. 218, 5 Sup. Ct. 857, 29 L. ed. 94 (Ga. and Ala.); Gray v. Lynch, 8 Gill (Md.) 403; Smyth v. Burns, 25 Miss. 422; Washington v. Emery, 4 Jones Eq. (N. Car.) 32. See also Boggs v. Adger, 4 Rich. Eq. (S. Car.) 408, and dictum in Hunt, Appellant, 141 Mass. 515, 6 N. E. 554.

[69] Barton v. London &c. R. Co., L. R. 24 Q. B. D. 77.

[70] Harrison v. Harrison, 2 Atk. 121; McKim v. Hibbard, 142 Mass. 422, 8 N. E. 152; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62, 117; Pinkett v. Wright, 2 Hare 120.

empowered to sell.[71] A bona fide purchaser from a trustee without notice takes a good title to the stock transferred.[72] But anything which is sufficient to put the purchaser upon inquiry that would, if reasonably pursued, disclose the real facts, will amount to constructive notice.[73] If the trustee has authority to transfer the stock for any purpose, the purchaser may assume that the proceeds of the sale will be properly disposed of,[74] and he will be protected unless he knows that the sale or pledge is to procure means for the private debts or purposes of the trustee.[75] The corporation is liable to the cestui que trust, if, with notice that stock is held in trust, it permits such stock to be transferred on the books of the company by the trustee without authority.[76] The

[71] McKim v. Hibbard, 142 Mass. 422, 8 N. E. 152.

[72] Smith v. Nashville &c. R. Co., 91 Tenn. 221, 18 S. W. 546; Salisbury Mills v. Townsend, 109 Mass. 115; Cook Corporations (7th. ed.), § 325. The rule is otherwise in England until the purchaser has obtained registry. Shropshire Union R., &c. Co. v. Queen, L. R. 7 H. L. 496; Roots v. Williamson, 58 L. T. R. 802.

[73] Where the stockholder is termed in the certificate a "trustee" or stated therein to hold the shares "in trust," this is notice of everything, which, upon inquiry, the purchaser could ascertain from the cestui que trust. Duncan v. Jaudon, 15 Wall. (U. S.) 165, 176, 21 L. ed. 142; Jaudon v. National City Bank, 8 Blatch. (U. S.) 430, Fed. Cas. No. 7230; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234.

[74] Perry Trusts (6th. ed.), § 225; Ashton v. Atlantic Bank, 85 Mass. 217.

[75] Simons v. Southwestern R. Bank, 5 Rich. Eq. (S. Car.) 270; Duncan v. Jaudon, 15 Wall. (U. S.) 165, 21 L. ed. 142; Jaudon v. National City Bank, 8 Blatch. (U. S.) 450, Fed. Cas. No. 7230.

[76] Bohlen's Estate, 75 Pa. St. 304; Maywood v. Railroad Bank, 5 S. Car. 379; Chapman v. City Council, 30 S. Car. 549, 6 S. E. 158, 3 L. R. A. 311; Barton v. North &c. R. Co., L. R. 38 Ch. D. 458, 58 L. T. R. 549. See Weyer v. Second Nat. Bank, 57 Ind. 198; Stewart v. Fireman's Ins. Co., 53 Md. 564; Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648; Bird v. Chicago &c. R. Co., 137 Mass. 428; Wooten v. Wilmington &c. R. Co., 128 N. Car. 119, 38 S. E. 298, 56 L. R. A. 615. A corporation having issued stock certificates showing on their face that they were to be taken by the holder as devisee under and subject to the provisions of a certain will, is chargeable with notice of the contents of such will and of the trusts imposed thereby, in all subsequent dealings with such shares of stock,

word "trustee" following the holder's name is sufficient notice,[77] and formal notice to a board of directors is notice to the corporation under all future boards.[78]

§ 110 (95). **Right of corporation to buy and sell stock.**—In England it is held that a corporation cannot buy shares of its own stock,[79] unless expressly empowered to do so. In case of a transfer of stock to the corporation[80] or to a trustee in trust for it, where this rule prevails, the transferor is liable on the subscription, and on the statutory liability in case of insolvency to the same extent as if he still held the stock,[81] unless the corporation has authority by charter or otherwise to make the pur-

and is liable for a conversion by a trustee to the prejudice of the rights of the cestui que trust, of which it has notice, where it aids such conversion by transfer of the stock and reissuance of certificates. Caulkins v. Gaslight Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. 786. Generally the corporation is not chargeable with liability for transferring stock in violation of trusts, of which it had no actual notice. Peck v. Providence Gas Co., 17 R. I. 275, 23 Atl. 967, 15 L. R. A. 643. Where the administrator of an estate transferred certain shares of stock to the "heirs and distributees" of his decedent's estate, it was held that the corporation was not bound to hold the stock subject to a trust imposed by the will of the decedent, of which it had no actual knowledge, but was justified in transferring her proportion of the stock to the grantee of the decedent's daughter. Smith v. Nashville &c. R. Co., 91 Tenn. 221, 18 S. W. 546.

[77] Loring v. Salisbury Mills, 125 Mass. 138. See also Marbury v. Ehlen, 72 Md. 206, 19 Atl. 648, 20 Am. St. 467; Geyser &c. Co. v. Stark, 53 L. R. A. 684. The fact that the transfer is made some years after the execution of the trust should have been completed, is notice. Lowry v. Commercial &c. Bank &c., Taney's Dec. (U. S.) 310.

[78] Mechanic's Bank &c. v. Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152.

[79] Trevor v. Whitworth, L. R. 12 App. C. 409, 57 L. T. R. 457; Zulueta's Claim, L. R. 5 Ch. 444. See also Coppin v. Greenlees &c. Co., 38 Ohio St. 275, 43 Am. St. 425; German Sav. Bank v. Wulfekuhler, 19 Kans. 60; Barton v. Port Jackson &c. Co., 17 Barb. (N. Y.) 397.

[80] Dillon, J., in Johnson v. Laflin, 5 Dill. (U. S.) 65, Fed. Cas. No. 7393; Great Eastern R. Co. v. Turner, L. R. 8 Ch. App. 149.

[81] Walters' Second Case, 3 DeG. & Sm. 244; Munt's Case, 22 Beav. 55; Daniell's Case, 22 Beav. 43.

chase.[82] Where, however, he does not know that the trustee takes the stock in trust for the corporation, but believes him to be a bona fide purchaser, the seller is not so liable.[83] The trustee accepting such a conveyance[84] and the directors procuring it[85] are also personally liable to the corporation and its creditors on all shares so conveyed. A person who has been employed by a railroad company to buy stock of a certain person for the purpose of consummating a sale of the corporate property, who buys such stock in his own name, must be regarded as holding it subject to the equitable considerations growing out of an arrangement previously made by his vendor with parties acting in the interest of the corporation, and the most that he can have after a transfer of the corporate property is the fair value of the stock at the time of such transfer.[86] But the better American authority[87] is to the effect that a railroad company may, for

[82] Grady's Case, 1 DeG., J. & S. 488.

[83] Johnson v. Laflin, 103 U. S. 800, 26 L. ed. 532; Nicol's Case, 3 DeG. & J. 387.

[84] Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Empire City Bank, Matter of, 18 N. Y. 199, 226; Allibone v. Hager, 46 Pa. St. 48. One who has exercised ownership of stock by accepting a dividend cannot deny his liability as owner. Sanger v. Upton, 91 U. S. 56, 60, 23 L. ed. 220.

[85] Evans v. Coventry, 25 L. J. (Ch.) 489, 501. So the corporate agent may be made personally liable for moneys expended by him for such stock. Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560.

[86] Young v. Toledo &c. R. Co., 76 Mich. 485, 40 Am. & Eng. R. Cas. 514.

[87] Johnson County v. Thayer, 94 U. S. 631, 24 L. ed. 133; First Nat. Bank v. Salem &c. Co., 39 Fed. 89; Fleitmann v. John M. Stone Cotton Mills, 186 Fed. 466; Allen v. Francisco Sugar Co., 193 Fed. 825; Snyder v. Tunitas &c. Co., 72 Cal. 194, 13 Pac. 479; Hartridge v. Rockwell, R. M. Charlton (Ga.) 260; Clapp v. Peterson, 104 Ill. 26; Iowa Lumber Co. v. Foster, 49 Iowa 25, 31 Am. Rep. 140; Dupee v. Boston Water-power Co., 114 Mass. 37; Cole v. Cole Realty Co., 169 Mich. 347, 135 N. W. 329; City Bank v. Bruce, 17 N. Y. 507; Eby v. Guest, 94 Pa. St. 160; Farmers', &c. Bank v. Champlain Trans. Co., 18 Vt. 131, 139; Marvin v. Anderson, 111 Wis. 387, 87 N. W. 226; Blalock v. Kenersville &c. Co., 110 N. Car. 99, 14 S. E. 501, 36 Am. & Eng. Corp. Cas. 84, 90, and note, where the authorities on both sides of the question are collected. Contra Schaun v. Brandt, 116 Md. 560, 82 Atl. 551. The authorities on both sides are also reviewed in the note to Hall v. Henderson, 126 Ala. 449,

legitimate purposes, and when not in violation of the rights of creditors, purchase shares of its own stock which have been issued to individuals,[88] unless prohibited by statute. And the courts of all the states apparently hold or concede that a corporation may take shares of its own stock in payment of, or as security for, antecedent debts due to it from the stockholders.[90] But it has been held that such purchase is voidable at the instance of corporate creditors who are injured thereby.[91] Where shares of its own stock are transferred to the corporation[92] or to a trustee for its benefit, the stock is not thereby merged, unless such is the intention, but may, it has been held, be resold by authority of the board of directors.[93] or of the stockholders at the market price,[94]

28 So. 531, 61 L. R. A. 621, 85 Am. St. 53, and in the note to Schulte v. Boulevard &c. Land Co., (164 Cal. 464, 129 Pac. 582) in Ann. Cas. 1914B, 1013, 1016, where attention is also called to statutory provision in different states. See also 8 Thomp. Corp., §§ 4075, 4076.

[88] Chicago &c. R. Co. v. President &c. Town of Marseilles, 84 Ill. 145. But see Hall v. Alabama &c. Co., 173 Ala. 398, 39 So. 285, 2 L. R. A. (N. S.) 130.

[90] Cook Corporations (7th. ed.), § 311. See also Schulte v. Boulevard &c. Land Co., 164 Cal. 464, 129 Pac. 582, Ann. Cas. 1914B, 1013, and note. A promise of a stockholder to surrender to the corporation stock on which there is an unpaid assessment, which stock is not at the time under his control, having been pledged by him, does not constitute a surrender of such stock, as against a subsequent purchaser from such stockholder. Hill v. Atoka &c. Co., 124 Mo. 153, 21 S. W. 508, 25 S. W. 926.

[91] Clapp v. Peterson, 104 Ill. 26; Commercial Nat. Bank v. Burch, 141 Ill. 519, 31 N. E. 420. See also Crandall v. Lincoln, 52 Conn. 73, 52 Am. Rep. 560; Tichenor-Grand Co., In re, 203 Fed. 720; Fraser v. Ritchie, 8 Ill. App. 554; Heggie v. People's &c. Assn. 107 N. Car. 581, 12 S. E. 275, 33 Am. St. 331n, 32 Am. & Eng. Corp. Cas. 605. So, if the corporation is insolvent at the time. Currier v. Lebanon &c. Co., 56 N. H. 262; Alexander v. Relfe, 74 Mo. 495; Columbian Bank, In re, 147 Pa. St. 422, 23 Atl. 626.

[92] State Bank of Ohio v. Fox, 3 Blatch. (U. S.) 431; Am. Railway Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377; Vail v. Hamilton, 85 N. Y. 453; State v. Smith, 48 Vt. 266.

[93] State Bank of Ohio v. Fox, 3 Blatch. (U. S.) 431; Jefferson v. Burford (Ky.), 17 S. W. 855; Williams v. Savage Mfg. Co., 3 Md. Ch. 418; State v. Smith, 48 Vt. 266. See also Commonwealth v. Boston &c. R. Co., 142 Mass. 146, 7 N. E. 716; City Bank v. Bruce, 17 N. Y. 507; Vail v. Hamilton, 85 N. Y. 453.

[94] Ramwell's Case, 50 L. J. (Ch.) 827; Otter v. Brevort &c. Co., 50 Barb. (N. Y.) 247.

without regard to its par value. But such stock, until resold, is said to be lifeless and cannot be voted, nor can it draw dividends.[95] A railroad company may not purchase stock of another railroad corporation,[96] without legislative authority contained in the charter or in the general statute of the state.[97] One corpora-

[95]Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 437; Monsseaux v. Urquhart, 19 La. Ann. 482; American &c. Co. v. Haven, 101 Mass. 398; New England &c. Ins. Co v. Phillips, 141 Mass. 535, 6 N. E. 534; McNeely v. Woodruff, 13 N. J. Law 352; Vail v. Hamilton, 85 N. Y. 453; State v. Smith, 48 Vt. 266.

[96] Dunbar v. American Tel. &c. Co., 238 Ill. 456, 87 N. E. 521; State v. Atlantic City &c. R. Co., 77 N. J. L. 465, 72 Atl. 111; Clark v. Memphis St. R. Co., 123 Tenn. 232, 130 S. W. 751. Such a purchase may be enjoined. Central R. Co. v. Collins, 40 Ga. 582; Mackintosh v. Flint &c. R. Co., 34 Fed. 582; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605n, 1 Lewis' Am. R. & Corp. 55, and note; Hazlehurst v. Savannah &c. R. Co., 43 Ga. 13, 57; Pearson v. Concord &c. R. Co., 62 N. H. 537, 13 Am. St. 590; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 5; Great North. R. Co. v. Eastern Counties R. Co., 21 L. J. (Ch) 837. On the general subject of power to purchase and hold stock in another corporation, see 4 Thomp. Corp. (2d. ed.), § 4055.

[97] Matthews v. Murchison, 17 Fed. 760; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488 (Ohio Act); Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596, and Atchison &c. R. Co. v. Cochran, 43 Kans. 225, 23 Pac. 151, 7 L. R. A. 414, 19 Am. St. 129, 1 Lewis' Am. R. & Corp. 640, construing Kansas statute; Mayor v. Baltimore &c. R. Co., 21 Md. 50; White v. Syracuse &c. R. Co., 14 Barb. (N. Y.) 559. Authority to consolidate with a road gives power to purchase its stock with a view to securing that end. Hill v. Nisbet, 100 Ind. 341. For a construction of the provision in the constitution of Pennsylvania that a railroad company may not control a competing line, see The Commonwealth v. South Pa. R. Co., 1 Co. Ct. (Pa.) 214, 223, affirmed in Sup. Ct., see 29 Am. & E. R. Cas. 145, 154, where it is held to prohibit a purchase of the stock of a competing line by a railroad company in its own name or in the name of another road which it controls. To the same point under the constitution of Georgia, see Clarke v. Central R. &c. Co., 50 Fed. 338 (1892). A railroad company is authorized to purchase the stock of another company for the purpose of acquiring its roadbed and right of way, by a statute (How. Mich. 3403) which provides that "it shall be lawful for any railroad company in this state, which shall have entered in good faith upon the work of constructing its road, and shall become unable to complete the construction of the same, or any part thereof, to sell and convey the whole or any part of its road so partially completed,

tion has, generally, no implied power to invest money in the stocks of another.[98] But a corporation may have the right to acquire shares in another company in the usual course of its legitimate business,[99] or to protect itself by way of compromise or security or payment of a doubtful debt owing to it by the corporation whose shares it receives.[1] A contract by the stockholders of a corporation to transfer their stock to a person or corporation not allowed by law to hold the same has been held illegal and void.[2]

§ 111 (96). **Gifts and bequests of stock.**—Shares of stock in a corporation may be the subject of a gift.[3] A clear intent to give it must be proven, although no formal method of transfer is nec-

together with the rights and franchises connected therewith, to any other railroad company or corporation of this state not having the same terminal points and not being a competing line." Dewey v. Toledo, &c. R. Co., 91 Mich. 351, 51 N. W. 1063, 50 Am. & Eng. R. Cas. 607. See also in Missouri State v. Missouri Pac. R. Co., 237 Mo. 338, 141 S. W. 643, 241 Mo. 1, 144 S. W. 863. A railroad company may purchase and vote the stock of another company in like manner as an individual under the New York Statute. Oelbermann v. New York &c. R. Co., 77 Hun 332, 27 N. Y. S. 545. See also Continental Securities Co. v. Interborough Rapid Trans. Co., 165 Fed. 945.

98 Hamilton v. Savannah &c. R. Co., 49 Fed. 412; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 6 L. R. A. 497n, 17 Am. St. 319, 1 Lewis' Am. R. & Corp. 562; Franklin Co. v. Lewiston Institution, 68 Maine 43, 28 Am. Rep. 9; Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594; Great Northern R. Co. v. Eastern &c. R. Co., 21 L. J. Ch. 837; Cook Corporations (7th. ed.), § 315; 4 Thomp. Corp. (2d. ed.), § 4055 et seq. But see Booth v. Robinson, 55 Md. 419; Ryan v. Leavenworth &c. R. Co., 21 Kans. 365.

99 Royal Bank of India's Case, L. R. 4 Ch. App. Cas. 252.

1 First Nat. Bank v. Nat. &c. Bank, 92 U. S. 122, 128, 23 L. ed. 679; Fleckner v. Bank, 8 Wheat. (U. S.) 351, 5 L. ed. 634. See also Converse v. Gordon Governor Co., 174 Fed. 30. But compare Irvine v. Chicago &c. Coal Co., 200 Fed. 953.

2 State v. Ohio &c. R. Co., 6 Ohio Cir. Ct. 415.

3 4 Thomp. Corp. (2d ed.), § 4305. See Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663; Walker v. Joseph &c. Co., 47 N. J. Eq. 342, 20 Atl. 885; Decaumont v. Bogert, 36 Hun (N. Y.) 382; Grymes v. Hone, 49 N. Y. 17, 10 Am. Rep. 313; Jackson v. Twenty-third St. R. Co., 88 N. Y. 520; Roberts Appeal 85 Pa. St. 84.

essary.[4] But in England, under the statutes, the stock must be registered in the name of the donee, in order to vest the title in him.[5] Stock may also be bequeathed by will like other property.[6]

§ 112 (97). **Formalities of transfer.**—In making a complete and formal transfer of shares of stock three separate and distinct steps are usually taken. The certificate is assigned by the transferor to the transferee, the certificate is then surrendered or delivered to the corporation, and finally the transfer is duly registered in the books of the corporation. A new certificate is then, ordinarily, issued to the transferee.[7] But where no certificate has ever been issued, the registry of the transfer upon the books of the company will be sufficient,[8] and a transfer may be good, even where a certificate has been issued, without surrendering it.[9] So, in the absence of any valid provision to the contrary, a transfer may be made, at least as between the parties, by mere delivery of the certificate without any written assignment or registration.[10] Ordinarily, however, the assignment is made in writ-

[4] Cook Corporations (7th. ed.), § 308. But see Matthews v. Hoagland, 48 N. J. Eq. 455, 21 Atl. 1054.

[5] Nanney v. Morgan, 57 L. T. R. 48.

[6] 4 Thomp. Corp. (2d ed.), § 4290. For the effect of different forms of devise and of gifts causa mortis, see Cook Stock and Stockholders, Ch. XVIII.

[7] But this is not absolutely essential. Chouteau Spring Co. v. Harris, 20 Mo. 382; First Nat. Bank v. Gifford, 47 Iowa 575.

[8] First Nat Bank v. Gifford, 47 Iowa 575; Brigham v. Mead, 10 Allen (Mass.) 245.

[9] Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. ed. 936; Citizens' St. R. v. Robbins, 128 Ind. 449, 26 N. E. 116, 12 L. R. A. 498, 25 Am. St. 445; Hastings v. Blue Hills &c. Co., 9 Pick. (Mass.) 80; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; DeCaumont v. Bogert, 36 Hun (N. Y.) 382; Roberts' Appeal, 85 Pa. St. 84; Seeligson v. Brown, 61 Tex. 114, 10 Am. & Eng. Corp. Cas. 143. But see Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. ed. 385.

[10] National Bank v. Western Pac. R. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663; Walsh v. Sexton, 55 Barb. (N. Y.) 251; Allerton v. Lang, 10 Bosw. (N. Y.) 362; Commonwealth v. Crompton, 137 Pa. St. 138, 20 Atl. 417; Parker v. Bethel &c. Co., 96 Tenn. 252, 34 S. W. 209. See also Harvey v. Stowe, 219 Fed. 17; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Jarvis v. Rogers, 13 Mass. 105. But compare Matthews v. Hoag-

ing upon the certificate, and it is held in accordance with the well established custom, that the assignment may be made in blank, that is, it may be signed by the transferor without inserting the name of the transferee, who, upon its delivery to him, may insert his own name.[11] Such an assignment is usually accompanied by a power of attorney also signed in blank, authorizing such attorney to sign the transfer or registry upon the books of the company, thus obviating any necessity for the presence of the transferor at the office of the company, and this blank may likewise be filled out by the transferee,[12] or by the registry clerk.[13]

§ 113 (98). **Registry of transfer.**—It is generally provided that stock shall be transferred only upon the books of the company. Even where such a provision exists, however, a valid assignment of the certificate will estop the transferor from impeaching his transferee's title or that of any subsequent bona fide transferee, notwithstanding the fact that such assignment or transfer is not registered.[14] As to the corporation, however, where such a pro-

land, 48 N. J. Eq. 455, 21 Atl. 1054; Burrall v. Bushwick R. Co., 75 N. Y. 211; Sitgreaves v. Farmers' &c. Bank, 49 Pa. St. 359.

[11] McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Bank of America v. McNeil, 10 Bush (Ky.) 54; Walker v. Detroit &c. R. Co., 47 Mich. 338; Cutting v. Damerel, 88 N. Y. 410; Pennsylvania R. Co.'s Appeal, 86 Pa. St. 80; Sargent, Ex parte, L. R. 17 Eq. Cas. 273; Ortigosa v. Brown, 47 L. J. Ch. 168, 4 Thomp. Corp. (2d ed.), § 4317. We are not considering, however, the question as to whether creditors can attach any of such assignments.

[12] Holbrook v. New Jersey Zinc Co., 57 N. Y. 616, 623; Bridgeport Bank v. New York &c. R. Co., 50 Conn. 231; Otis v. Gardner, 105 Ill. 436; McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252n, 128 Am. St. 95n; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Colonial Bank v. Hepworth, 36 Ch. Div. 36.

[13] 2 Cook Corporations (7th. ed.), § 375; Allen v. South Boston R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. 185. Such a power of attorney has been held irrevocable. Skinner v. Ft. Way &c. R. Co., 58 Fed. 55.

[14] Black v. Zacharie, 3 How. (U. S.) 483, 513, 11 L. ed. 690; Johnson v. Laflin, 103 U. S. 800, 804, 26 L. ed. 532; Continental Nat. Bank v. Elliot &c. Bank, 7 Fed. 369; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Ross v. Southwestern R. Co., 53 Ga. 514; Bruce v. Smith, 44 Ind. 1; People's Bank

vision exists it is not ordinarily bound to recognize as a stockholder a purchaser who does not have the transfer registered or properly apply for its registration.[15] But the corporation may waive a formal registry so far as its own rights are concerned.[16] And in most jurisdictions the rule is that a bona fide purchaser of

v. Gridley, 91 Ill. 457; Noble v. Turner, 69 Md. 519, 16 Atl. 124; Brown v. Smith, 122 Mass. 589; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Lund v. Wheaton &c. Co., 50 Minn. 36, 52 N. W. 268; Merchants' &c. Bank v. Richards, 6 Mo. App. 454; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315; Smith v. Nashville, &c. R. Co., 91 Tenn. 221, 18 S. W. 546. Noyes v. Spaulding, 27 Vt. 420. See also National Bank v. Western Pac. R. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; Shires v. Allen, 47 Colo. 440, 107 Pac. 1072. The same rule has been held to apply to the transferer's assignee in bankruptcy. Dickinson v. Central Nat. Bank, 129 Mass. 279; Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Dobson, Ex parte, 2 Mont. & D. (Eng. B. R.) 685. As to whether it transfers both legal and equitable title or only the latter, see 4 Thomp. Corp. (2nd ed.) §§ 4318, 4319.

[15] 2 Cook Corporations (7th. ed.), § 381. See also Evansville Union Stockyards Co. v. State, 179 Ind. 505, 101 N. E. 822; Star Mut. Tel. Co. v. Longfellow, 85 Kans. 353, 116 Pac. 506. As to the ordinary manner of registering the transfer, see Burrall v. Bushwick R. Co., 75 N. Y. 211; Green Mount &c. Co. v. Bulla, 45 Ind. 1; National Bank v. Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039. As to what is a sufficient registry or application in particular cases, see Case v. Bank, 100 U. S. 446, 25 L. ed. 695; Fisher v. Jones, 82 Ala. 117, 3 So. 13; Plumb v. Bank, 48 Kans. 484, 29 Pac. 699; Newell v. Williston 138 Mass. 240; Pinkerton v. Manchester &c. R. Co., 42 N. H. 424; Chemical Nat. Bank v. Codwell, 132 N. Y. 250, 30 N. E. 644; American Nat. Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. 795. Either party to the transfer is usually entitled to demand a registry. Johnson v. Laflin, 103 U. S. 800, 26 L. ed. 532; Webster v. Upton, 91 U. S. 65, 23 L. ed. 385.

[16] Upton v. Burnham, 3 Biss. (U. S.) 431, 520, Fed. Cas. No. 16798; Richmondville Mfg. Co. v. Prall, 9 Conn. 487; Wilson v. St. Louis &c. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. 624, 36 Am. & Eng. Corp. Cas. 290; Isham v. Buckingham, 49 N. Y. 216; Cutting v. Damerel, 88 N. Y. 410; Robinson v. Natl. Bank, 95 N. Y. 637; Chambersburg Ins. Co. v. Smith, 11 Pa. St. 120; American Nat. Bank v. Oriental Mills, 17 R. I. 551, 23 Atl. 795. See also National Safe &c. Trust Co. v. Hibbs, 32 App. D. C. 459; Gray v. Fankhauser, 58 Ore. 423, 115 Pac. 146.

a share of stock for a valuable consideration is not affected by a subsequent attachment or levy upon stock for the debts of the transferor, nor, in general, by any subsequent equities, although the transfer has never been registered.[17] But this rule has not passed unchallenged,[18] and it does not, of course, apply to a purchaser of stock upon which a levy has been made before the purchase.[19] The corporation may, and should, generally, we

[17] Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. 369; Scott v. Pequonnock Nat. Bank, 15 Fed. 494; Nat. Bank v. Western Pac. R. Co., 157 Cal. 573, 108 Pac. 676, 27 L. R. A. (N. S.) 978; Thurber v. Crump, 86 Ky. 408, 6 S. W. 145; Smith v. Crescent City &c. Co., 30 La. Ann. 1378; Kern v. Day, 45 La. Ann. 71, 12 So. 6; Lund v. Wheaton &c. Co., 50 Minn. 36, 36 Am. St. 623; Clark v. German &c. Bank, 61 Miss. 611; Broadway Bank v. McElrath, 13 N. J. Eq. 24; Comeau v. Guild Farm Oil Co., 3 Daly (N. Y.) 218; Doty v. First Nat. Bank, 3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259; Seeligson v. Brown, 61 Tex. 114. See also Everitt v. Farmers' &c. Bank, 82 Nebr. 191, 117 N. W. 401, 20 L. R. A. (N. S.) 996n; Reilly v. Alsecon Land Co., 75 N. J. Eq. 71, 71 Atl. 248; Smith v. American Coal Co., 7 Lans. (N. Y.) 317; Lipscomb v. Condon, 56 W. Va. 416, 49 S. E. 392, 67 L. R. A. 670, 107 Am. St. 938. At least where there is notice of the transfer. Bridgewater Iron Co. v. Lissberger, 116 U. S. 8, 6 Sup. Ct. 241, 29 L. ed. 557; Mowry v. Hawkins, 57 Conn. 453, 18 Atl. 784; Wilson v. St. Louis &c. R. Co., 108 Mo. 588, 18 S. W. 286, 32 Am. St. 624; Scripture v. Francestown &c. Co., 50 N. H. 571; Telford &c. Co. v. Gerhab (Pa.), 13 Atl. 90, 21 Am. & Eng. Corp. Cas. 471; Commonwealth v. Watmough, 6 Whart. (Pa.) 117. See generally as to liability of transferees, note in 30 L. R. A. (N. S.) 283, et seq.

[18] Berney Nat. Bank v. Pinchard, 87 Ala. 577, 6 So. 364; Weston v. Bear River &c. Co., 5 Cal. 186, 63 Am. Dec. 117; Conway v. John, 14 Colo. 30, 23 Pac. 170; Oxford &c. Co. v. Bunnel, 6 Conn. 552; State v. First Nat. Bank, 89 Ind. 302; Colman v. Spencer, 5 Blackf. (Ind.) 197; Fort Madison &c. Co. v. Batavian Bank, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789; Skowhegan Bank v. Cutler, 49 Maine 315; Noble v. Turner, 69 Md. 519, 16 Atl. 124; Dean v. Rapid Tel. Co., 162 Mo. App. 100, 144 S. W. 135; Buttrick v. Nashua &c. R. Co., 62 N. H. 413, 13 Am. St. 578; Murphy, Re, 51 Wis. 519, 8 N. W. 419. But in several of these cases the statute explicitly altered the rule. The transferer is generally held liable to creditors where the transfer is not registered as required, especially if the requirement is statutory. 4 Thomp. Corp. (2nd ed.) § 4364.

[19] Young v. South Tredegar &c.

think, insist upon the surrender of the old certificate as a condition to registration.[20] But when this is done and proper application made it is the duty of the company to register the transfer in the absence of some legal excuse.[21] When a corporation wrongfully refuses to make or permit the registry of a transfer the party entitled thereto usually has his remedy by suit in equity,[22] but he may, if he so elects, bring an action at law for damages,[23] and, in some jurisdictions, it is also held that man-

Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. 752; Chesapeake & Ohio R. Co. v. Paine, 29 Grat. (Va.) 502; Shenandoah Valley R. Co. v. Griffith, 76 Va. 913.

[20] Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 172; Tafft v. Presidio R. Co., 84 Cal. 131, 22 Pac. 485, 18 Am. St. 166; Supply Ditch Co. v. Elliott, 10 Colo. 327, 3 Am. St. 586; Ironstone Ditch Co. v. Equitable Securities Co., 52 Colo. 268, 121 Pac. 174; Bridgeport Bank v. New York &c. R. Co., 30 Conn. 231; State v. New Orleans &c. R. Co., 30 La. Ann. 308; Factors' &c. Co. v. Marine &c. Co., 31 La. Ann. 149; New York &c. R. Co. v. Schuyler, 34 N. Y. 30; Brisbane v. Delaware &c. R. Co., 94 N. Y. 204; National Bank v. Lake Shore &c. R. Co., 21 Ohio St. 221; Cleveland &c. R. Co. v. Robbins, 35 Ohio St. 483.

[21] As to what will justify refusal, see Telegraph Co. v. Davenport, 97 U. S. 369, 24 L. ed. 1047; Gould v. Head, 41 Fed. 240; People v. Sterling Mfg. Co., 82 Ill. 457; Merchants' Nat. Bank v. Richards, 6 Mo. App. 454. As to what will not justify refusal, see Helm v. Swiggett, 12 Ind. 194; American &c. Co. v. Bayless, 91 Ky. 94, 15 S. W. 10; Kahn v. St. Joseph Bank, 70 Mo. 262; People v. Paton, 5 N. Y. St. 316; State v. McIver, 2 S. Car. 25; Moffatt v. Farquhar, L. R. 7 Ch. Div. 591.

[22] Mechanic's Bank v. Seton, 1 Pet. (U. S.) 299, 7 L. ed. 152; Wilson v. Atlantic &c. R Co., 2 Fed. 459; Shinner v. Ft. Wayne &c. R. Co., 58 Fed. 55; Jessup v. Chicago &c. R. Co., 188 Fed. 931; Iasigi v. Chicago &c. R. Co., 129 Mass. 46; Cushman v. Thayer Mfg. Co., 76 N. Y. 365, 32 Am. Rep. 315; Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84; 2 Cook Corporations (7th. ed.), § 391; 4 Thomp. Corp. (2d ed.) §§ 4405, 4407. See also Vernon &c. R. Co. v. Washington Twp., 48 Ind. App. 309, 95 N. E. 599. In Gould v. Head, 41 Fed. 240, the suit was against the secretary and it was held that the corporation was not a necessary party.

[23] Kimball v. Union Water Co., 44 Cal. 173, 13 Am. R. 157; Helm v. Swiggett, 12 Ind. 194; Vernon &c. R. Co. v. Washington Twp., 48 Ind. App. 309, 95 N. E. 599; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Kortwright v. Buffalo &c. Bank, 20 Wend. (N. Y.) 90; Doty v. First Nat. Bank,

damus will lie to compel the corporation to make or permit a registration.[24]

§ 114 (99). **Lien of corporation on stock.**—A corporation has, at common law, no lien upon a shareholder's stock for debts due from him to it.[25] Such a lien is given by general statutes in many

3 N. Dak. 9, 53 N. W. 77, 17 L. R. A. 259; Rio Grande &c. Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; 4 Thomp. Corp. (2d ed.) § 4406, et seq.

[24] People v. Goss &c. Co., 99 Ill. 355; Green Mount &c. Co. v. Bulla, 45 Ind. 1; State v. First Nat. Bank, 89 Ind. 302; Slemmons v. Thompson, 23 Ore. 215, 31 Pac. 514; State v. Cheraw &c. R. Co., 16 S. Car. 524; Goodwin v. Ottawa &c. R. Co., 13 Upper Can. (C. P.) 254; Norris v. Irish Land Co., 8 El. & Bl. 512. See also Scherck v. Montgomery, 81 Miss. 426, 33 So. 507; Sheppard v. Rockingham Power Co., 150 N. Car. 776, 64 S. E. 894. It has been said that this remedy is peculiarly appropriate in the case of railroads on account of their quasi public nature. State v. McIver, 2 S. Car. 25. But although we believe that, in many cases, where the shares have comparatively little value or an emergency exists, mandamus ought to lie, yet we do not believe that the distinction referred to in the case last cited exists, as the rights of the members are substantially the same as in ordinary private corporations. See Stackpole v. Seymour, 127 Mass. 104. The following cases hold that mandamus will not lie: Tobey v. Hakes, 54 Conn. 274, 7 Atl. 551 Am. St. 114; Townes v. Nichols, 73 Maine 515; Baker v. Marshall, 15 Minn. 177; State v. Rombauer, 46 Mo. 155; State v. Guerrero, 12 Nev. 105; State v. People's &c. Assn. 43 N. J. L. 389; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; Shipley v. Mechanics Bank, 10 Johns (N. Y.) 484; Birmingham &c. Co. v. Commonwealth, 92 Pa. St. 72; Rex v. Bank, 2 Doug. 524; Rex v. London &c. Co., 1 Dowl. & R. 510. See generally, on the subject of this section, note in 57 Am. St. 379, et seq., and 3 L. R. A. (N. S.) 551.

[25] Case v. Bank, 100 U. S. 446, 25 L. ed. 695; Farmers' &c. Bank v. Wasson, 48 Iowa 336, 30 Am. Rep. 398; Dempter &c. Co. v. Downs, 126 Iowa 80, 101 N. W. 735, 106 Am. St. 340; Jewell v. Nuhn (Iowa), 138 N. W. 457; Hagar v. Union Nat. Bank, 63 Maine 509; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Massachusetts Iron Co. v. Hooper, 7 Cush. (Mass.) 183; Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Carroll v. Mullanphy &c. Bank, 8 Mo. App. 249; Williams v. Lowe, 4 Nebr. 382; Driscoll v. West Bradley &c. Co., 59 N. Y. 96; Merchants' Bank v. Shouse, 102 Pa. St. 488.

of the states,[26] and is frequently given by charter.[27] It may be created also, when authorized, by a by-law of the corporation,[28] but many of the courts hold that, if created in this way, it will not bind a bona fide purchaser, without notice that such a by-law

[26] Pittsburgh &c. R. Co. v. Clarke, 29 Pa. St. 146, construing the Pennsylvania statute requiring payment of the shareholder's indebtedness to the corporation before transfer of shares in a railway corporation unless the lien is waived. Lien upon shares are forbidden by statute in New Hampshire. Hill v. Pine River Bank, 45 N. H. 300, 309. A corporation has no special vendor's lien, in the absence of a contract to that effect, on shares or its capital stock, for unpaid purchase-money. Lankershim Ranch Land & W. Co. v. Herberger, 82 Cal. 600. A statute may create a lien in favor of the corporation for debts due from shareholders prior to its enactment. Birmingham Trust &c. Co. v. East Lake Land Co., 99 Ala. 379, 13 So. 72, 20 L. R. A. 600. See also Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 990; Oliphint v. Bank, 60 Ark. 198, 29 S. W. 460; note in 57 Am. St. 394.

[27] Kenton Ins. Co. v. Bowman, 84 Ky. 430, 1 S. W. 717; German &c. Bank v. Jefferson, 10 Bush (Ky.) 326; Reese v. Bank, 14 Md. 271, 74 Am. Dec. 536; Leggett v. Bank, 24 N. Y. 283; Cross v. Phenix Bank, 1 R. I. 39; Bohmer v. City Bank, 77 Va. 445; Sabin v. Bank, 21 Vt. 353; Bradford &c. Co. v. Briggs, L. R. 12 App. Cas. 29.

[28] Cunningham v. Alabama &c. Co., 4 Ala. 652; Tuttle v. Walton, 1 Ga. 43; Farmers' &c. Bank v. Haney, 87 Iowa 101, 54 N. W. 61; Dempster &c. Co. v. Downs, 126 Iowa 80, 101 N. W. 735, 106 Am. St. 340; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; St. Louis Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Young v. Vough, 23 N. J. Eq. 325; Reading Trust Co. v. Reading Iron Works, 137 Pa. St. 282, 21 Atl. 169; Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 258; 2 Cook Corps. (7th ed.), § 522; 4 Thomp. Corp. (2d. ed.), §4007. See also Bankers Trust Co. v. McCloy, 109 Ark. 160, 159 S. W. 205. It has also been held that such a lien may be created by contract. Jennings v. Bank, 79 Cal. 323, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. 145; Vansands v. Middlesex Co. Bank, 26 Conn. 144; Farmers' &c. Bank v. Haney, 87 Iowa 101, 54 N. W. 61. Or by usage. Morgan v. Bank, 8 Yerg. & R. (Pa.) 73, 11 Am. Dec. 575, and note. But this would not bind a bona fide purchaser without notice. Driscoll v. West Bradley &c. Co., 59 N. Y. 96; Bryon v. Carter, 22 La. Ann. 98.

existed,[29] and it is held that such a by-law, unless recited in the certificate, will not amount to constructive notice.[30] Authority to make "regulations" as to transfers has been held sufficient to empower the directors of a corporation to make a by-law reserving such a lien.[31] "Where, by general law, a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world."[32]

§ 115 (100). **When and to what the lien attaches.**—It may attach to the stock for the owner's debts, although registered in another's name;[33] and it will take priority over antecedent debts which the stock has been pledged to secure, if the pledgee has failed to notify the corporation of his interest.[34] No action of the

[29] Bankers' Trust Co. v. McCloy, 109 Ark. 160, 159 S. W. 205; Hardy v. Boyer, 7 Ga. App. 472, 67 S. E. 205 (should be on face of certificate); This is true not only in Arkansas and Georgia, but also of New York, Louisiana, Massachusetts, Alabama, Pennsylvania, California, Mississippi and Ohio, and probably some others. 2 Cook Corporations (7th. ed.), § 532. See also Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. ed. 172; Bank v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Brinkerhoff-Farris Trust &c. Co. v. Home &c. Co., 118 Mo. 447, 24 S. W. 129; Kisterbock's Appeal, 127 Pa. St. 601, 18 Atl. 381, 14 Am. St. 868; 1 Thomp. Corp. (2d. ed.), § 1034 et seq; 2 Thomp. Corp. (2d. ed.), § 4007.

[30] Brinkerhoff-Ferris Trust, &c. Co. v. Home &c. Co., 118 Mo. 447, 24 S. W. 129; 2 Cook Corporations (7th. ed.), § 532. But it is otherwise where the articles of incorporation duly filed in the proper public office so provide. Dempster Mfg. Co. v. Downs, 126 Iowa 80, 101 N. W. 735, 106 Am. St. 340.

[31] Pendergast v. Bank, 2 Sawy. (U. S.) 108, Fed. Cas. No. 10918; Cunningham v. Alabama &c. Co., 4 Ala. 652; Spurlock v. Pacific R. Co., 61 Mo. 319; Bank v. Durfee, 118 Mo. 431, 24 S. W. 133; McCready v. Rumsey, 6 Duer (N. Y.) 574. But see Bank v. Manufacturers' &c. Bank, 20 N. Y. 501.

[32] Hammond v. Hastings, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 960, 2 Lewis' Am. R. & Corp. 698, and authorities there cited. To the same effect, see Bishop v. Globe Co., 135 Mass. 132; Bohmer v. City Bank, 77 Va. 445.

[33] Stebbins v. Phoenix F. Ins. Co., 3 Paige (N. Y.) 350. See also Mount Holley Paper Co.'s Appeal, 99 Pa. St. 513; Planters' &c. Co. v. Selma Sav. Bank, 63 Ala. 585. But compare Helm v. Swiggett, 12 Ind. 194.

[34] Platt v. Birmingham Axle Co., 41 Conn. 255, 264; Union Bank v. Laird, 2 Wheat. (U. S.) 390, 4 L.

directors is necessary to fix the lien upon stock owned by its debtor.[35] It will attach to trust stock for debts of a trustee holding the stock in his own name, there being nothing in the way of notice to the corporation of the nature of his title.[36] The lien attaches to dividends as well as to stock, and they may be retained by the corporation to discharge a debt due it from the shareholder,[37] and the lien may be enforced, whether the debts are due, or are to become due at some future time.[38] But it has been held that no lien attaches for debts of a holder of certificates who has re-transferred them without obtaining registry.[39]

§ 116 (101). **Waiver of lien—Enforcement of lien.**—The right to a lien is usually given exclusively for the benefit of the corporation,[40] and cannot be enforced by any one else. It cannot even be enforced indirectly by assignment of another's claim to the corporation that it may enforce payment for his benefit.[41] But

ed. 269. See, however, where notice is given, or the corporation has knowledge of the prior pledge, Bradford &c. Co. v. Briggs, 56 L. T. R. 62; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412; Ardmore State Bank v. Mason, 30 Okla. 568, 120 Pac. 1080, 39 L. R. A. (N. S.) 292.

35 Elliott v. Sibley, 101 Ala. 344, 13 So. 500.

36 Young v. Vough, 23 N. J. Eq. 325; New London &c. Bank v. Brocklebank, L. R. 21 Ch. Div. 302. Compare Bradford &c. Co. v. Briggs, L. R. 12 App. Cas. 29.

37 5 Fletcher Cyc. Corp., § 3606. Hagar v. Union Nat. Bank, 63 Maine 509; Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90, 19 Am. Dec. 306; Bates v. N. Y. &c. Co., 3 Johns. Cas. (N. Y.) 238. See Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412, and compare Brent v. Bank, 2 Cranch C. C. (U. S.) 517, Fed. Cas. No. 1834.

38 Pittsburgh &c. R. Co. v. Clarke, 29 Pa. St. 146; Cunningham v. Alabama &c. Co., 4 Ala. 652; St. Louis &c. Ins. Co. v. Goodfellow, 9 Mo. 149. The lien is not lost, even though the statute of limitations should interpose as a bar to an action on the debt. Geyer v. Western Ins. Co., 3 Pittsb. (Pa.) 41; Farmers' Bank v. Iglehart, 6 Gill (Md.) 50.

39 Helm v. Swiggett, 12 Ind. 194. But see first note to this section, supra.

40 2 Cook Corporations (7th. ed), § 529; Bank of Utica v. Smalley, 2 Cowen (N. Y.) 770, 14 Am. Dec. 526.

41 White's Bank v. Toledo &c. Ins. Co., 12 Ohio St. 601.

a surety of the stockholder, who has been compelled to discharge such a lien, is subrogated to the rights of the corporation.[42] The corporation may waive its lien and proceed by other means to collect the debt,[43] or at its election it may enforce it against shares in the hands of the debtor as liens are enforced against other property.[44] It has been held that the waiver of the lien will not release a surety unless he has given the corporation express notice not to waive it.[45] The ordinary method of enforcing its lien against shares which have been sold by the debtor is by a refusal to transfer the stock.[46] But it is generally held that the lien may be foreclosed in equity.[47] The corporation cannot hold

[42] Young v. Vough, 23 N. J. Eq. 325; Petersburg Sav. &c. Co. v. Lumsden, 75 Va. 327. See also Gray v. Stone, 69 L. T. R. 282. But compare Cross v. Phenix Bank, 1 R. I. 39.

[43] Hoylake R. Co., In re, L. R. 9 Ch. App. C. 257, 259; 5 Fletcher Cyc. Corp., § 3620. A corporation may waive a lien on its stock, but ignorance of the existence of the lien, on the part of the purchaser, does not destroy the lien and does not constitute waiver on part of the corporation. Hammond v. Hastings. 134 U. S. 401, 10 Sup. Ct. 727, 33 L. ed. 960. See generally as to waiver, Cecil Nat. Bank v. Watsontown Bank, 105 U. S. 217, 26 L. ed. 1039; First Nat. Bank v. Hartford &c. Co., 45 Conn. 22; Des Moines &c. Co. v. Des Moines &c. Bank, 97 Iowa 668, 66 N. W. 914; Kenton Ins. Co. v. Bowman, 84 Ky. 430; Bishop v. Globe Co., 135 Mass. 132; Citizens' State Bank v. Kalamazoo &c. Bank, 111 Mich. 313, 69 N. W. 663 (by-law held no waiver); Hill v. Pine River Bank, 45 N. H. 300; Nat. Bank v. Rochester Tumbler Co., 172 Pa. St. 614, 33 Atl. 748.

[44] Brent v. Bank of Washington, 10 Peters (U. S.) 596, 9 L. ed. 547. Foreclosure and sale or attachment, Sabin v. Bank, 21 Vt. 353; Farmers' Bank of Maryland's Case, 2 Bland's Ch. (Md.) 394; Morrison, In re, 10 Nat. Bank Reg. 105.

[45] Perrine v. Fireman's Ins. Co., 22 Ala. 575.

[46] First Nat. Bank of Hartford v. Hartford &c. Co., 45 Conn. 22; Reese v. Bank, 14 Md. 271, 74 Am. Dec. 536; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Bohmer v. City Bank, 77 Va. 445. See also Moore v. Royal Oak Lumber Co., 171 Mich. 400, 137 N. W. 270.

[47] Kenton Ins. Co. v. Bowman, 84 Ky. 430, 1 S. W. 717; United States &c. Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51, and note; National Bank &c. v. Rochester Lumber Co., 172 Pa. St. 614, 33 Atl. 748; White River Sav. Bank v. Capital Sav. Bank &c. Co., 77 Vt. 123, 59 Atl. 197, 107 Am. St. 754. See also Wynn v. Lallafoosa County Bank,

the purchaser personally liable.[48] And it cannot hold a lien on stock for the debts of a registered stockholder contracted after it has been regularly notified that he has sold such stock and transferred the certificates.[49]

§ 117 (101a). **Condemnation of stock.**—An important question, to which reference will also be made in another connection, has recently been decided by the Supreme Court of the United States. A state statute authorized the condemnation, under certain circumstances and by proper proceedings, by a railroad company of minority shares of stock in another company, and it was held that one company, which was the lessee of another and the owner of three-fourths of the stock of the latter, could lawfully condemn the outstanding shares owned by a person who refused to sell, where the improvement of the lessor's road was necessary in order to serve the public and the lessor did not have, while the condemning company did have, means to make the improvement.[50] This is in accordance with the prevailing view, and affirmed the decision of the state court,[51] but the general question as to when stock of minority holders can be thus taken has been regarded as not entirely free from doubt, and there are comparatively few decisions upon the subject.[52]

168 Ala. 469, 53 So. 228; Wright Lumber Co. v. Hixon, 105 Wis. 153, 80 N. W. 1110. Contra, Aldine Mfg Co. v. Phillips, 118 Mich. 162, 76 N. W. 371, 42 L. R. A. 531, 74 Am. St. 380

[48] Cook Corporations (7th ed.), § 530.

[49] Bank of America v. McNeil, 10 Bush (Ky.) 54; Nesmith v. Washington Bank, 6 Pick. (Mass.) 324; Conant v. Reed, 1 Ohio St. 298. See Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032.

[50] Offield v. New York &c. R. Co., 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231.

[51] In New York &c. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510, and 78 Conn. 1, 60 Atl. 740.

[52] See Spencer v. Seaboard Air Line R. Co., 137 N. Car. 107, 1 L. R. A. (N. S.) 604, and note.

CHAPTER VII.

SUBSCRIPTIONS.

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§ 120 (102). **Preliminary agreements to subscribe.**—It frequently happens, especially where corporations are formed under general laws, that, prior to their incorporation, a preliminary agreement is made by those who are interested, to take a certain amount of stock.[1] There is a sharp conflict among the authorities as to the effect of such agreements and the liability of those who execute them. A distinction is sometimes drawn between an agreement to subscribe, and a present subscription or agreement stating that each subscriber "hereby subscribes" a certain sum, or the like;[2] but while this may be good law where the facts

[1] This is often contemplated by the statutory scheme of incorporation, even where there is no express provision upon the subject. Thus, in Anderson v. New Castle &c. R. Co., 12 Ind. 376, 74 Am. Dec. 218, it is said: "Under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of the contemplated corporation, and for that reason and purpose are valid before the corporation is organized, and may be collected by it after organization." See also Cross v. Pickneyville &c. Co., 17 Ill. 54; Hughes v. Antietam &c. Co., 34 Md. 316; Hamilton &c. Co. v Rice, 7 Barb. (N. Y.) 157.

[2] See Mt. Sterling &c. Co. v. Little, 14 Bush (Ky.) 429; Lake Ontario &c. R. Co. v. Curtiss, 80 N. Y. 219; Strasburg R. Co. v. Echternacht, 21 Pa. St. 220, 60 Am. Dec. 49. In such a case it is held that while the agreement does not amount to a subscription which can be enforced, yet the corporation may recover from the signer the damages caused by his failure to accept and pay for the stock, which should be measured, however, not by the par value of the stock, but by the difference between its par value and its market value. Thrasher v. Pike County R. Co., 25 Ill. 340 (393 orig. ed.). See also Stowe v. Flagg, 72 Ill. 397, 402; Quick v. Lemon, 105 Ill. 578; Peninsular R. Co. v. Duncan, 28 Mich. 130; Rhey v. Ebensburg &c. Co., 27 Pa. St. 261; Irwin Creek &c. Co. v. Taylor, 51 N. Y. 969; Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. 910; Lake Ontario &c. R.

justify such a distinction, it would seem that although the company is not yet incorporated and the agreement is made in contemplation of its future incorporation, yet if each one who signs the agreement relies and must rely upon each and every other party thereto in order to obtain the means to incorporate and carry out the purposes of the agreement, the effect is practically the same, no matter whether the agreement is in terms that they agree to subscribe a certain amount or that they do subscribe a certain amount.[3] In either case, if a signer of the agreement receives shares after the company is incorporated, pays calls, takes part in the corporate proceedings, or otherwise ratifies the subscription, the corporation, after also ratifying it, may hold him liable the same as any other subscriber.[4] Upon this proposition there

Co. v. Curtiss, 80 N. Y. 219 (intimating that one of the parties to the agreement, if made for his benefit, could bring such an action and that the measure of damages would be as above stated). The preliminary agreement may, of course, be so worded as to be binding only in case a de jure corporation is formed. Capps v. Hastings &c. Co., 40 Nebr. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. 677.

[3] See 1 Thomp. Corp. (2d ed.) §§ 543, 547; Cook Corporations, 7th. ed.), § 75; Auburn &c. Assn. v. Hill, 113 Cal. 382, 45 Pac. 695; Nickum v. Burckhardt, 30 Ore. 464, 47 Pac. 788, 48 Pac. 474, 60 Am. St. 822. Compare also Planters &c. Packet Co. v. Webb, 144 Ala. 666, 39 So. 562; Webb v. Baltimore &c. R. Co., 77 Md. 92, 39 Am. St. 396, 26 Atl. 113; Gettysburg Nat. Bank v. Brown, 95 Md. 367, 52 Atl. 975, 93 Am. St. 339, and note.

[4] Rockville &c. Co. v. Van Ness, 2 Cranch C. C. (U. S.) 449, Fed. Cas. 11986; Cross v. Pickneyville &c. R. Co., 17 Ill. 54; Tonica &c. R. Co. v. McNeely, 21 Ill. 71; McCormick v. Gas Co., 48 Kans. 614, 29 Pac. 1147; Twin Creek &c. Co. v. Lancaster, 79 Ky. 552; Kennebec &c. R. Co. v. Palmer, 34 Maine 366; Penobscot R. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654; Maltby v. Northwestern &c. R. Co., 16 Md. 422; Red Wing Hotel Co. v. Freidrich, 26 Minn. 112, 1 N. W. 827; Minneapolis &c. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796n, 12 Am. St. 701; Kansas City Hotel Co. v. Hunt, 57 Mo. 126; Inter Mountain Pub. Co. v. Jack, 5 Mont. 568, 6 Pac. 20; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; Buffalo &c. R. Co. v. Gifford, 87 N. Y. 294; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. 532; International &c. Assn. v. Walker, 83 Mich. 386, 47 N. W. 338, 3 Lewis Am. R. & Corp. 731, and note, where the authorities are collected and reviewed.

is substantial unanimity among the authorities, although it is sometimes said that a corporation not in existence at the time a contract is made cannot become a party to it so far as to enforce it after the incorporation,[5] and, in a recent Massachusetts case the rule is broadly stated that although a contract is made in the name and for the benefit of a projected corporation, it cannot, after its organization, become a party to the contract even by adoption or ratification of it.[6] But the better rule is that such an agreement, if not a completed contract, is at least a continuing offer made for the benefit of the corporation, which is practically the aggregate of the individuals who entered into the agreement upon the faith of each other's subscription, and that the corporation may adopt and enforce it.[7] The statute may, however, provide that subscriptions shall be made by signing the articles of incorporation, with certain other formalities, and it has been held that in such a case one who has merely signed a preliminary

[5] Mt. Sterling &c. Co. v. Little, 14 Bush (Ky.) 429; Lake Ontario &c. Co. v. Curtiss, 80 N. Y. 219; Pittsburgh &c. R. Co. v. Gazzam, 32 Pa. St. 340; Charlotte &c. R. Co. v. Blakely (S. Car.), 3 Strob. 245, and note to Winston v. Dorsett &c. Co., 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507, 508. See also Rikhoff v. Machine Co., 68 Ind. 388.

[6] Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193.

[7] Marysville &c. Co. v. Johnson, 93 Cal. 538, 29 Pac. 126, 27 Am. St. 215, 6 Lewis Am. R. & Corp. 9; Auburn &c. Assn. v. Hill, 32 Cal. xvii, 32 Pac. 587; note to Winston v. Dorsett &c. Co., 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430 n; Miller v. Wild Cat &c. Co., 52 Ind. 51; Nulton v. Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213; Campbell v. Raven, 176 Mich. 208, 142 N. W. 355; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435; Ashuelot Shoe Co. v. Hoit, 56 N. H. 548; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Buffalo &c. R. Co. v. Clark, 22 Hun (N. Y.) 359; Lowville &c. R. Co. v. Elliott, 196 N. Y. 545, 89 N. E. 1104; and authorities cited in notes to § 20, ante. In no case, perhaps, is this more clearly stated than it is by the Supreme Court of Massachusetts in the case of Athol Music Hall Co. v. Carey, 116 Mass. 471, and yet this is difficult to reconcile with the extreme rule that a corporation can not ratify a contract made for its benefit, announced in Abbott v. Hapgood, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. 193, heretofore cited.

agreement, and has not signed or joined in the execution of the articles of incorporation in the manner provided by statute, cannot be held liable upon the incomplete subscription or agreement.[8] It is also urged, in support of this doctrine, and, indeed, in support of the broader doctrine announced in some of the cases, which requires a ratification by the corporation and the alleged stockholder, before he can be held liable as a subscriber, that, as every contract must be mutually binding upon both parties, the corporation cannot enforce such an agreement because it is not itself bound thereby.[9] In line with these decisions, it has also been held that one who signs such an agreement may withdraw before acceptance by the corporation,[10] but this would, in some cases, be very unfair to the other subscribers, and one

[8] Monterey &c. R. Co. v. Hildreth, 53 Cal. 123; Reed v. Richmond St. R. Co., 50 Ind. 342; Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Carlisle v. Saginaw &c. R. Co., 27 Mich. 315; Parker v. Northern Cent. &c. R. Co., 33 Mich. 23; Sedalia &c. R. Co. v. Wilkerson, 83 Mo. 235; Poughkeepsie &c. R. Co. v. Griffin, 24 N. Y. 150; Dutchess &c. R. Co. v. Mabbett, 58 N. Y. 397; Buffalo &c. R. Co. v. Gifford, 87 N. Y. 294; Troy &c. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; Erie &c. R. Co. v. Owen, 32 Barb. (N. Y.) 616; Butcher v. Dillsburg &c. R. Co., 76 Pa. St. 306. But see McClure v. People's Freight R. Co., 90 Pa. St. 269.

[9] Monterey &c. R. Co. v. Hildreth, 53 Cal. 123; Goff v. Winchester College, 6 Bush (Ky.) 443; Fanning v. Insurance Co., 37 Ohio St. 339, 41 Am. Rep. 517; Strasburg R. Co. v. Echternacht, 21 Pa. St 220, 60 Am. Dec. 49; Gleaves v. Brick Church Co., 1 Sneed (Tenn.) 491. But compare Shober v. Lancaster &c. Assn., 68 Pa. St. 429, and Edinboro Academy v. Robinson, 37 Pa. St. 210, 78 Am. Dec. 421, with the Pennsylvania case above cited. While some of the cases in which this rule is stated were, perhaps, correctly decided, yet we think the broad doctrine they announce is unsound in principle and upon authority.

[10] Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N. E. 465, 32 Am. St. 434; Garrett v. Dillsburg &c. R. Co., 78 Pa. St. 465; Auburn Bolt & Nut Works v. Shultz, 143 Pa. St. 256, 22 Atl. 904; Patty v. Hillsboro &c. Co., 4 Tex. Civ. App. 224, 23 S. W. 336. See also Holt v. Winfield Bank, 25 Fed. 812; Planters &c. Packet Co. v. Webb, 156 Ala. 551, 46 So. 977, 16 Ann. Cas. 529; Plank's Tavern Co. v. Burkhard, 87 Mich. 182, 49 N. W. 562; 1 Thomp. Corp. (2d ed.) § 518.

court, at least, has denied the existence of such a right.[11] Where a company has been incorporated before the subscription is made, the objection made in some of the cases to the enforcement of preliminary subscriptions upon the ground that a corporation not in existence could not be a party, does not, of course, obtain even though it may not have completed its organization before the subscription is made.[12] But the conditions of the agreement must be substantially complied with, at least so far as they are conditions precedent, and if the contemplated scheme becomes impossible of performance or a different corporation from that contemplated is organized, the subscriber to the preliminary agreement cannot be held liable as a shareholder.[13]

§ 121 (103). **Subscriptions generally—Form.**—No particular formality is required by any principle of law in making a subscription to the capital stock of a corporation, and a binding subscription may, in general, be made in any way in which other contracts are entered into.[14] The courts will look to the intention of

[11] Kidwelly Canal Co. v. Raby, 2 Price 93. See also Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Peninsular &c. R. Co. v. Duncan, 28 Mich. 130; Bullock v. Falmouth &c. Co., 85 Ky. 184, 3 S. W. 129, 1 Thomp. Corp. (2d ed.) § 524. And compare Rutenbeck v. Hohn, 143 Iowa 13, 121 N. W. 698, 136 Am. St. 731; Utah Hotel Co. v. Madsen, 43 Utah 285, 134 Pac. 577.

[12] The right to enforce the subscription is merely suspended until organization. Danbury &c. R. Co. v. Wilson, 22 Conn. 435; Marlborough Branch R. Co. v. Arnold, 9 Gray (Mass.) 159, 69 Am. Dec. 279; Low v. Connecticut &c. R. Co., 45 N. H. 370; Oregon Cent. R. Co. v. Scoggin, 3 Ore. 161; Diman v. Providence &c. R. Co., 5 R. I. 130; Vermont &c. Co. v. Windham Bank, 44 Vt. 489. But see Starrett v. Rockland Ins. Co., 65 Maine 374; Wilmington &c. R. Co. v. Wright, 5 Jones (N. Car.) 304.

[13] Knox v. Childersburgh &c. Co., 86 Ala. 180, 5 So. 578; Hanford Mercantile Store v. Sowlveere, 11 Cal. App. 261, 104 Pac. 708; Wright Bros. v. Merchants &c. Packet Co., 104 Miss. 507, 61 So. 550; Dorris v. Sweeney, 60 N. Y. 463. See also Indianapolis &c. Co. v. Herkimer, 46 Ind. 142; Marshall Foundry Co. v. Killian, 99 N. Car. 501, 6 S. E. 680, 6 Am. St. 539; note in 33 Am. St. 185; 1 Thomp. Corp. (2d ed.) § 528, et seq.

[14] Blunt v. Walker, 11 Wis. 334, 349, 78 Am. Dec. 709. See also Dupee v. Chicago &c. Co., 117 Fed. 40; Hays v. Ottawa &c. R. Co., 61 Ill. 422.

the parties rather than to the manner in which it is manifested, and if it appear that a writing was intended as a subscription, it will usually be sufficient in the absence of some provision to the contrary, no matter how informal it may be.[15] Indeed, it would seem that a parol subscription may be valid,[16] and merely accepting and holding a certificate of stock may be sufficient to make one liable as a stockholder,[17] or if he assumes the duties and claims the rights of a stockholder, and acts as such with the acquiescence and consent of the corporation,[18] it is generally suf-

[15] Woodruff v. McDonald, 33 Ark. 97; Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; Ottawa &c. R. Co. v. Black, 79 Ill. 262; Brownlee v. Ohio &c. R. Co., 18 Ind. 68; State v. Beck, 81 Ind. 500; Nulton v. Clayton, 54 Iowa 425, 6 N. W. 685, 37 Am. Rep. 213; Fry v. Lexington &c. R. Co., 2 Met. (Ky.) 314; Oler v. Baltimore &c. R. Co., 41 Md. 583; Hagerstown &c. Co. v. Creeger, 5 Harr. & J. (Md.) 122, 9 Am. Dec. 495; Cayuga &c. R. Co. v. Kyle, 64 N. Y. 185; Phoenix &c. R. Co. v. Badger, 67 N. Y. 294; Ogdensburgh &c. R. Co. v. Frost, 21 Barb. (N. Y.) 541; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; Stuart v. Valley R. Co., 32 Grat. (Va.) 146, and note to Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385, 395. But see McClelland v. Whiteley, 11 Biss. (U. S.) 444, 15 Fed. 322.

[16] 1 Thomp. Corp. (2d ed.) § 573; Colfax &c. Co. v. Lyon, 69 Iowa 683, 29 N. W. 780; Rutenbeck v. Hohn, 143 Iowa 13, 121 N. W. 698, 136 Am. St. 730, 731, and note on p. 743, where additional authorities are cited; Manchester St. R. Co. v. Williams, 71 N. H. 312, 52 Atl. 461. See also Walter v. Merced Academy, 126 Cal. 582, 59 Pac. 136; Electric Tel. Co., In re, 3 De G. & J. 170. If it may be performed within a year, it is not within the statute of frauds. Bullock v. Falmouth &c. Co., 85 Ky. 184, 3 S. W. 129; Straughan v. Indianapolis &c. R. Co., 38 Ind. 185. But see Pittsburgh &c. Co. v. Gazzam, 32 Pa. St. 340; Vreeland v. New Jersey &c. Co., 29 N. J. Eq. 188; Fanning v. Insurance Co., 37 Ohio St. 339, 41 Am. Rep. 517. And in a number of other cases a mere informal offer or promise to subscribe has been held insufficient. Notes in 93 Am. St. 339; 136 Am. St. 746.

[17] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Stutz v. Handley, 41 Fed. 531; McLaughlin v. Detroit &c. R. Co., 8 Mich. 99. See also Lane v. Brainerd, 30 Conn. 565; Clark v. Continental &c. Co., 57 Ind. 135; Nulton v. Clayton, 54 Iowa 425, 37 Am. Rep. 213, 6 N. W. 635; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Hamilton &c. Co. v. Rice, 7 Barb. (N. Y.) 157; Rensselaer &c. R. Co. v. Barton, 16 N. Y. 457.

[18] Such acts operate as an estoppel to deny his membership in the company. Sanger v. Upton, 91 U.

ficient to bind both him and the corporation. But the charter or statute may require subscriptions to be made in a specified manner; and, unless there is a subsequent ratification, express or implied, by the parties, the statute must be substantially complied with in order to hold the subscriber.[19] It has also been held that an agreement by one to accept so many shares as should be allotted to him, and sending to the company's banker a sufficient deposit to cover the advancement required upon a subscription to such shares, although it is acted upon by the corporation and a certain number of shares are allotted, and the rest of his deposit returned, is not sufficient to constitute him a stockholder until he has accepted the shares, although his name is placed upon the register as a stockholder, and he has notice that his certificates of stock are ready for him, and he requests that they be forwarded to him.[20]

§ 122 (104). **Construction of contract of subscription.**—Where the place of performance is not specified in a contract made in one state to subscribe for shares of stock of a railroad company incorporated under the laws of another state where it has its road and treasury, it has been held that the contract is to be performed in the latter state and is to be construed by its laws.[21] It

S. 56, 23 L. ed. 220; Jewell v. Rock River &c. Co., 101 Ill. 57; Boston &c. R. Co. v. Wellington, 113 Mass. 79; Griswold v. Seligman, 72 Mo. 110; Wheeler v. Millar, 90 N. Y. 353; Philadelphia &c. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Cheltenham &c. R. Co. v. Daniel, 2 Q. B. 281. But see Shields v. Casey, 155 Pa. St. 253, 25 Atl. 619.

[19] Eppes v. Mississippi &c. R. Co., 35 Ala. 33; Reed v. Richmond St. R. Co., 50 Ind. 342; Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Carlisle v. Saginaw Val. R. Co., 27 Mich. 315; Sedalia &c. R. Co. v. Wilkerson, 83 Mo. 235; Troy &c. R. Co. v. Tibbetts, 18 Barb. (N. Y.) 297; Dutchess &c. R. Co. v. Mabbett, 58 N. Y. 397; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; Bucher v. Dillsburg &c. R. Co., 76 Pa. St. 306; Union R. Co v. Sneed, 99 Tenn. 1, 41 S. W. 364, 47 S. W. 89. But see Jewell v. Rock River &c. Co., 101 Ill. 57; Phoenix &c. Co. v. Badger, 67 N. Y. 294; Buffalo &c. R. Co. v. Gifford, 87 N. Y. 294; and compare Grangers' &c. Co. v. Vinson, 6 Ore. 172.

[20] New Brunswick &c. R. Co. v. Muggeridge, 4 H. & N. 160.

[21] Penobscot &c. R. Co. v. Bartlett, 12 Gray (Mass.) 244, 71 Am.

is a well-established rule that the construction of a written contract is for the court, and this is true of a contract of subscription.[22] But, on the other hand, questions of ratification and intention are usually questions of fact for the jury, and it has been held that the intention of an alleged subscriber to take stock as a subscriber, or to ratify an insufficient subscription, or an act of the corporation treating him as a subscriber, is a question of fact for the jury.[23]

§ 123 (105). Contracts of subscription are several.—Contracts of subscription, as usually made, are several and not joint.[24] This is true, ordinarily, even where they are joint in form, because it is clear from the nature of the contract that each subscriber intends to bind himself alone for his own subscription, and this intention must prevail notwithstanding the joint form of the promise.[25] In accordance with this rule it has even been

Dec. 753. See generally as to conflict of laws and the law of the state where the corporation is created governing, note in 93 Am. St. 393, 394.

[22] Monadnock R. Co. v. Felt, 52 N. H. 379; 1 Elliott Gen. Prac. § 431. The object, as in other cases, is to get at the intention of the parties, and while parol evidence is not admissible to vary the written contract, the court in a proper case may hear and receive evidence of matters that enable it to view the contract from the standpoint of the parties at the time and construe it "in the light of existing circumstances," or of practical construction given it by the parties. 1 Thomp. Corp. (2d ed.) §§ 568, 569, and cases cited, especially Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. 298.

[23] Philadelphia &c. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Maconib v. Barcelona &c. Assn., 134 N. Y. 598, 31 N. E. 613; Galveston &c. Co. v. Bolton, 46 Tex. 635.

[24] Robertson v. March, 4 Ill. 198; Herron v. Vance, 17 Ind. 595; Hastings Lumber Co. v. Edwards, 188 Mass. 587, 75 N. E. 57; Miller v. Preston, 4 N. Mex. 396, 17 Pac. 565; Whittlesey v. Frantz, 74 N. Y. 456; Wayne &c. Inst. v. Smith, 36 Barb. (N. Y.) 576; Orynski v. Louisiana (Tex.), 15 S. W. 674; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Gibbons v. Grinsel, 79 Wis. 365, 48 N. W. 255; 2 Elliott Cont. §§ 1480, 1481.

[25] 2 Elliott Contracts § 1480; Davis &c. Co. v. Barber, 51 Fed. 148; Price v. Grand Rapids &c. R. Co., 18 Ind. 137; Landwerlen v. Wheeler, 106 Ind. 523, 5 N. E. 888; Hall v. Thayer, 12 Met. (Mass.) 130; Davis

held that where one person makes two subscriptions in two different capacities, that is, as an individual and as a trustee, a separate action must be brought to enforce each subscription.[26]

§ 124 (106). **Effect of statutes requiring cash deposit to complete subscription.**—Several of the states by general statute require that a certain sum shall be paid upon each share of stock at the time of subscribing, at least where the subscription is made before organization, and such a provision is frequently found in special charters and in by-laws. It is generally held that an entire omission to make such a payment at the time of subscribing will not render the subscription absolutely void so that the subscriber can defend against payment of it for this cause,[28] since this would be permitting him to take advantage of his own wrong in failing to pay.[29] The theory of these cases is that the requirement is made for the benefit of the corporation and that it may waive the right to avoid the subscription for this cause,[30] and

v. Belford, 70 Mich. 120, 37 N. W. 919; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80, and note. But see Davis v. Shafer, 50 Fed. 764; Davis v. Bronson, 2 N. Dak. 300, 50 N. W. 836, 16 L. R. A. 655, 33 Am. St. 783; Darnell v. Lyon, 85 Tex. 455, 22 S. W. 304, 960; Galt v. Swain, 9 Grat. (Va.) 633, 60 Am. Dec. 311.

[26] Erie &c. R. Co. v. Patrick, 2 Abb. App. Cas. 72, 2 Keyes (N. Y.) 256.

[28] Selma &c. R. Co. v. Roundtree, 7 Ala. 670; Mitchell v. Rome R. Co., 17 Ga. 574; Illinois River R. Co. v. Zimmer, 20 Ill. 654; Wight v. Shelby R. Co., 55 Ky. 4, 63 Am. Dec. 522; Vicksburg &c. R. Co. v. McKean, 12 La. Ann. 638; Oler v. Baltimore &c. R. Co., 41 Md. 583; Webb v. Baltimore &c. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. 396; Minneapolis &c. R. Co. v. Bassett, 20 Minn. 535, 18 Am. Rep. 376; Barrington v. Mississippi Cent. R. Co., 32 Miss. 370; Henry v. Vermillion &c. R. Co., 17 Ohio 187; Spartanburg &c. R. Co. v. Ezell, 14 S. Car. 281; Pittsburgh &c. R. Co. v. Applegate, 21 W. Va. 172; East Gloucestershire R. Co. v. Bartholomew, L. R. 3 Exch. 15. See also 1 Thomp. Corp. (2d ed.), § 564.

[29] Haywood &c. R. Co. v. Bryan, 6 Jones L. (N. Car.) 82.

[30] Piscataqua Ferry Co. v. Jones, 39 N. H. 491; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Garrett v. Dillsburg &c. R. Co., 78 Pa. St. 465. Cases cited in two preceding notes. But see McRea v. Russell, 12 Ired. (N. Car.) 224, where it is said that the provision "was, moreover, meant to protect

enforce payment thereof, notwithstanding the fact that the statute, if literally construed, would seem to make a cash deposit essential to the validity of the subscription. In some of the states, however, this defense is allowed, because of the stringent language of the statute,[31] but even in such states it is strongly disapproved,[32] and is usually restricted to the narrowest possible limits.[33] Thus a few subscribers have been permitted to pay the percentage for all;[34] payment by check,[35] or by promissory note,[36] or in services rendered to the company under a contract,[37] has been held a sufficient compliance with the statute; and it has

men from the consequences of making such subscriptions under the influence of momentary excitement, which they could not fulfill."

[31] People v. Chambers, 42 Cal. 201; Wood v. Coosa &c. R. Co., 32 Ga. 273; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760 n; New York &c. R. Co. v. Van Horn, 57 N. Y. 473; Hibernia T. Cor. v. Henderson, 8 Serg. & R. (Pa.) 219, 11 Am. Dec. 593; Fiser v. Mississippi &c. R. Co., 32 Miss. 359; Charlotte &c. R. Co. v. Blakely, 3 Strobh. Eq. (S. Car.) 245. See also 1 Thomp. Corp. (2d ed.), § 564. If the requirement is merely in the by-laws, and not in the charter or statute, failure to comply with it will not vitiate the subscription so as to prevent its enforcement by the company. Water Valley &c. Co. v. Seaman, 53 Miss. 655; Piscataqua &c. Co. v. Jones, 39 N. H. 491.

[32] Rensselaer &c. R. Co. v. Barton, 16 N. Y. 457, note; Erie &c. R. Co. v. Brown, 25 Pa. St. 156. In Wood v. Coosa &c. R. Co., 32 Ga. 273, the court based its decision upon the positive language of the statute that a subscription without a preliminary payment should be void.

[33] See note to Parker v. Thomas, 81 Am. Dec. 385, 397, 398; Lee v. Cutrer, 96 Miss. 355, 51 So. 808, 27 L. R. A. (N. S.) 315.

[34] Ogdensburgh &c. R. Co. v. Wooley, 3 Abb. Ct. of App. 398. See also Mississippi &c. R. Co. v. Harris, 36 Miss. 17.

[35] Syracuse &c. R. Co. v. Gere, 4 Hun (N. Y.) 392; Staten Island &c. R. Co., Re, 37 Hun (N. Y.) 422, where the check was certified; People v. Stockton &c. R. Co., 45 Cal. 306, 13 Am. Rep. 178, when it was shown that the check would have been paid if presented.

[36] Ogdensburgh &c. R. Co. v. Wooley, 3 Abb. Ct. of App. 398; Greenville &c. R. Co. v. Woodsides, 5 Rich. L. (N. Car.) 145, 55 Am. Dec. 708; Vermont Cent. R. Co. v. Clayes, 21 Vt. 30, 35. Contra, Boyd v. Peach Bottom R. Co., 90 Pa. St. 169; Leighty v. Susquehanna &c. Co., 14 Serg. & R. (Pa.) 434

[37] Beach v. Smith, 30 N. Y. 116, affirming same case, 28 Barb. (N. Y.) 254. But see New York &c. R. Co. v. Hunt, 39 Conn. 75.

been held that actual payment at any period after subscription with intent to effectuate and complete the subscription is sufficient.[38] Indeed, acts indicating that the subscriber holds himself to be a shareholder may amount to a waiver of this defense.[39] And the statute is held to apply only to subscriptions expressly mentioned in it, and not to embrace conditional subscriptions,[40] nor subscriptions taken before incorporation,[41] where the language of the statute is general as to subscriptions given to the corporation. So, where the statute expressly referred only to subscriptions taken by the commissioners, the provision was held to apply to no others.[42]

§ 125 (107). Who may subscribe for stock.—In general any one may subscribe for stock who is competent to enter into an ordinary contract.[43] Married women are enabled by statute in England[44] and generally in the United States,[45] to become subscribers for stock. An infant's subscription is subject to the same rules which apply to his other contracts.[46] And the general rules applicable to agency govern contracts made by the

[38] Barrington v. Mississippi Cent. R. Co., 32 Miss. 370; Black River &c R. Co. v. Clarke, 25 N. Y. 208. See also Hall v. Selma &c. R. Co., 6 Ala. 741.

[39] Erie &c. R. Co. v. Brown, 25 Pa. St. 156; Everhart v. West Chester &c. R. Co., 28 Pa. St. 339. See also Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858, and note to the effect that it is no defense to subscribers as against creditors, that part of the necessary amount is illegally subscribed by others, if they knew the facts at the time they subscribed.

[40] Hanover &c. R. Co. v. Haldeman, 82 Pa. St. 36.

[41] Garrett v. Dillsburg &c. R. Co., 78 Pa. St. 465, construing Pennsylvania act of 1868. See also Minneapolis &c. R. Co. v. Bassett, 20 Minn. 535, 18 Am. Rep. 376; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 457.

[42] Philadelphia &c. R. Co. v. Hickman, 28 Pa. St. 318.

[43] 1 Thomp. Corp. (2d. ed.), § 640.

[44] Mrs. Matthewman's Case, L. R. 3 Eq. 781; Pugh & Sharman's Case, L. R. 13 Eq. 566.

[45] 1 Thomp. Corp. (2d ed.), § 643; Witters v. Sowles, 32 Fed. 767.

[46] See Mitchell's Case, L. R. 9 Eq. 363; Ebbett's Case, L. R. 5 Chan. 302; Baker's Case, L. R. 7 Chan. 115; Dublin &c. R. Co. v. Black, 8 Exch. 181; 1 Thomp. Corp. (2d ed.), § 642.

agents of the subscriber[47] or of the corporation,[48] or by persons assuming to act as such in case their acts are subsequently ratified.[49] The corporation itself cannot make a valid subscription to its own stock,[50] and one corporation cannot, as a general rule, subscribe for stock in another corporation[51] unless making such a subscription is within the powers, express or implied, conferred by its charter or by statute.[52] It has been held, however, that a construction company has implied power to take stock in a railroad which it is building.[53] Commissioners to take subscriptions[54] and corporate officers may take stock where the sub-

[47] Musgrave v. Morrison, 54 Md. 161; New York &c. Co., In re, 35 Hun (N. Y.) 220; New York &c. R. Co., In re, 99 N. Y. 12; Rhey v. Evensburgh &c. Co., 27 Pa. St. 261· Merrick &c. Co. v. Philadelphia &c. Co., 115 Pa. 314, 8 Atl. 794; 1 Thomp. Corp. (2d ed.) § 644. It has been held that a subscription by a trustee of an undisclosed principal is binding on the trustee. State v. Superior Court, 45 Wash. 321, 88 Pac. 332.

[48] Walker v. Mobile &c. R. Co., 34 Miss. 245.

[49] Judah v. American &c. Co., 4 Ind. 333; Musgrave v. Morrison, 54 Md. 161; Mississippi &c. R. Co. v. Harris, 36 Miss. 17; Philadelphia &c. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128; Mobile &c. R. Co. v. Yandal, 5 Sneed (Tenn.) 294; 1 Thomp. Corp. (2d ed.) § 645.

[50] Holladay v. Elliott, 8 Ore. 84; Allibone v. Hager, 46 Pa. St. 48; Preston v. Grand Colliery &c. Co., 11 Sim. 327. See also Johnston v. Allis, 71 Conn. 207, 41 Atl. 816; Martin v. Ohio Stove Co., 78 Ill. App. 105; Oliver v. Rahway &c. Co., 64 N. J. Eq. 596, 54 Atl. 460.

[51] Maunsell v. Midland &c. R. Co., 1 Hem. & M. 130; Zabriskie v. Railroad Co., 23 How. (U. S.) 381, 16 L. ed. 488; Merz Capsule Co. v. United States &c. Co., 67 Fed. 414; People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. Rep. 319; Nebraska Shirt Co. v. Horton, 3 Nebr. 888, 93 N. W. 225; Berry v. Yates, 24 Barb. (N. Y.) 199, 410; Franklin Bank v. Commercial Bank, 36 Ohio St. 350, 38 Am. Rep. 594; Valley R. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412.

[52] White v. Syracuse &c. R. Co., 14 Barb. N. Y. 559. See Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Matthews v. Murchison, 17 Fed. 760; Ryan v. Leavenworth &c. R. Co., 21 Kans. 365; Mayor &c. v. Baltimore &c. R. Co., 21 Md. 50; Pearson v. Concord &c. R. Co., 62 N. H. 537, 13 Am. St. 590, 13 Am. & Eng. R. Cas. 102.

[53] Rochester &c. R. Co., In re, 45 Hun (N. Y.) 126.

[54] Walker v. Devereaux, 4 Paige (N. Y.) 229. See also Cheraw &c. R. Co. v. White, 14 S. Car. 51.

scriptions are fairly made and no advantage is taken of the public or of other subscribers.[55] So municipal corporations are frequently given authority by the legislature to aid railroads by subscribing to their stock.[56]

§ 126 (108). Presumption that one whose name is subscribed is a stockholder.—The appearance of a person's name on the books of a company as a subscriber or stockholder,[57] or its appearance on the original subscription paper,[58] or books,[59] or its entry in the books kept by commissioners[60] to take subscriptions is said to be prima facie evidence that he is a stockholder.[61] But it is not conclusive unless shown to have been placed there by himself or by his authority.[62] Where the books are lost or destroyed, a certified copy of the list of stockholders from the files or records of a public office is held to be evidence in like manner as the books themselves, if such list is required by law to be so

[55] Sims v. Street R. Co., 37 Ohio St. 556. See Brower v. Passenger R. Co., 3 Phila. (Pa.) 161.

[56] Selma &c. R. Co., Ex parte, 45 Ala. 696, 6 Am. Rep. 722; Sharpless v. Mayor, 21 Pa. St. 147; Commissioners v. Miller, 7 Kans. 479, 12 Am. Rep. 425, where the authorities are collected and reviewed; 1 Thomp. Corp. (2d ed.) §§ 662, 671, et seq. Post, § 1070, et seq. So, a state may subscribe. Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Brady v. State, 26 Md. 290; Baltimore &c. R. Co. v. State, 36 Md. 519.

[57] Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 437; Iowa &c. R. Co. v. Perkins, 28 Iowa 281; Hoagland v. Bell, 36 Barb. (N. Y.) 57; Pittsburgh &c. R. Co. v. Applegate, 21 W. Va. 172.

[58] Partridge v. Badger, 25 Barb. (N. Y.) 146.

[59] Marlborough &c. R. Co. v. Arnold, 75 Mass. 159, 69 Am. Dec. 279; Rockville &c. Co. v. Van Ness, 2 Cranch. C. C. (U. S.) 449, Fed. Cas. No. 11986.

[60] Wood v. Coosa &c. R. Co., 32 Ga. 273.

[61] But see, on this general subject, 3 Elliott Ev. § 1946; Harrison v. Remington &c. Co., 140 Fed. 385, 402; Chesapeake &c. R. Co. v. Deepwater, 57 W. Va. 641, 50 S. E. 890, 906. The presumption arising from his name being entered in the books may be overcome by proof. Mudgett v. Horrell, 33 Cal. 25

[62] New Brunswick &c. R. Co. v. Muggeridge, 4 H. & N. 160; Waterford &c. R. Co. v. Pidcock, 8 Exch. 279.

filed or recorded,[63] but not otherwise.[64] The erasure of a name from a subscription list by the subscriber will not necessarily end his liability,[65] and the fact that he became bound may be proved by parol, where the written evidences of that fact have been lost or destroyed.[66]

§ 127 (109). Implied promise to pay subscription—Consideration.—An action by the corporation to recover the amount subscribed may be maintained upon the implied promise to pay contained in a subscription to its capital stock,[67] and the right to membership in the corporation, with the probable advantages to be derived from such membership, is a sufficient consideration to support the action.[68] Indeed, a consideration arising from the

[63] Cleveland v. Burnham, 55 Wis. 598, 13 N. W. 677, 680.

[64] Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581, 600.

[65] Johnson v. Wabash &c. Co., 16 Ind. 389; Bordentown v. Imlay, 4 N. J. L. 285; Greer v. Chartiers &c. R. Co., 96 Pa. St. 391, 42 Am. Rep. 548. But see Burt v. Farrar, 24 Barb. (N. Y.) 518, to the effect that a subscriber having access to the certificate before it is filed may erase or modify his subscription even though he has previously induced others to subscribe.

[66] Galveston Hotel Co. v. Bolton, 46 Tex. 633; Haynes v. Brown, 36 N. H. 545.

[67] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Hawley v. Upton, 102 U. S. 314, 26 L. ed. 179; Selma &c. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Ventura &c. R. Co. v. Collins (Cal.), 46 Pac. 287; Branch v. Augusta &c. Works, 95 Ga. 573, 23 S. E. 128; note to Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385, 393, 394; Miller v. Wild Cat &c. Co., 52 Ind. 51; Coppage v. Hutton, 124 Ind. 401, 24 N. E. 112, 7 L. R. A. 591; Atlantic &c. Co. v. Andrews, 97 Mich. 466, 56 N. W. 858; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Greenville &c. R. Co. v. Cathcart, 4 Rich. (S. Car.) 89; Chase v. Tennessee &c. R. Co., 5 Lea (Tenn.) 415; Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. 838; 1 Thomp. Corp. (2d ed.) § 576; note in 93 Am. St. 357, 358, 359, where this is stated to be the rule supported by the weight of authority. A few courts, however, seem to require an express promise. See note last above referred to in 93 Am. St. 356, 357, for citation of such cases.

[68] Bullock v. Falmouth &c. Co., 85 Ky. 184, 3 S. W. 129; Selma &c. R. Co v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; New Albany &c. R. Co. v. Fields, 10 Ind. 187; St. Paul &c. R. Co. v. Robbins, 23 Minn. 439; Walter A. Woods Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; Osborn v. Crosby, 63 N. H. 583; Lake Ontario &c. R. Co. v. Mason,

mutual obligations entered into by the subscribers,[69] will, it seems, be conclusively implied by law from the fact of the subscription.[70] A subscription to the capital stock of a corporation amounts to an agreement to take the stock at its par value, and where a land-owner agrees to take the stock of a railroad company in payment of damages to his land caused by the construction of the road, it has been held that he cannot demand the stock at its market value.[71]

§ 128 (110). Payment of subscription—Trust fund doctrine.—As already stated, a subscription to corporate stock is, in effect, a contract to pay for it in the mode prescribed, although it contains no express promise to pay.[72] The fund contributed and agreed to be contributed by the stockholders constitutes, in equity, a trust fund for the benefit or security of the corporate creditors,[73] and the general rule, therefore, is that subscriptions

16 N. Y. 451. In most of the New England States, however, it is held that the only remedy available to the corporation is to declare the shares forfeited, unless the subscriber expressly promises to pay, or the charter expressly provides that a subscription on his part shall bind him to pay for the shares subscribed. Russell v. Bristol, 49 Conn. 251; Belfast &c. R. Co. v. Moore, 60 Maine 561; Boston &c. R. Co. v. Wellington, 113 Mass. 79; White &c. R. Co. v. Eastman, 34 N. H. 124; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181.

[69] West v. Crawford, 80 Cal. 19. 21 Pac. 1123; Twin Creek &c. Co. v. Lancaster, 79 Ky. 552; Northern &c. R. Co. v. Miller, 10 Barb. (N. Y.) 260; Belton Compress Co. v. Saunders, 70 Tex. 699, 6 S. W. 134. But see Cottage &c. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286.

[70] East Tennessee &c. R. Co. v. Gammon, 5 Sneed (Tenn.) 567.

[71] Hoffman v. Bloomsburg &c. R. Co., 157 Pa. St. 174, 27 Atl. 564.

[72] Ante, § 127; 1 Cook Corp. (7th. ed.), § 52, et seq; Shattuck v. Robbins, 68 N. H. 565; Howley v. Upton, 102 U. S. 314; note to Winston v. Brooks, 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507.

[73] Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Graham v. Railroad Co., 102 U. S. 148, 161, 26 L. ed. 106; Camden v. Stewart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. ed. 363; Wood v. Dummer, 3 Mason (U. S.) 308, Fed. Cas. No. 17944; John W. Cooney Co. v. Arlington Hotel Co., (Del. Ch.) 101 Atl. 879; Goodman v. White, 174 N. Car. 399, 93 S. E 906; Germantown

must be paid in money or "money's worth."[74] But this does not mean that stock must necessarily be paid for in cash at the time it is issued.[75] Unless otherwise provided, payment may be

Pass. R. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546, and note; Adler v. Milwaukee &c. Co., 13 Wis. 57; 2 Thomp. Corp. § 1569. This doctrine, which is not found in the old English cases, is now too well settled in this country to need the citation of all the authorities. They are collected and reviewed in the note to Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797, 808. Sawyer v. Hoag, 17 Wall (U. S.) 610; Upton v. Trebilcock, 91 U. S. 45. See also Perkins v. Cowles, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283 n, 137 Am. St. 158, and notes; Niles v. Olszak, 87 Ohio St. 229, 100 N. E. 820, L. R. A. 1918E, 238, and note; note in 5 L. R. A. 649, 46 L. R. A. (N. S.) 440, 448, and Easton Nat. Bank v. American Brick &c. Co., 70 N. J. 732, 64 Atl. 917, 8 L. R. A. (N. S.) 271. For explanations of the general doctrine and limitations upon another phase of it see Hollins v. Brierfield &c. Co, 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; Chattanooga &c. R. Co. v. Evans, 66 Fed. 809; O'Bear &c. Co. v. Volfer, 106 Ala. 205, 17 So. 525, 28 L. R. A. 707, 54 Am. St. 31; Worthen v. Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. 50, and note; First Nat. Bank v. Dovetail &c. Co., 143 Ind. 550, 40 N. E. 810; Henderson v. Indiana Trust Co., 143 Ind. 561, 40 N. E. 516. The doctrine has been criticised in some respects, but the same result has been reached on other principles. See Macbeth v. Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am. St. 670, 677; Hospes v. Northwestern &c. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618.

[74] Drummond's case, L. R. 4 Ch. 772; note to Winston v. Brooks, 129 Ill. 64, 21 N. E. 514, 4 L. R. A. 507; Wetherbee v. Baker, 35 N. J. Eq. 501; Marshall Foundry Co. v. Killian, 99 N. Car. 501, 6 S. E. 680, 6 Am. St. 539. See also John W. Cooney Co. v. Arlington Hotel Co., (Del. Ch.) 101 Atl. 879; and likewise notes in 51 L. R. A. (N. S.) 56, 52 L. R. A. (N. S.) 454, and L. R. A. 1916E, 570.

[75] "Where a share is issued, if the price be paid in cash, so much is added to the working capital, thereby enhancing the creditor's security. If the price be not paid, the purchaser's indebtedness may be looked to for a like effect." Chouteau v. Dean, 7 Mo. App. 210, 214. "Unpaid stock is as much a part of this pledge (that the capital stock shall constitute a trust fund for the creditor), and as much a part of the assets of the company, as the cash which has been paid in upon it. creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due

made in notes,[76] checks,[77] or municipal bonds,[78] where the municipality is authorized to issue them for that purpose. So, it may be made in labor or services.[79] And property which is necessary to the corporation in carrying out its legitimate business, or which it is authorized to purchase, may likewise be received in payment.[80] It has also been held that stock may be issued in

the company." Sanger v. Upton, 91 U. S. 56, 60, 61, 23. L. ed. 220, and authorities there cited.

[76] Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49; Stoddard v. Shetucket &c. Co., 34 Conn. 542; Hardy v. Merriweather, 14 Ind. 203; Ogdensburg &c. R. Co v. Wooley, 3 Abb. App. Dec. (N. Y.) 398; Vermont Central R. Co. v. Clayes, 21 Vt. 30; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709. And see Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; McDowell v. Chicago Steel Works, 124 Ill. 491, 16 N. E. 854, 7 Am. St. 381; Union Cent. &c. Co. v. Curtis, 35 Ohio St. 343; Doak v. Stahlman (Tenn.), 58 S. W. 741.

[77] People v. Stockton &c. R. Co., 45 Cal. 306, 13 Am. Rep. 178; Syracuse &c. R. Co. v Gere, 4 Hun (N. Y.) 392; Staten Island &c. R. Co., In re, 37 Hun (N. Y.) 422.

[78] Post, chapter on Municipal Securities. See also Southern &c. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; Valk v. Crandall, 1 Sandf. Ch. (N. Y.) 179; Leavitt v. Pell, 27 Barb. (N. Y.) 322. 5 Thomp. Corp. (2d. ed.), § 6689.

[79] Lake St. El. R. Co. v. Ziegler, 99 Fed. 114; Cincinnati &c. R. Co. v. Clarkson, 7 Ind. 595; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Rich v. State Nat. Bank, 7 Nebr. 201, 29 Am. Rep. 382; State v. Timken, 48 N. J. L. 87, 2 Atl. 783; Beach v. Smith, 30 N. Y. 116; La-Crosse &c. Harvester Co. v. Goddard, 114 Wis. 610, 91 N. W. 225, and note in 19 Am. and Eng. Corp. Cas. 258. Upon principle, where the corporation has authority to pay its officers salaries or compensation for special services, there seems to be no valid reason why the indebtedness of the corporation to them may not be used to pay for stock issued to him in good faith. 4 Thomp. Corp. (2nd ed.) § 3952. But see Daniell, Ex parte, 1 De G. & J. 372.

[80] Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279; Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736; Ohio &c. R. Co. v. Cramer, 23 Ind. 490; Coffin v. Ransdall, 110 Ind. 417, 11 N. E. 20; New Haven Nail Co. v. Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Donald v. American &c. Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116; Beach v. Smith, 30 N. Y. 116; Philadelphia &c. R. Co. v. Hickman, 28 Pa. St. 318; Bedford County v. Nashville &c. R. Co., 14 Lea (Tenn.) 525; Clark v. Farrington, 11 Wis. 306. Contra,

satisfaction of a debt due from the corporation.[81] But the transaction must be bona fide, and the overvaluation of services or property received in payment may be so grossly excessive as to raise a presumption of fraud.[82] Yet the courts will usually treat that as a payment which the parties have agreed shall be payment,[83] and it will make no difference, in the absence of fraud, that the property afterwards turns out to be of less value than was supposed.[84] The doctrine which we have been considering would seem to prevent a corporation, at least as against creditors, from issuing paid-up stock and releasing the subscriber upon payment in money of less than its par value;[85] but where all

Henry v. Vermilion &c. R. Co., 17 Ohio 187; Neuse &c. Co. v. Commissioners, 6 Jones (N. Car.) 204.

[81] Lohman v. New York &c. R. Co., 2 Sandf. (N. Y.) 39; Reed v. Hayt, 51 N. Y. 121; Carr v. LeFevre, 27 Pa. St. 413; Appleyard's Case, 49 L. J. Ch. 290; Woodfall's Case, 3 DeG. & Sm. 63. So, it has been held that it may be issued in payment of damages. Philadelphia &c. R. Co. v. Hickman, 28 Pa. St. 318.

[82] Elyton Land Co. v. Birmingham &c. Co., 92 Ala. 407, 9 So. 129, 12 L. R. A. 307, 25 Am. St. 65; Boulton &c. Co. v. Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649n, 6 R. & Corp. L. J. 417; Boynton v. Andrews, 63 N. Y. 93; Douglass v. Ireland, 73 N. Y. 100; Carr v. LeFevre, 27 Pa. St. 413. See also Osgood v. King, 42 Iowa 478; Chisholm v. Forny, 65 Iowa 333, 21 N. W. 664; National Tube Works Co. v. Gilfillan, 124 N. Y. 302, 26 N. E. 538. And in a few states the property must be taken at its true value in order to amount to a complete payment as against a creditor. Libby v. Tobey, 82 Maine 397, 19 Atl. 904; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274, 2 Thomp. Corp. § 1616.

[83] Phelan v. Hazard, 5 Dill. (U. S.) 45, 6 Cent. L. J. 109, Fed. Cas. No. 11068; Peck v. Coalfield Coal Co., 11 Ill. App. 88; Coffin v. Ransdell, 110 Ind. 417, 11 N. E. 20; Brant v. Ehlen, 59 Md. 1.

[84] Coit v. North Carolina &c. Co., 14 Fed. 12, affirmed in 119 U. S. 343, 7 Sup. Ct. 231, 30 L. ed. 420; Dupont v. Tilden, 42 Fed. 87; Coe v. East & West R. Co., 52 Fed. 531; Grant v. East & West R. Co., 54 Fed. 569; Arapahoe &c. Co. v. Stevens, 13 Colo. 534, 22 Pac. 823; Young v. Erie &c. R. Co., 65 Mich. 111, 31 N. W. 814; Brickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250; Schenck v. Andrews, 57 N. Y. 133.

[85] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Remington &c. Co., In re, 139 Fed. 766 (distinguishing Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227); Williams v.

the other stockholders consent, and it is not forbidden by the charter or statute, such a transaction is binding upon the company, and it cannot collect the difference between the amount paid and the face value of the stock for its own benefit.[86] And in a recent case, the supreme court of the United States went still further and held that an active corporation might issue stock and sell it upon the market for far less than its par value, in order to obtain money to prosecute its business and pay its debts, and that creditors could not compel the purchaser to pay its face value.[87] This case, however, has met with much criticism,[88] and the rule therein announced should not be extended in its application to a different state of facts. In some jurisdictions the action of the directors and stockholders in good faith determining the value of the property, services, or the like taken in payment of a stock subscription is conclusive, in the absence of actual fraud, but in others the rule is not so strict, and a gross overvaluation of property, whose value is easily ascertained is presumptive if

Evans, 87 Ala. 725, 6 So. 702, 6 L. R. A. 218 n; Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521. See Chouteau v. Dean, 7 Mo. App. 210; Macbeth v. Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am. St. 670; Gogebic &c. Co. v. Iron Chief &c. Co., 78 Wis. 427, 47 N. W. 726, 23 Am. St. 417; 8 Fletcher Cyc. Corp. § 5038.

[86] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Harrison v. Arkansas Valley R. Co., 13 Fed. 522, 4 McCrary (U. S.) 264. See also Memphis &c. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. ed. 595; Foster v. Seymour, 23 Fed. 65; Stewart v. Railroad Co., 41 Fed. 736; Dickerman v. Northern Trust Co., 80 Fed. 450; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; St Louis &c. R. Co. v. Tiernan, 37 Kans. 606, 15 Pac. 544; Coler v. Tacoma &c. R. Co., 53 N. J. Eq. 680, 53 Atl. 680.

[87] Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227. See also cases cited in Grant v. East & West R. Co., 54 Fed. 569, 575, and Van Cott v. Van Brunt, 82 N. Y. 535

[88] See article by R. C. McMurtrie in 25 Am. L. Rev. 749; 2 Thomp. Corp. (1st ed.), § 1665. See also Kimbell v. Chicago &c. Co., 119 Fed. 102; Smith v. Ferries &c. R. Co., 119 Cal. xvii, 51 Pac. 723; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415.

not conclusive evidence of fraud, in the absence of anything to the contrary.[89]

§ 129 (111). **Conditional subscriptions.**—A subscription may be made upon a condition precedent, in which case it can only be enforced after the performance of the condition.[90] The courts, however, lean toward a construction of the subscription which will hold any conditions expressed therein to be conditions subsequent,[91] in which case the subscription is generally held to be

[89] Coit v. North Carolina &c. Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. ed. 420; Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. ed. 1111; Coleman v. Howe, 154 Ill. 458, 39 N. E. 725, 727, 45 Am. St. 133; National Tube Works v. Gilfillan, 124 N. Y. 302, 307, 26 N. E. 538. In Macbeth v. Banfield, 45 Ore. 553, 78 Pac. 693, 106 Am St. 670, 680, it is said: "It is competent for the determination of the question to take into consideration the nature of the property, the purposes for which it is accepted, and all the conditions and circumstances attending and surrounding the transaction; and if, from the whole, it appears that the board has acted in good faith, in the honest exercise of its best judgment, no adverse presumption pending, then are its acts conclusive, otherwise not. Clark Corporations, 380, 381; Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, 598; Boynton v. Andrews, 63 N. Y. 93; Douglass v. Ireland, 73 N. Y. 100; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Elyton Land Co. v. Birmingham &c. Co., 92 Ala. 407, 423, 9 So. 129, 12 L. R. A. 307, 25 Am. St. 65; Osgood v. King, 42 Iowa 478; Jackson v. Traer, 64 Iowa 469, 20 N. W. 764, 52 Am. Rep. 449." See also note in 42 L. R. A. 593, and notes in 52 L. R. A. (N. S.) 454, and L. R. A. 1916E, 570.

[90] North &c. R. Co. v. Winfree, 51 Ga. 318; Allman v. Havana &c. R. Co., 88 Ill. 521; note to Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385, 398; Peoria &c. R. Co. v. Preston, 35 Iowa 115; Bucksport &c. R. Co. v. Buck, 68 Maine 81; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760 n; Monroe v. Fort Wayne &c. R. Co., 28 Mich. 272; Porter v. Raymond, 53 N. H. 519; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; Chartiers &c. R. Co. v. Hodgens, 85 Pa. St. 501; Lowe v. Edgefield &c. R. Co., 1 Head (Tenn.) 659; Montpelier &c. R. Co. v. Langdon, 46 Vt. 284; Milwaukee &c. R. Co. v. Field, 12 Wis. 340. See also Stone v. Monticello Const. Co., 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978; Foote v. Greilick, 166 Mich. 636, 132 N. W. 473; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97.

[91] Swartout v. Michigan Air Line R. Co. 24 Mich. 389; Chamberlain

absolute,[92] and the condition subsequent a separate contract of the corporation to be enforced like other contracts.[93] Subscriptions made before incorporation and taken for the purpose of raising the capital required to secure incorporation under a general statute, must be absolute.[94] Advance subscriptions made upon condition are held void in New York,[95] while the condition only is held void in Pennsylvania,[96] and the subscription is upheld as an absolute one. But the cases generally agree that a conditional subscription is not to be counted in estimating the stock subscribed,[97] and the better reason and weight of authority

v. Painesville &c. R. Co., 15 Ohio St. 225. The electors of a county voted to subscribe for stock in the plaintiff's railroad and issue the bonds of the county for the same, on condition that the railroad should be completed and in operation in the county, by lease or otherwise, from a connection with existing roads in the state, and, also, conditioned that the acceptance of the bonds issued in payment of the stock should constitute a covenant binding upon the railroad company, its lessees or assigns, to maintain and operate said line of road, by lease or otherwise, over its route for a term of ninety-nine years. The court held that an agreement by the railroad company, executed after such subscription, to sell and transfer its road after it was completed, in order to obtain money for its construction, did not discharge or release the county from the payment of its subscription. Southern &c. R. Co. v. Tower, 41 Kans. 72.

[92] Johnson v. Georgia &c. R. Co., 81 Ga. 725, 8 S. E. 531; Henderson &c. R. Co. v. Leavell, 16 B. Mon. (Ky.) 358; Belfast &c. R. Co. v. Moore, 60 Maine 561, 576; Miller v. Pittsburgh &c. R. Co., 40 Pa. St. 237, 80 Am. Dec. 570; Paducah &c. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842. See also Sarbach v. Kansas &c. Co., 86 Kans. 734, 122 Pac. 113, Ann. Cas. 1913C, 415.

[93] 1 Cook Corporations (7th. ed.), § 78. See also Bobzin v. Gould Balance Valve Co., 140 Iowa 744, 118 N. E. 40.

[94] New York &c. R. Co. v. Hunt, 39 Conn. 75; Brand v. Lawrenceville &c. R. Co., 77 Ga. 506, 1 S. E. 255; Troy &c. R. Co. v. Newton, 8 Gray. (Mass.) 596; Ellison v. Mobile &c. R. Co. v. Tibbits, 18 Barb. (N. Y.) 297; Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225; Boyd v. Peach Bottom R. Co., 90 Pa. St. 169, 1 Am. & Eng. R. Cas. 631.

[95] Troy &c R. Co. v. Tibbits, 18 Barb. (N. Y.) 297.

[96] Caley v. Philadelphia &c. R. Co., 80 Pa. St. 363; Boyd v. Peach Bottom R. Co., 90 Pa. St. 169. See also Burke v. Smith, 16 Wall. (U. S.) 390, 396, 21 L. ed. 361.

[97] California &c. Co. v. Russell,

would seem to be that, when made for this purpose, only absolute subscriptions are valid and enforceable by either the subscriber or the corporation.[98] Yet, a condition in a preliminary subscription that the organization shall not be completed until a certain amount of stock has been subscribed, is valid.[99] And such a provision in the charter constitutes a condition precedent annexed to every subscription.[1]

88 Cal. 277, 26 Pac. 105; New York &c. R. Co. v. Hunt, 39 Conn. 75; Brand v. Lawrenceville &c. R. Co., 77 Ga. 506; Ticonic &c. Co. v. Lang, 63 Maine 480; Boston &c. R. Co. v. Wellington, 113 Mass. 79; Caley v. Philadelphia &c. R. Co., 80 Pa. St. 363. Nor colorable or fictitious subscriptions. Memphis Branch R. Co. v. Sullivan, 57 Ga. 240. Nor subscriptions by persons having no reasonable expectation of being able to pay. Holman v. State, 105 Ind. 569, 5 N. E. 702; Belfast &c. R. Co. v. Inhabitants of Brooks, 60 Maine 568. See also Branch v. Augusta &c. Works, 95 Ga. 573, 23 S. E. 128; Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 137. But if there is good faith, insolvency of some may not be a defense for others. Penobscot R. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654; Salem &c. Corp. v. Ropes, 9 Pick. (Mass.) 187, 19 Am. Dec. 363.

[98] 1 Cook Corporations (7th. ed.), § 79, note.

[99] Penobscot &c. R. Co. v. Dunn, 39 Maine 587; Philadelphia &c. R. Co v. Hickman, 28 Pa. St. 318. And, according to the weight of authority, there is even at common law an implied condition that all the required stock shall be subscribed before a subscription shall become due. Peoria &c. R. Co. v. Preston, 35 Iowa 115; Salem Mill Dam Corp. v. Ropes, 6 Pick. (Mass.) 23; Livesey v. Omaha Hotel Co., 5 Nebr. 50, and authorities there cited; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; 1 Thomp. Corp. (2d. ed.), § 528, and authorities cited in note; Anderson v. Middle &c. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149, 151; Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 130. But see Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Newcastle &c. R. Co. v. Bell, 8 Blackf. (Ind.) 584; Stewart v. Minnesota &c. R. Co., 36 Minn. 355, 31 N. W. 351 (as to rights of creditors); Astoria &c. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379; Cheraw &c. R. Co. v. White, 14 S. Car. 51. See also ante, § 24.

[1] Memphis Branch R. Co. v. Sullivan, 57 Ga. 240; Peoria &c. R. Co v. Preston, 35 Iowa 115; New Hampshire &c. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Somerset R. Co. v. Clarke, 61 Maine 379; 1 Thomp. Corp. §§ 612, 613. Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose

§ 130 (111a). Implied conditions.—It is not only true that a provision in a charter to the effect that no subscription shall be enforceable until a certain amount of stock has been subscribed for is a condition precedent, but it is also held in many jurisdictions that where the capital stock is fixed, it is an implied condition, in the absence of anything to the contrary, that it shall all be subscribed for before a subscriber is liable upon his subscription. Thus it is said: "It is a general and well-settled rule, subject to a few qualifications only, that where the capital stock of a corporation is fixed, it is implied in every contract of subscription, as a condition precedent to liability thereunder, that all the capital stock must be subscribed. Until all the capital stock is subscribed, payment of his subscription or any part thereof cannot be required of any subscriber."[2] But if the subscription con-

shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, can not be compelled to pay until the whole capital has been subscribed for and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards. Exposition R. &c. Co. v. Canal St. E. R. Co., 42 La. Ann. 370, 7 So. 627. This is the common law rule where the charter does not otherwise provide, but such defense may be waived by the subscriber. Masonic Temple Assn. v. Channell, 43 Minn. 353, 45 N. W. 716; International &c. Assn. v. Walker, 83 Mich. 386, 47 N. W. 338, 3 Lewis' Am. R. & Corp. 731. See also McConnaghy v. Monticello Const. Co., 135 Ky. 667, 117 S. W. 372.

[2] Note to Gettysburg Nat. Bank v. Brown (95 Md. 367, 52 Atl. 975), in 93 Am. St. 339, 368; Stoneham Branch R. Co. v. Gould, 68 Mass. 277; Contuocook Valley R. Co. v. Barker, 32 N. H. 363. See also Santa Cruz R. Co. v. Schwartz, 53 Cal. 106; Stearns v. Sopris, 4 Colo. App. 191, 35 Pac. 281; Allman v. Havana &c. R. Co., 88 Ill. 521; McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. 288; Hoagland v. Cincinnati &c. R. Co., 18 Ind. 452; Peoria &c. R. Co. v. Preston, 35 Iowa 115; Exposition R. &c. Co. v. Canal St. &c. R. Co., 42 La. Ann. 370, 7 So. 627; Somerset &c. R. Co. v. Cushing, 45 Maine 524; Somerset &c R. Co. v. Clarke, 61 Maine 379; Rockland &c. Co. v. Sewall, 78 Me. 167, 3 Atl. 181, 80 Maine 400, 14 Atl. 939; Hughes v. Antietam Mfg. Co., 34 Md. 316; Musgrove v. Morrison, 54 Md. 161; Worcester &c. R. Co. v. Hinds, 62 Mass. 110; Shurtz v. Schoolcraft &c. R. Co., 9 Mich. 270; International &c. Assn. v. Walker, 88 Mich. 62, 49 N. W. 1086; Curry

tract or agreement shows a contrary intention there is no room for such an implication,[3] and an express unconditional provision to pay has been held in some cases to evince such an intention.[4] So, the matter is frequently regulated and determined by statute.[5] And a subscriber may be responsible for preliminary ex-

Hotel Co. v. Mullins, 93 Mich. 318, 53 N. W. 360; Masonic Temple Assn. v. Chanwell, 43 Minn. 353, 45 N. W. 716; Duluth Inv. Co. v. Witt, 63 Minn. 538, 65 N. W. 956; Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481; Sedalia &c. R. Co. v. Abell, 17 Mo. App. 645; McCann v. American Cent. Ins. Co., 4 Nebr. 256; Macfarland v. West Side &c. Assn, 53 Nebr. 417, 73 N. W. 736; Jewett v. Valley R. Co., 34 Ohio St. 601; Astoria &c. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379; Read v. Memphis &c. Gas. Co., 56 Tenn. 545; Anderson v. Middle &c. R. Co., 91 Tenn. 44, 17 S. W. 803; Galveston Hotel Co. v. Bolton, 46 Tex. 633; Norwich Lock Mfg. Co. v. Hockaday, 89 Va. 557, 16 S. E. 877; Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 130; Birge v. Browning, 11 Wash. 249, 39 Pac. 643; Greenbrier Industrial Exp. v. Ocheltree, 44 W. Va. 626, 30 S. E. 78; Milwaukee Brick &c. Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838; Wontner v. Shairp, 4 Com. B. 404. But see South. Ga. &c. R. Co. v. Ayres, 56 Ga. 230; Rensselaer &c. Plank Road Co. v. Wetsel, 21 Barb. (N. Y.) 56; Schenectady Plank Road Co. v. Thacher, 11 N. Y. 102; Lynch v. Eastern &c. R. Co., 57 Wis. 430, 15 N. W. 743, 825. As to the rule where the capital stock is not fixed, see note in 93 Am. St. 375, citing apparently conflicting authorities from the same states, most of which, however, may probably be reconciled in view of the fact that in all or nearly all of those holding that there was no such implied condition there was an express promise to pay, and that both the fact of the express promise and of the capital not being fixed were influential factors in the decision. As to when, if at all, a subscriber can question the validity of the corporate organization in case it exists as a de facto corporation, see Jones v. Dodge, 97 Ark. 248, 133 S. W. 828, L. R. A. 1915A, 472, and elaborate note.

[3] Arkadelphia Cotton Mills v. Trimble, 54 Ark. 316, 15 S. W. 776; Troy &c. R. Co. v. Newton, 74 Mass. 596; Sedalia &c. R. Co. v. Abell, 17 Mo. App. 645; Anderson v. Middle &c. R. Co., 91 Tenn. 44, 17 S. W. 803.

[4] See West v. Crawford, 80 Cal. 19, 21 Pac. 1123; Lail v. Mt. Sterling Coal Road Co., 76 Ky. 32; Skowhegan &c. R. Co. v. Kinsman, 77 Maine 370; Rockland &c. Co. v. Sewell, 80 Maine 400, 14 Atl. 939.

[5] See San Bernardino &c. Co. v. Merrill, 108 Cal. 490, 41 Pac. 487; Mandel v. Swan &c. Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. 124; Anglo-American &c. Co. v. Dyer,

penses, even though not subject to calls and assessments for the general purpose of the corporation.[6]

§ 131 (112). **Valid and invalid conditions.**—Where the condition is that the capital stock shall be limited to a certain amount, after that amount is reached a subscription in excess thereof cannot be enforced by the corporation.[7] Parol and secret conditions annexed to an absolute subscription are held void as a fraud upon the corporate creditors and other subscribers who are injured thereby,[8] and the subscription is enforceable according to its

181 Mass. 593, 64 N. E. 416; Fairview R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688. This the statutes frequently provide for organizing and doing business when a certain amount less than all the stock is subscribed, and a subscriber is generally liable in such a case, having subscribed with reference to such provision. See Jewett v. Valley R. Co., 34 Ohio St. 601; Hanover Junction R. Co. v. Haldeman, 82 Pa. St. 36; Milwaukee &c. Co. v. Schoknecht, 108 Wis. 457, 84 N. W. 838, and other authorities cited in note in 93 Am. St. 373.

[6] Covington &c. R. Co. v. Moore, 3 Ind. 510; Salem Mill &c. Corp. v. Ropes, 23 Mass. 23; Littleton Mfg. Co. v. Parker, 14 N. H. 543; Anvil Min. Co. v. Sherman, 74 Wis. 226, 42 N. W. 226, 4 L. R. A. 232 n. Such a condition is waived if the subscriber, with knowledge that the required proportion of the stock has not been subscribed attends the meetings of the company and participates in its organization, but not if he acted in ignorance of the fact that the required stock had not been subscribed. Fairview &c. R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688; Auburn Opera House &c. v. Hill, 97 Cal. xvii, 32 Pac. 587; International &c. Assn. v. Walker, 97 Mich. 159, 56 N. W. 344.

[7] Clark v. Turner, 73 Ga. 1; Merrill v. Gamble, 46 Iowa 615; Oler v. Baltimore &c. R. Co., 41 Md. 583; Burrows v. Smith, 10 N. Y. 550. See also Laredo Imp. Co. v. Stevenson, 66 Fed. 633; 1 Thomp. Corp. (2d ed.) § 578.

[8] Mississippi &c. R. Co. v. Cross, 20 Ark. 443; Mann v. Cooke, 20 Conn. 178; Ridgefield &c. R. Co. v. Brush, 43 Conn. 86; Johnson v. Pensacola &c. R. Co., 9 Fla. 299; New Albany &c. R. Co. v. Fields, 10 Ind. 187; Chouteau Co. v. Floyd, 74 Mo. 286; Kishacoquillas &c. R. Co. v. McConaby, 16 Serg. & R. (Pa.) 140; Robinson v. Pittsburg &c. R. Co., 32 Pa. St. 334; Philadelphia &c. R. Co. v. Conway, 177 Pa. St. 364, 35 Atl. 716; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181; Preston v. Grand Collier Dock Co., 2 Eng. Rail. & Canal Cas. 335; Davidson's Case, 3 DeG. & S. 21. But see Pickler v.

terms. It cannot even be varied by a separate written contract executed at the time the subscription was made, if such separate contract was unknown to other subscribers and creditors.[9] But as a general rule any condition which can be legally[10] performed or complied with by the corporation,[11] may be annexed to a subscription given for stock in a corporation which is already organized, if such condition be expressed therein.[12] It has also been held that a condition will be presumed to have been made when the subscription was given, in the absence of proof to the contrary,[13] and will be held valid when annexed to the subscription after it was given, if done with the consent of all the parties, and for a consideration.[14]

§ 132 (113). Conditional subscription is a mere offer until accepted.—A conditional subscription usually constitutes only an offer on the part of the subscriber until it is accepted by the

Arkansas Packing Co., 112 Ark. 33, 164 S. W. 764 (parol evidence admissible to show application for stock not to be delivered or to become operative until subscriber so directed).

[9] Brownlee v. Ohio &c. R. Co., 18 Ind. 68; White Mountains R. Co. v. Eastman, 34 N. H. 124; Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. 500.

[10] As to the effect of an ultra vires condition in a subscription, see Pellatt's Case, L. R. 2 Ch. 527; Thigpen v. Mississippi &c. R. Co., 32 Miss. 347. See also Morrow v. Nashville &c. Co., 87 Tenn. 262, 10 S. W. 495, 3 L. R. A. 37, 10 Am. St. 658; Laredo Imp. Co. v. Stevenson, 66 Fed. 633.

[11] Penobscot &c. R. Co. v. Dunn, 39 Maine 587; Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 60, 55 Am. Rep. 719, 5 N. E. 404; Bobzin v. Gould Balance Valve Co., 140 Iowa 744, 118 N. W. 40; McMillan v. Maysville &c. R. Co., 54 Ky. 218, 61 Am. Dec. 181; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; Dayton &c. R. Co. v. Hatch, 1 Disney (Ohio) 84; Lake Ontario Shore R. Co. v. Curtiss, 80 N. Y. 219. See Chicago &c. R. Co. v. Aurora, 99 Ill. 205, where it is held that a town may issue railroad aid bonds, payable upon a condition which can not legally be fulfilled.

[12] For conditions which have been held valid see 1 Cook Corporations (7th. ed.), § 83; 8 Thomp. Corp. §§ 591, 612, 619, 628; Cox v. Hardee, 135 Ga. 80, 68 S. E. 932.

[13] Robinson v. Pittsburgh &c. R. Co., 32 Pa. St. 334, 72 Am. Dec. 792.

[14] Pittsburgh &c. R. Co. v. Stewart, 41 Pa. St. 54; Tonica &c. R. Co. v. Stein, 21 Ill. 96; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300.

corporation,[15] after which, upon performance of the condition, it has the binding force of any other subscription,[16] but it has been held that such a subscription may be recalled if there is an unreasonable delay in accepting it.[17] So, a gratuitous subscription with only one signer is said to be an offer, which, until accepted by the promisee in express terms, or by a performance of the conditions stipulated therein, is but a nudum pactum, and cannot be enforced, against the will of the subscriber, by an action at law.[18]

§ 133 (114). Subscriptions in escrow—Parol evidence.—A contract of subscription to capital stock, absolute on its face, may,

[15] Junction R. Co. v. Reeve, 15 Ind. 236. See also Cass v. Pittsburgh &c. R. Co., 80 Pa. St. 31; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760. But see Mansfield &c. R. Co. v. Stout, 26 Ohio St. 241, to the effect that the question of acceptance is immaterial where the corporation has fully performed the condition imposed. The death of the subscriber before acceptance of a conditional subscription amounts to a revocation. Sedalia &c. R. Co. v. Wilkinson, 83 Mo. 235; Wallace v. Townsend, 43 Ohio St. 537, 3 N. E. 601, 54 Am. Rep. 829. Where the acceptance must be formal, as in an offer to give land in payment for stock, it must be by the board of directors, or a specially authorized agent, so as to bind the company to issue stock in exchange for it before the subscriber will be bound. An acceptance by less than a quorum of the directors will not bind him. Junction R. Co. v. Reeve, 15 Ind. 236.

[16] New Albany &c. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337; Webb v. Baltimore &c. R. Co., 77 Md. 92, 39 Am. St. 396, 54 Am. & Eng. R. Cas. 202; Ashtabula &c. R. Co v. Smith, 15 Ohio St. 328; Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897. Immediately upon performance of the condition, a promise on the part of the subscriber to pay, and of the company to issue its stock upon such payment, is implied. Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223. See also Webb v. Baltimore, &c. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. 396; St. Paul &c. R. Co. v. Robbins, 23 Minn. 439.

[17] Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760n. See also Wood's Case, L. R. 15 Eq. 236, holding that notice of such recall may be given to the secretary. That a conditional subscription may be revoked while still in the hands of the corporate agent, see Lowe v. Edgefield &c. R. Co., 1 Head (Tenn.) 659.

[18] Broadbent v. Johnson, 2 Idaho 300, 13 Pac. 83.

like any other contract, be delivered to a third person to be held in escrow until the performance of certain conditions. But if delivered to the railroad company it becomes valid and binding, and the delivery is effectual to convey title to the company.[19] Where a subscription is delivered in escrow, parol evidence is admissible to show the conditions upon which it is held.[20] But such evidence is not, as a rule, admissible to establish an escrow in the hands of the company,[21] although it has been held admissible to show that a subscription left with a soliciting agent was not to be delivered until the subscriber should have made an investigation and directed its delivery, and that, upon the investigation proving unsatisfactory, he had at once notified the agent to withhold and cancel it.[22] If a subscription, delivered to a committee of citizens to be held as an escrow to await the performance of certain parol conditions annexed thereto, be delivered to the company before the condition is fulfilled, such delivery is ineffective, and the subscription cannot be enforced.[23] When a

[19] Cass v. Pittsburgh &c. R. Co., 80 Pa. St. 31; Madison &c. Co. v. Stevens, 10 Ind. 1; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522, where delivery was made to a commissioner to take subscriptions. But a director not authorized to take subscriptions directly may hold one in escrow. Ottawa &c. R. Co. v. Hall, 1 Bradw. (Ill.) 612. And it has been held that where the subscription was left in the hands of an agent to solicit subscription with directions, to which he assented, to hold it until the subscriber made investigations and not to deliver it to the company until the subscriber directed him to do so, and the subscriber, on the investigation proving unsatisfactory, immediately notified the agent to withhold and cancel it, the subscriber did not become a stockholder and was not liable thereon. Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318.

[20] Ottawa &c. R. Co. v. Hall, 1 Bradw. (Ill.) 612; Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318. See also Pickler v. Arkansas Packing Co., 112 Ark. 33, 164 S. W. 764.

[21] Wight v. Shelby R. Co., 55 Ky. 4, 63 Am. Dec. 522.

[22] Great Western Tel. Co. v. Loewenthal, 154 Ill. 261, 40 N. E. 318. See also Pickler v. Arkansas Packing Co., 112 Ark. 33, 164 S. W. 764; Cass v. Pittsburgh &c. R. Co., 80 Pa. St. 31; Gilman v. Gross, 97 Wis. 224, 72 N. W. 885.

[23] Beloit &c. R. Co. v. Palmer, 19 Wis. 574. The same is true if it be put into the hands of a special agent of the company to be deliv-

subscription is given on a separate paper, parol evidence is admissible to show that it was to be annexed to the books only on the performance of certain conditions.[24] So, on the other hand, it has been held that where a subscription is in the name of a party as "trustee" it may be shown by parol evidence that he acted as agent for others, and creditors, or a receiver appointed at their instance, may maintain an action to recover the subscription from the real parties in interest.[25]

§ 134 (115). **Waiver of conditions.**—The condition may be waived by the subscriber, by express agreement,[26] by acting as an officer of the corporation,[27] by paying the whole subscription,[28] or giving an absolute, promissory note therefor,[29] or by

ered only upon the performance of conditions annexed. Saginaw &c. R. Co. v. Chappell, 56 Mich. 190, 22 N. W. 278.

[24] Bucher v. Dillburgh &c. R. Co., 76 Pa. St. 306; Tonica &c. R. Co. v. Stein, 21 Ill. 95.

[25] Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858. But see as to the inadmissibility of parol evidence generally, Smith v. Tallahassee &c. Co., 30 Ala. 650; Martin v. Pensacola &c. R. Co., 8 Fla. 370, 73 Am. Dec. 713; New Albany &c. R. Co. v. Fields, 10 Ind. 187; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; Kennebec &c. R. Co. v. Waters, 34 Maine 369; Miller v. Hanover &c. R. Co., 87 Pa. St. 95, 30 Am. Rep. 349.

[26] Hanover Junction &c. R. Co. v. Haldeman, 82 Pa. St. 36. The conditions implied by law in subscriptions to stock, that payment shall not be enforced until all the stock is subscribed is waived by the subscribers to the stock of a railroad company expressly agreeing, for the purpose of enabling the company to build a certain part of its road, to pay their subscriptions; and if the company acts upon this agreement and constructs the road, the subscribers making such an agreement must pay, though others do not. Anderson v. Middle &c. Tenn. Cent. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149. As to waiver of such condition by express agreement, see, also, Skowhegan &c. R. Co. v. Kinsman, 77 Maine 370.

[27] Dayton &c. R. Co. v. Hatch, 1 Disney (Ohio) 84; Lane v. Brainerd, 30 Conn. 565. See also Macfarland v. West Side Imp. Assn., 53 Nebr. 417, 73 N. W. 736, 1 Thomp. Corp. (2d ed.) § 616.

[28] Parks v. Evansville &c. R. Co., 23 Ind. 567. See also Stone v. Monticello Const. Co., 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978.

[29] Evansville &c. R. Co. v. Dunn, 17 Ind. 603; Slipher v. Earhart, 83

any act, with knowledge of the facts, which shows an intention to hold himself to be an absolute shareholder in the enterprise.[30] So, as a general rule, any acts on the part of the subscriber which have induced others to act in reliance upon the fact that he was a stockholder will be sufficient to establish such a waiver or estoppel without any necessity for showing that either the corporation or any other subscriber has in fact been influenced by such acts.[31] The rule as to waiver of the implied condition that no subscription shall be payable until all of the capital stock has been subscribed is well stated in a recent case, as follows: "The courts, in stating what will estop the subscriber, or prevent his being heard to make the objection (that the full capital stock of the corporation has not been subscribed) refer only to his acts, and do not include the fact that they did influence others. If a technical estoppel were required to prevent a subscriber withdrawing his subscription on this ground much fraud might be

Ind. 173; Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225. But when the company's agent induces the subscriber to execute the notes by means of falsely representing that the condition has been complied with, their execution is not a waiver. Taylor v. Fletcher, 15 Ind. 80. See also Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385n. And where payments are made under a mistaken belief induced by false and fraudulent representations that the condition has previously been performed, such payment is not a waiver. Ridgefield &c. R. Co. v. Brush, 43 Conn. 86; Somerset &c. R. Co. v. Cushing, 45 Maine 524; Morris &c. Co. v. Nathan, 2 Hall (N. Y.) 239. The note given subsequent to the contract of subscription can not be regarded as forming a part of such contract and so is not subject to the conditions annexed to it. O'Donald v. Evansville &c. R. Co., 14 Ind. 259.

[30] Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385n; Parks v. Evansville, &c. R. Co., 23 Ind. 567; Willamette Freighting Co. v. Stannus, 4 Ore. 261. See also California &c. Co. v. Callender, 94 Cal. 120, 29 Pac. 859, 28 Am. St. 99; Hendrix v. Academy of Music, 73 Ga. 437; McConnaghy v. Monticello, 135 Ky. 667, 117 S. W. 372; Hards v. Platte Val. &c. Co., 35 Nebr. 263, 53 N. W. 73; Fairview &c. R. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688; note in 93 Am. St. 380-383; 1 Thomp. Corp. (2d ed.) §§ 616-618. Delay in canceling a subscription may bind one where it shows an intention to become an absolute stockholder. Wheatcroft's Case, 29 L. T. R. 324.

[31] Railway Co. v. Lacey, 3 Younge & J. 80.

committed; for, if it must be shown that the corporation or some subscriber, of whom there may be many hundreds or even thousands, was in fact influenced by the acts of the subscriber who seeks to withdraw it, might be impossible to prove the fact, even though it exist. The safer rule in such a case is that, if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or to be estopped to assert the defense. It is immaterial which word is used, except, perhaps, for the sake of strict verbal accuracy.[32] A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbid the doing of any corporate act until the requisite capital is subscribed.[33] An express condition may also be waived or qualified by another clause of the agreement which is inconsistent with it.[34] But a subscriber's mere silence,[35] or a part payment,[36] or soliciting subscriptions and permitting himself to be chosen to a corporate office, without acting as such,[37] is not necessarily such a waiver. Nor, in general, is participation in any acts done for perfecting the organization and setting it on its feet for business, such as preparing and procuring the execution of the articles, procuring subscriptions to its stock, preparing by-laws for its government, and the like, to be considered a waiver of the condition that the

[32] Masonic Temple Assn. v. Channell, 43 Minn. 353, 45 N. W. 716.

[33] Anderson v. Middle &c. Tenn. Cent. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149.

[34] Woonsocket Union R. Co. v. Sherman, 8 R. I. 564.

[35] Burlington &c. R. Co. v. Boestler, 15 Iowa 555; Bucksport, &c. R. Co. v. Inhabitants &c., 67 Maine 295.

[36] Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539; Pittsburgh &c. R. Co. v. Stewart, 41 Pa. St. 54. But see Klein v. Alton, &c. R. Co., 13 Ill. 514. The distinction is made as to whether the payments are such as to entitle the subscriber to demand his stock and preclude the company from denying that he is a stockholder. Appeal of Mack (Pa.) 7 Atl. 481. See also Parks v. Evansville &c. R. Co., 23 Ind. 567.

[37] Ridgefield &c. R. Co. v. Reynolds, 46 Conn. 375.

corporation shall not begin business until the capital stock is all subscribed, for these things are proper, and to some extent necessary to be done, although the subscriptions are incomplete.[38] If the annexed condition be a reserved right to withdraw the subscription, this right must be exercised within a reasonable time or it will ordinarily be held to be waived.[39]

§ 135 (116). When conditional subscription becomes payable.—Where certain acts are to be done within a specified time, the expiration of the time without performance will generally operate to discharge the subscriber from liability,[40] at least where they are conditions precedent and time is of the essence. A subscription made on condition that the road shall be "permanently" located on a certain route has been held payable when the route is adopted by the directors,[41] but a change in the route so that it does not fulfill the conditions, after part of the money is paid, may enable the subscriber to recover his money.[42] Whether the conditions have been performed is a question of fact

[38] Gilfillan, C. J., in Masonic Temple Assn. v. Channell, 43 Minn. 353; Memphis &c. R. Co. v. Sullivan, 57 Ga. 240; Old town &c. R. Co. v. Veazie, 39 Maine 571. See also Livesey v. Omaha &c. Co., 5 Nebr. 50; International &c. Assn. v. Walker, 88 Mich. 62, 49 N. W. 1086.

[39] Wilmington &c. R. Co. v. Robeson, 5 Ired. (N. Car.) 391.

[40] Freeman v. Matlock, 67 Ind. 99; Moore v. Campbell, 111 Ind. 328, 12 N. E. 495; Memphis &c. R. Co. v. Thompson, 24 Kans. 170; Portland &c. R. Co., v. Inhabitants &c., 58 Maine 23. See also Cincinnati &c. R. Co. v. Bensley, 51 Fed. 738, 19 L. R. A. 796. Where performance of the condition was completed soon after the expiration of the time, and the subscriber neglected to take his name off the books, he was held bound. Lee v. Imbrie, 13 Ore. 510, 11 Pac. 270. And see Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97. See however Freeman v. Matlock, 68 Ind. 99.

[41] Smith v. Allison, 23 Ind. 366; Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225. Contra Nashville &c. R. Co. v. Jones, 2 Coldw. (Tenn.) 574. As to meaning of "locate" generally, see note in Am. Cas. 1912C, 1309.

[42] Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539. But if the change is unauthorized by law it is said that the alteration is inoperative and the subscription not made voidable. Danbury &c. R. Co. v. Wilson, 22 Con. 435, 456.

which may be proved by parol,[43] as may fraud or bad faith on the part of the corporation or its officers in this connection.[44] Where the agreement leaves the question as to when the condition has been performed to the judgment of the directors, their decision, if made in good faith, is final.[45] Notice of such performance must usually be given to the subscriber, and payment demanded before the subscription will become payable.[46] But a formal notice of performance is not usually necessary before suit, where the subscriber has actual knowledge that the condition has been fulfilled.[47] Property subscribed in payment for stock taken should be specially demanded by the corporation, if no time is fixed for delivery.[48] And upon the failure of the subscriber to furnish the property, the subscription becomes payable in cash.[49]

§ 136 (117). Construction of conditional subscriptions—What is a sufficient compliance with condition as to time of beginning and completing road.—The conditions most commonly annexed

[43] St. Louis &c. R. Co. v. Eakins, 30 Iowa 279; Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539. See also Toledo &c. R. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492; Brand v. Lawrenceville Branch R. Co., 77 Ga. 506, 1 S. E. 255. In some cases proof is made by the corporate records. Penobscot &c. R. Co. v. Dunn, 39 Maine 587. And the burden is usually upon the company. Santa Cruz R. Co. v. Schwartz, 53 Cal. 106; Chase v. Sycamore &c. R. Co., 38 Ill. 215; Bucksport &c. R. Co. v. Buck, 65 Maine 536.

[44] New York Exchange Co. v. DeWolf, 31 N. Y. 273. But see Ellison v. Mobile &c. R. Co., 36 Miss. 572.

[45] Cass v. Pittsburgh &c. R. Co., 80 Pa. St. 31.

[46] Chase v. Sycamore &c. R. Co., 38 Ill. 215; Trott v. Sarchett, 10 Ohio St. 241; 1 Cook Corporations, (7th. ed.), § 89. Contra, Cox v. Hardee, 135 Ga. 80, 68 S. E. 932 (where condition is that there shall be no liability until a certain amount is subscribed); Spartanburg &c. R. Co. v. De Graffenreid, 12 Rich. L. (S. Car.) 675. See generally 1 Thomp. Corp. (2d ed.), § 606.

[47] New Albany &c. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337. See also Nichols v. Burlington &c. Co., 4 Greene (Iowa) 42; Spartanburg &c. R. Co. v. De Graffenreid, 12 Rich. L. (S. Car.) 675; 1 Thomp Corp. (2d ed.) § 607.

[48] Ohio &c. R. Co. v. Cramer, 23 Ind 490. See McClure v. People's R. Co., 90 Pa St. 269.

[49] Haywood &c. R. Co. v. Bryan 6 Jones L. (N. Car.) 82; Sperry v. Johnson, 11 Ohio 452.

to subscriptions to the stock of a railroad company relate to the time of beginning and completing the road, or to the route over which the road shall run. Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract,[50] and the subscriber may be discharged from liability by a failure to comply with the condition. But a substantial compliance is generally held sufficient,[51] at least where this appears to have been the intention of the parties, while a mere colorable compliance with a condition that the road should be completed and a train run over the road by laying a temporary track, over which an engine and a few cars are run, but which must be replaced by another before regu-

[50] Freeman v. Matlock, 67 Ind. 99; Burlington &c. R. Co. v. Boestler, 15 Iowa 555; Memphis &c. R. Co. v. Thompson, 24 Kans. 170; Ticonic &c. Co. v. Lang, 63 Maine 480; Jackson v. Shortridge, 29 Tex. 394, 94 Am. Dec. 290. The text is quoted in McCrackin v. Greensboro &c. R. Co., 168 N. Car. 62, 84 S. E. 30; and in West Va. R. Co. v. Harrison Co., 47 W. Va. 273, 34 S. E. 786. But see Johnson v. Kessler, 76 Iowa 411, 41 N. W. 57.

[51] Hall v. Sims, 106 Ala. 56, 17 So. 534; Freeman v. Matlock, 67 Ind. 99; Brocaw v. Board &c., 73 Ind. 543; Southern Kansas &c. R. Co. v. Towner, 41 Kans. 22, 21 Pac. 221; Missouri Pac. R. R. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Fort Worth &c. R. Co. v. Williams, 82 Tex. 553, 18 S. W. 206; Williams v. Ft. Worth &c. R. Co., 82 Tex. 553, 18 S. W. 206. See also Hunt v. Upton, 44 Wash. 124, 87 Pac. 56. But compare Toledo &c. R. Co. v. Hinsdale, 45 Ohio St. 556, 15 N. E. 665; Martin v. Pensacola R. Co., 8 Fla. 390, 73 Am. Dec. 713. The road may be substantially built to a certain point, although a depot has not been erected nor a station agent employed. Ogden v. Kirby, 79 Ill. 555. The court held it a substantial compliance where the road was not finally completed for two and a half months after the stipulated time. Des Moines Valley R. Co. v. Graff, 27 Iowa 99, 1 Am. Rep. 256. See also Missouri Pac. R. Co. v. Tygard, 84 Mo. 264, 54 Am. Rep. 97. A condition in the vote of bonds by a county in aid of a railroad company, that it shall establish and maintain a division terminus at a point situated between two named cities in the county, is substantially complied with if the terminus is established at a point on the line of the road between the two cities a few rods off from a direct line between them. Chicago &c. R. Co. v. Harris, 49 Kans. 399, 30 Pac. 456. See also Wullenwaber v. Dunigan, 30 Nebr. 877, 47 N. W. 420, 13 L. R. A. 811.

lar trains can be run, would not be sufficient to bind the subscriber.[52] A condition that "cars shall run to B, upon a completed railroad from B," is, however, sufficiently complied with by running leased cars over the road.[53] Where payment is to be made upon completion of a portion of the road, it is not necessary that it be made a first-class road before payment can be enforced, but the specified portion must be substantially finished and capable of being operated for the transaction of railroad business.[54] Upon such a completion of the specified part of the

[52] Freeman v. Matlock, 67 Ind. 99; Brocaw v. Board &c., 73 Ind. 543; Paris &c. R. Co. v. Henderson, 89 Ill. 86. The condition is not fulfilled by making a temporary arrangement by which cars are run to the required terminus over a portion of another company's track. Lawrence v. Smith, 57 Iowa 701, 11 N. W. 674; Indianapolis &c. R. Co. v. Holmes, 101 Ind. 348. A person subscribed $5,000 in aid of a railroad company, "one-half of said sum to be due and payable when said company shall construct or secure a continuous line of railway from T. to M." Trains ran from T. into M. over the road in the specified time, but the road belonging to the company only extended to D., and from D. to T.; trains were run over the road of another company under an arrangement by which the track was to be used by the new company, but in subordination to the use of the company owning. The court held that there was no performance under which the subscriber could be held upon his subscription. Brown v. Dibble, 65 Mich. 520, 32 N. W. 656. See also Tabor &c. R. Co. v. McCormick, 90 Iowa 446, 57 N. W. 949. But see People v. Holden, 82 Ill. 93, where the company used one mile of track and terminals belonging to another railroad company in order to reach one of the towns named in the condition, and it was held to be a sufficient compliance to render the subscriber liable. A notice of election stated that the question to be submitted was whether aid should be voted for the construction of a railroad between W. and a point on the W. R. Co. in W. county, the petition stated that the road should be completed so that trains could be run from W. to L. on the line of the W. R. Co. by a stated time. It was held that the company was not required to build an independent, continuous line to L., but a junction with the W. R. Co. was sufficient. Young v. Webster City &c. R. Co., 75 Iowa 140, 39 N. W. 234.

[53] Courtright v Deeds, 37 Iowa 503. But see St. Louis &c. R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963.

[54] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897. When the company has constructed a road which is reasonably safe, fit

road the subscription becomes final and absolute and is enforceable.[55]

§ 137 (118). Subscriptions payable as work progresses, or upon expenditure of a certain amount.—Subscriptions are sometimes made payable as the work progresses, or upon the construction of a certain portion of the work, or the expenditure of a certain sum or percentage. Such a stipulation in the contract of subscription may operate as a waiver of the implied condition that all the stock shall be subscribed before any subscription can be collected, and an agreement by subscribers to pay their subscription as the work progresses, in order to enable the company to build a certain portion of the road, will operate as such a waiver and render such subscribers liable to pay their subscription as the specified portion of the work is done under the agreement.[56] Where a subscription when made was unauthorized and

and convenient for the public use and accommodation, as new railroads are ordinarily used in similar localities, it has complied with a condition in a vote of a municipal corporation granting aid in the construction of the railroad, that it shall be paid when the road is completed for use. Where an act providing for the issuance of bonds for the purpose of aiding a railroad authorizes preferred stock to be issued to the county extending the aid when the road is completed, the county will be estopped to deny that the road is completed if it receives and retains stock. Lancaster County v. Cheraw &c. R. Co., 28 S. Car. 134, 5 S. E. 338.

[55] Webb v. Baltimore &c. R. Co., 77 Md. 92, 26 Atl. 113, 39 Am. St. 396, 54 Am. & Eng. R. Cas. 202. The entire road need not be completed in such a case before the subscription can be collected. Gardner v. Walsh, 95 Mich. 505, 55 N. W. 355, 59 Am. & Eng. R. Cas. 1.

[56] Anderson v. Middle & East Tenn. Cent. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. C. 149. In this case subscribers to the capital stock of a railroad chartered to run from Gallatin to Knoxville, a distance of one hundred and fifty miles, signed an agreement to pay their subscriptions "as fast as the work progressed," upon a section of the road eleven and one-half miles long, extending from Hartsville to a point on the Chesapeake and Nashville railroad, eight and one-half miles from Gallatin, which they agreed should be constructed before the company had procured sufficient finances to build the whole road. They were held liable to pay their subscriptions upon suit brought to enforce

invalid because the company had not, at that time, expended ten per centum of its authorized capital in the construction of its road, nor obtained actual bona fide subscriptions to its capital stock, to the amount of twenty per cent thereof, as required by statute,[57] it was held that such subscription could be enforced against the subscriber, after the company had fully complied with its conditions.[58] Although originally invalid, it constituted a continuing offer by the subscriber to pay the company the amount subscribed, upon the performance by it of the prescribed conditions, which, when not withdrawn before the conditions were fully complied with, became an absolute subscription, and was no longer open to the objection that the company was without corporate capacity to receive it. But a requirement in the subscription that certain things be done must clearly appear to be intended as a condition precedent, or it will not be construed to have that effect.[59]

§ 138 (119). Failure to perform parol condition will not defeat subscription.—A condition will not be permitted to defeat a sub-

payment when seventy per cent. of the work had been done upon such section of the road, although the company was insolvent, and wholly unable to complete the road as originally contemplated, and although the subscribers were business men of Gallatin, whose object in taking stock was to secure an outlet from their city to Knoxville. The court said that they were estopped by their express agreement to deny their liability as subscribers, for by such an agreement they waived the conditions, express and implied, annexed to their original contract of subscription. A company, having accepted a donation from a city, in consideration that it permanently establish its terminus, main office, shops and car works in said city, has fulfilled its obligation when the terminus, office, shops and car works have been established therein without any intention of removing them, and the company can not be compelled to keep them there when the interests of the road and of the public require a removal. The city is relegated to its remedy for a breach by action for damages. Texas &c. R. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. ed. 385, 8 R. & Corp. L. J. 162, 42 Am. & Eng. R. Cas. 637.

[57] Rev. Stat. Ohio, § 3298.

[58] Armstrong v. Karshner, 47 Ohio 276, 24 N. E. 897.

[59] Armstrong v. Karshner, 47 Ohio 276, 24 N. E. 897; Johnson v. Kessler, 76 Iowa 411, 41 N. W. 57.

scription unless clearly required by what is set forth in the writing,[60] for, in the absence of fraud, or mistake, the written subscription cannot, as a rule, be varied or controlled by parol evidence.[61] Thus, it was held in a recent case, that "it is no defense in an action on a railroad aid subscription, conditioned on the completion of the road to Iowa Falls, by September 1, 1884 that the company had broken an oral promise, which was part of the consideration, to complete the line from Iowa Falls to Forest City within one year from the date fixed in the contract for the completion of the road to Iowa Falls, and that the company had abandoned the project of building the line between those points. The rights of the parties are governed by the written contract, and parol evidence is not admissible to show a condition not embodied in the written agreement."[62]

§ 139 (120). Conditions in notes.—A note payable two years after the road is completed and trains are running to a certain point and expressed to be in consideration of the completion of the line within sixty days, is not defeated by a failure to complete it within such time,[63] and a note payable when the track is laid and cars run thereon cannot be defeated by showing that the consideration for such note was that the track should be so laid within three years of its date.[64] But a long delay in constructing the road may defeat a note given upon this condition.[65] The words "the road to be finished by September 1, 1872," in such a

[60] Cairo &c. R. Co. v. Delap, 7 Brad. (Ill.) 60; Johnson v. Georgia Midland &c. R. Co., 81 Ga. 725, 8 S. E. 531. See also Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. 500; Paducah &c. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842.

[61] Low v. Studabaker, 110 Ind. 57, 10 N. E. 301; Johnson v. Georgia Midland &c. R. Co., 81 Ga. 725, 8 S. E. 531; Tabor &c. R. Co. v. McCormick, 90 Iowa 446, 57 N. W. 949. But compare Lake Manawa R. Co. v. Squire, 89 Iowa 576, 57 N. W. 307.

[62] Blair v. Buttolph, 72 Iowa 31, 33 N. W. 349.

[63] Traer v. Stuart, 46 Iowa 15.

[64] Cairo &c. R. Co. v. Delap, 7 Brad. (Ill. App.) 60.

[65] A period of fourteen years is not "a reasonable time" within which to build a railroad, where it is the evident intent of the parties that the road should be completed within "a reasonable time," so as to render subscribers to capital stock liable on notes payable when cars shall be running. Blake v. Brown, 80 Iowa 277, 45 N. W. 751.

note will not imply a condition precedent.[66] Notes made payable when the railroad between two points "with the privilege of entering Atlanta, Ga., on the track of any railroad having terminal facilities there," is graded and ready for the cross-ties, trestles and bridges, were held payable when the grading was done, although the road had not yet acquired such privilege.[67] And when the notes were payable at specified times "as the work progressed through the county, provided the company establish a depot" at a certain place, the condition to erect a depot was held not a condition precedent.[68]

§ 140 (121). **Subscriptions conditioned upon location or construction of the road.**—A subscription conditioned upon the location of the railroad through a certain town becomes absolute when such location is permanently made, although the road has not been constructed.[69] So, where the subscription was payable at such times and in such instalments as the directors should prescribe, provided the road should be "permanently located" on a certain route, and a "freight house and depot be built" at a certain point, the provision that the buildings be erected was held to be a stipulation merely, and not a condition precedent, to be per-

[66] Davis v. Cobban, 39 Iowa 392.

[67] Johnson v. Georgia Midland &c. R. Co., 81 Ga. 725, 8 S. E. 531. The court, by Bleckly, C. J., says. "There was no stipulation that the privilege of entering Atlanta was to be secured before the notes became payable. The clause relating to that privilege was introduced to describe the railroad as it was to be ultimately, not as it was to be at the maturity and payment of the subscriptions to the capital stock."

[68] Paducah &c. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842; Williams v. Fort Worth &c. R. Co., 82 Tex. 553, 18 S. W. 206. See further as to what are conditions subsequent rather than precedent. 1 Thomp. Corp. (2d ed.) §§ 625-632.

[69] Wemple v. St. Louis &c. R. Co., 120 Ill. 196, 11 N. E. 906; Smith v. Allison, 23 Ind. 366; McMillan v. Maysville &c. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; Swartout v. Michigan Air Line R. Co., 24 Mich. 389; North Missouri &c. R. Co. v. Winkler, 29 Mo. 318; Miller v. Pittsburgh &c. R. Co., 40 Pa. St. 237, 80 Am. Dec. 570 (where subscription said "located and constructed"); Berryman v. Cincinnati Southern R. Co., 14 Bush (Ky.) 755 (same as last case).

formed before the subscription could be collected.[70] And so a stipulation that the road should be operated independently of an existing railroad was held to relate to what should be done after payment was made and the road was completed.[71] Where the subscribers promised to pay the sums set opposite their names, in equal instalments at six, twelve and eighteen months from a certain date, to be used only toward paying the damages and costs in acquiring the right of way, if the plaintiff's railroad should be permanently located and constructed through Lexington, it was held that the construction of the road was not a condition precedent.[72] It is generally held, in accordance with the authorities already cited, that a subscription, made upon the express condition that the company shall locate and construct its railroad to a certain point, becomes payable at the time or times mentioned in the contract of subscription, if the railroad shall have been located at that point, and that the construction of the road, unless expressly made so, is not a condition precedent to the payment of the subscription.[73] Where the subscription is made upon condition that the road be "built" to a certain point, the money is payable upon call when the road is permanently located, in good faith, upon the designated route.[74] And the same rule applies where the condition is that the railway shall "pass" through a certain country.[75] Payment of such a subscription may

[70] Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328. See also Pittsburgh &c. R. Co. v. Biggar, 34 Pa. St. 455.

[71] Johnson v. Georgia Midland &c. R. Co., 81 Ga. 725, 8 S. E. 531.

[72] Berryman v. Cincinnati &c. R. Co., 14 Bush (Ky.) 755. But see Burlington &c. R. Co v. Boestler, 15 Iowa 555.

[73] Miller v. Pittsburgh &c. R. Co., 40 Pa. 237, 80 Am. Dec. 570; McMillan v. Maysville &c. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

[74] Warner v. Callender, 20 Ohio St. 190; Swartout v. Michigan Air Line R. Co., 24 Mich. 389; Woonsocket Union R. Co. v. Sherman, 8 R. I. 564. In this latter case the subscription was payable "if the road is built" through a certain village. See also Hunt v. Upton, 44 Wash. 124, 87 Pac. 56.

[75] Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; North Missouri R. Co. v. Winkler, 29 Mo. 318; Chamberlain v. Painesville &c. R. Co., 15 Ohio St. 225.

be enforced, it seems although work upon the road has been suspended from lack of means to prosecute it. To permit the subscriber to set up such a suspension as a defense in a suit to collect the subscription would be to permit him to take advantage of his own wrong and bad faith in refusing to pay what he agreed to pay at a time fixed in order that the company might have means with which to build the road.[76] It is now established by the decided weight of authority that stock may be subscribed or money donated to a railroad company upon condition that it will locate or build its road upon a specified route not inconsistent with its charter, and which does not plainly conflict with the interests of the public; and that any such agreement to take stock or to pay money will become binding when the road is so located.[77] But where a citizen and business man of a town made a subscription on condition that the company would construct and operate its road through or into the town, it was held that this had reference to the limits of the town as they existed at the time, and that

[76] Miller v. Pittsburgh &c. R. Co., 40 Pa. St. 237, 80 Am. Dec. 570.

[77] Martin v. Pensacola &c. R. Co., 8 Fla. 370, 78 Am. Dec. 713; Paris &c. R. Co. v. Henderson, 89 Ill. 89; Jewett v. Lawrenceburgh &c. R. Co., 10 Ind. 539; Burlington &c. R. Co. v. Boestler, 15 Iowa 555; Des Moines &c. R. Co. v. Graff, 27 Iowa 99, 1 Am. Rep. 256; Cedar Rapids &c. R. Co. v. Spafford, 41 Iowa 292; McMillan v. Maysville &c. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181; Bucksport &c. R. Co. v. Brewer, 67 Maine 295; Tygard v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760; Agricultural &c. R. Co. v. Winchester, 13 Allen (Mass.) 29; Swartout v. Michigan &c. R. Co., 24 Mich. 389; Missouri Pacific R. Co. v. Taggard, 84 Mo. 263, 54 Am. Rep. 97; Cayuga Lake &c. R. Co. v. Kyle, 5 T. & C. (N. Y.) 659. Buffalo &c. R. Co. v. Pottle, 23 Barb. (N. Y.) 21; Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223; Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.) 458; Moore v. Hanover Junction R. Co., 94 Pa. St. 324; Woonsocket &c. R. Co. v. Sherman, 8 R. I. 564; Charlotte &c. R. Co. v. Blakeley, 3 Strobh. (S. Car.) 245; Nashville &c. R. Co. v. Jones, 2 Cold. (Tenn.) 574; Rose v. San Antonio &c. R. Co., 31 Tex. 49; Connecticut &c. R. Co. v. Baxter, 32 Vt. 805; Racine Co. Bank v. Ayres, 12 Wis. 512; Post, §§ 417, 418. But see Woodstock Iron Co. v. Richmond &c. Extension Co., 129 U. S. 643, 32 L. ed. 819; 9 Sup. Ct. 402; Florida &c. R. Co. v. State,

the construction of the road into territory afterwards annexed to the town was not a compliance therewith.[78]

§ 141 (122). Effect of alteration in route fixed by charter.—Generally, if a subscription be made to a railroad, whose route is fixed by its charter, any material alterations in such route, made without his consent, will release the subscriber from liability.[79] In a Georgia case where the southern terminus was

31 Fla. 482, 13 So. 103, 34 Am. St. 30; St. Louis &c. R. Co. v. Mathers, 104 Ill. 257; St. Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369. An agreement to pay a stated sum to secure the location of a railroad upon a specified route was upheld and enforced on the ground that the public interest was not opposed to the location required by the condition, in First National Bank v. Hendre, 49 Iowa 402, 31 Am. Rep. 153. A condition involving the location of the proposed route of a turnpike company's road has been held void in New York as an attempt to influence by improper means the decision of a question in which public interests are involved, and therefore against public policy. Butternuts &c. T. Co. v. North, 1 Hill (N. Y.) 518; Fort Edwards &c. Co. v. Payne, 15 N. Y. 583; Macedon &c. Plank R. Co. v. Snediker, 18 Barb. (N. Y.) 317. See to the same effect as to railroads, Utica &c. R. Co. v. Brinckerhoff, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220. But see later New York cases cited, supra.

[78] St. Loius &c. R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963. The court also held that the construction of a new line from the point named to a point where it connected with an old line extending into the town would be sufficient, but that where it was also a condition to the payment of the subscription that the railroad company "shall have constructed and begun the operation" of a road through or into a certain town, and "shall have caused" a certain trust company "to execute in favor of the undersigned a bond" in a certain sum, conditioned that the line would be maintained and operated for the period of five years, it was understood that the operation of the road should be begun in good faith and with the intention of continuing to run trains for five years, and an operation designed to be temporary, either in order to conform to the words of the subscription, or as a makeshift until a depot was built outside of the town named, to be stopped as soon as the new depot was finished and the mere running of a local train to and from the depot for convenience of the train crew, was not sufficient.

[79] Caley v. Philadelphia &c. R. Co., 80 Pa. St. 363; Danbury &c. R. Co. v. Wilson, 22 Conn. 435; Buckfield &c. R. Co. v. Irish, 39 Maine 44. But see where it was not def-

changed by act of the legislature, passed upon application of the corporation, from Hawkinsville to Thomasville, and the authorized capital was greatly increased, the court held that a dissenting subscriber was released by such alterations, although, when he subscribed, the general law under which the first charter was obtained authorized amendments to be made to the charter, the route to be changed, and the capital stock to be increased.[80] The same is true if the subscription paper specifies the route and termini, and material alterations are made in them after it is signed; and passing a resolution to make such a change will be evidence of an abandonment of the route as originally contemplated.[81] Where a subscription is made upon a condition as to location, the subscriber may show that the alterations made, though very slight, are material alterations as to him. Thus, where the road is constructed 1,200 feet from the subscriber's mill, instead of 500 feet, as required by the condition annexed to the subscription, it has been held that the subscriber may show that his interests are so injuriously affected by the change that he would have no inducement to subscribe stock in a road on the new location.[82] And building a railroad twenty-four hundred feet from a certain point, with a branch passing over the route mentioned in the condition, will not fulfill a requirement that the road shall be built within twelve hundred feet of the designated point.[83] But a condition that the road should be constructed from Stockton up the valley of the San Joaquin river, in the direction of another town lying to the south, was held to be substantially complied with by the construction of the road toward the east across the valley for the first few miles, and then up the valley toward the town named.[84] Where the charter empowers the corporation to change its route or termini, a subscription

initely located. Eppes v. Mississippi &c. R. Co., 35 Ala. 33.

[80] Snock v. Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104.

[81] Caley v. Philadelphia &c. R. Co., 80 Pa. St. 363. See also Burlington &c. R. Co. v. Whitney, 43 Iowa 113; Burrows v. Smith, 10 N. Y. 550; Plattville v. Galena &c. R. Co., 43 Wis. 493.

[82] Caley v. Philadelphia &c. R. Co., 80 Pa. St. 363.

[83] Virginia & Truckee R. Co. v. Commissioners, 6 Nev. 68.

[84] Stockton &c. R. Co. v. Stockton, 51 Cal. 328.

must, however, as a general rule, expressly make the construction of the road to a given point operate as a condition precedent or the subscription will be construed to be absolute and such changes as are deemed necessary may be made without affecting the subscriber's liability.[85] The same rule applies to a note given for donated aid, even where an improper motive prompted the change, if it was legally made.[86]

§ 142 (123). Effect of abandonment or sale of road.—The fact that the corporation has abandoned a part of its road,[87] or has not completed, and apparently has no intention of completing it,[88] is no defense to an action for the payment of a subscription, unless the completion of the road is clearly made a condition precedent. Neither, it has been held, is the sale of a portion of the road under authority of a statute,[89] which provides that any dissenting stockholder may exchange his shares for shares in the purchasing company.[90] In Indiana it is provided by statute,[91] that in case of a sale of any railroad by virtue of any mortgage foreclosure, and the formation by the purchasers of a new corporation to operate the road, all subscribers to the original stock of said railroad company shall be released and discharged from all their unpaid subscriptions. "Recognizing the fact that stock in an insolvent railway company, the property of which has been sold in a foreclosure or other judicial proceeding, is worthless,

[85] Jewett v. Valley R. Co., 34 Ohio St. 601.

[86] Greenville &c. R. Co. v. Johnson. 8 Baxter (Tenn.) 332.

[87] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897; Dorman v. Jacksonville &c. R. Co., 7 Fla. 265; Ogden v. Kirby, 79 Ill. 555. See also McMillan v. Maysville &c. R. Co., 15 B. Mon. (Ky.) 218, 61 Am. Dec. 181.

[88] Buffalo &c. R. Co. v. Gifford, 87 N. Y. 294, 22 Hun 359. See also Four Mile Valley R. Co. v. Bailey, 18 Ohio St. 208; Dorman v. Jacksonville &c. Co., 7 Fla. 265. But total abandonment causing a loss of the charter or the like may be. Sodus Bay &c. R. Co. v. Lapham, 43 Hun (N. Y.) 314; Fountain Ferry &c. Co. v. Jewell, 8 B. Mon. (Ky.) 147; Pittsburgh &c. R. Co. v. Byers, 32 Pa. St. 22, 72 Am. Dec. 770; McCully v. Pittsburgh &c. R. Co., 32 Pa. St. 25.

[89] Rev. Stat. Ohio, § 3409.

[90] Armstrong v. Karshner, 47 Ohio St. 276, 24 N. E. 897.

[91] Rev. Stat. Ind. (1914), § 5335.

this statute was intended to protect subscribers by cancelling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise. In other words, the statute was intended to enact into a law the rule of fair dealing, that no one should be required to pay something for nothing."[92]

§ 143 (124). Condition as to terminus—Question of intention for jury.—Where a condition requires the road to run to a certain named place, and there are both a township and a village of that name, it is a question of intention as to which is meant. And this is true though the village is not incorporated, if it is commonly designated by that name.[93] The question as to which is meant in such a case, it is said, is to be determined by the jury upon evidence offered, like any other question of fact.[94]

§ 144 (125). What is sufficient compliance with condition as to terminus or location of depot at a certain place—Illustrative cases.—Where subscriptions to the capital stock of a railroad company were to be paid when the road "is completed and cars running from T. to M.," it was held that payment could not be enforced when the road had been built to a point nine hundred and fifty feet from the limits of T. and in another county, at which place its terminal facilities were located. The fact that the company had built a track leading from its main line into the town of T., where it had built a platform and transacted some business, did not, it was held, constitute a compliance with the condition of the subscription, where it was shown that such track was built upon ground leased for one year, and the plaintiff's president had stated that it was not intended to be permanent. Such a condition in a subscription to the capital stock of a railroad company chartered to build a railroad from one town to another requires that the principal business at the latter should be transacted at a point within its corporate limits.[95] Where the

[92] Zollars, J., in Board &c. v. State, 115 Ind. 64, 88, 4 N. E. 589, 17 N. E. 855.

[93] Ogden v. Kirby, 79 Ill. 555.

[94] Connecticut, &c. R. Co. v. Baxter, 32 Vt. 805.

[95] Tabor &c. R. Co. v. McCormick, 90 Iowa 446, 57 N. W. 949.

subscription is made upon condition that a depot be established within a certain distance of a town, the distance may be measured in a straight line from the corporate limits without regard to buildings or improvements,[96] or from the recorded plat, as it was at the time the subscription was made, and is not affected by a subsequent annexation of adjoining territory.[97] The measurement of distance is not controlled by the traveled route between the two points.[98] The location of the depot at the designated point, fulfills the condition, although the side-tracks and switches are placed at a greater distance away from the town.[99] A subscription made on condition that the depot shall be located at the nearest practicable point within one mile of the courthouse, is not violated by a failure to locate it at the nearest possible point; but the company has fulfilled the condition when it has built a depot at the nearest point within one mile of the court house at which it could be located at a reasonable cost, with reference to all the circumstances under which it was to be done.[1] An agreement to subscribe a certain amount of stock upon condition that the railroad company shall locate a depot at a certain point is held to become an absolute subscription, of which payment may be enforced according to its terms upon the location of the depot.[2] Where the condition is that the road shall be "permanently located to and within the town of W., with a station at the same," the condition is not fulfilled by the construction of the road through the town with a depot just outside its limits.[3]

§ 145 (126). **General rule of construction—Performance of condition by consolidated company.**—Generally, where it can be done without doing violence to the language used, any condi-

See also St. Louis &c. R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963.

[96] Courtright v. Strickler, 37 Iowa 382.

[97] Davenport &c. R. Co. v. Rogers, 39 Iowa 298.

[98] Cedar Falls &c. R. Co. v. Rich, 33 Iowa 113.

[99] Courtright v. Strickler, 37 Iowa 382.

[1] Wooters v. International R. Co., 54 Tex. 294.

[2] North Missouri R. Co. v. Miller, 31 Mo. 19.

[3] Davenport &c. R. Co. v. O'Conner, 40 Iowa 477. See also St. Louis &c. R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963.

tions imposed will be given such a construction as will further the enterprise. And a condition relating to the construction of the road may be so far complied with by another company which builds it, as to hold the subscriber;[4] for it is usually of no importance to the subscriber who builds the road, if it is built in pursuance of the plan existing when the subscription was made. But the subscriber can, of course, limit his subscription to a single company, by express stipulation. And the consolidation of the railroad company with another made after the subscription, but before the stock was issued under a power existing when the subscription was made, has been held not to release a town from liability upon bonds issued in payment of such a subscription.[5] The liability upon such a subscription cannot be denied where the municipality took an active part in bringing about the consolidation.[6] But where the consolidated company has a longer route

[4] Michigan &c. R. Co. v. Bacon, 33 Mich. 466. See also Muscatine &c. R. Co. v. Horton, 38 Iowa 33; Merrill v. Gamble, 46 Iowa 615; Munroe v. Fort Wayne &c. R. Co., 28 Mich. 272. The purchaser of a railroad, under a decree of foreclosure, after one installment on a township subscription to the railroad has been paid, acquires no interest in the money subscribed to the original company. Board of Commissioners v. State, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855. A promise to pay money upon the completion of a railroad described in the contract as the Delphos, Bluffton and Frankfort Railroad can only be enforced by the promisee upon proof that the railroad named has been completed, and it will not be sufficient to entitle the promisee to a recovery to prove that a railroad has been built, for it must be shown that the railroad described has been built. Low v. Studabaker, 110 Ind. 57, 10 N. E. 301.

[5] Menasha v. Hazard, 102 U. S. 81, 26 L. ed. 85; Mt. Vernon v. Hovey, 52 Ind. 563. The subscription of a county to bonds in aid of a railroad is not annulled by consolidation of such railroad company with another, under a law providing that the railroad company might consolidate with other companies with the aproval of two-thirds of the stock held in each company. Chicago &c. R. Co. v. Board &c., 36 Kans. 121, 12 Pac. 593.

[6] County of Tipton v. Locomotive Works, 103 U. S. 523, 26 L. ed. 340. A township in Missouri voted bonds in aid of the C. & O. R. Co., whose road was not then built, and whose articles of association declared that its object was to construct and operate a railroad from C. to such point on the line between Missouri and Iowa as should be deemed the

and different termini than the company to which the subscription was made, and the consolidation is entered into without the consent of the subscriber, it has been held that the subscription cannot be enforced.[7] Such contracts are interpreted by the same rules as other contracts, with reference to the true intent and meaning of the parties; and in order to ascertain such intent and meaning, the circumstances under which the agreement was made may be shown.[8] The condition, to be valid, must be expressed in the subscription. Secret agreements between the subscriber and the officers of the company afford no protection to the subscriber, but the subscription will usually be enforced as an absolute one.[9]

§ 146 (127). Fraudulent representations in obtaining subscription.—A subscription to capital stock is understood to be made upon the implied condition that the representations of the company or its officers and authorized agents and promoters as to the financial condition of the enterprise, the amount and kind

best route for operating a road between C. and Omaha, Nebr. Before the bonds were issued, the C. & O. consolidated with an Iowa company, and the consolidated company proceeded to construct and operate a road from St. Louis, by way of C., to Council Bluffs, Iowa, and Omaha, and the bonds were issued to the consolidated company. The court held that as consolidation was necessary, in order to carry out the purpose for which the C. & O. Co. was organized, the existing statutory provision therefor became part of the contract with the township, and the issuance of bonds to the consolidated company was valid. Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359.

[7] Rochester &c. R. Co. v. Cuyler, 7 Lans. (N. Y.) 431. See also Marsh v. Fulton County, 10 Wall. (U. S.) 676, 19 L. ed. 1040.

[8] Detroit &c. R. Co. v. Starnes, 38 Mich. 698. See also State v. Old Town Bridge Co., 85 Maine 17, 26 Atl. 947; Rogers v. Galloway &c. College, 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636.

[9] Great Western Tel. Co. v. Haight, 49 Ill. App. 633; Madison &c. R. Co. v. Stevens, 6 Ind. 379; Minneapolis &c. Co. v. Davis, 40 Minn. 110, 12 Am. St. 701; York Park &c. Assn. v. Barnes, 39 Nebr. 834, 58 N. W. 440; Robinson v. Pittsburgh &c. R. Co., 32 Pa. St. 334, 72 Am. Dec. 792; Cunningham v. Edgefield &c. R. Co., 2 Head (Tenn.) 23; Downie v. White, 12 Wis. 176, 78 Am. Dec. 731. See article in 28 Am. Law Reg. (N. S.) 306; also Oswald v. Minneapolis &c. Co., 65 Minn. 249, 68 N. W. 15.

of property which it owns, or any other existing facts that would influence subscriptions, upon the faith of which such subscription is made, shall be true and made in good faith.[10] And not only is this true, but where statements are made to induce subscriptions there must be a full and fair statement of all material facts, which it is the duty of the corporation or its agents to disclose. A suppression of part of the truth will often amount to a misrepresentation.[11] But representations, in order to be so far binding upon the corporation as to avoid the subscription in case they prove to be false, must generally relate to some fact existing either in the past or present time which has an influence upon the status of the corporation.[12] And it must appear that the rep-

[10] Cook Corporations (7th ed.), Ch. 9. See also Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37; Davis v. Louisville Trust Co., 181 Fed. 10, 30 L. R. A. (N. S.) 1011 (subscriber may rely on report made to Bradstreet or Davis); 8 Thomp. Corp. §§ 708, 726, 727, 728.

[11] New Brunswick &c. R. Co. v. Muggeridge, 1 Dr. & Sm. 363, 381; Directors &c. R. Co. v. Kisch, L. R. 2 H. L. Cas. 99; Oakes v. Turquand, L. H. 2 H. L. Cas. 325, 2 Pom. Eq. Jur. §§ 901, 902. Where the prospectus set forth the ownership by the corporation of a piece of property claimed to be of great value, the omission to state that a very large sum of money was paid for it was held to be a fraudulent suppression of facts. Directors &c. v. Kisch, L. R. 2 H. L. Cas. 99. An omission to state in a prospectus how many shares have been taken by the directors is not. Directors &c. v. Kisch, L. R. 2 H. L. Cas. 99; Atlanta &c. R. Co. v. Hodnett, 36 Ga. 669; Pulsford v. Richards, 17 Beav. 87, 17 Jur. 865; Heymann v. European &c. R. Co., L. R. 7 Eq. 154.

[12] Edington v. Fitzmaurice, L. R. 29 Ch. Div. 459; Southern Ins. Co. v. Milligan, 154 Ky. 216, 157 S. W. 37. See generally Alabama &c. Works v. Dallas, 127 Ala. 513, 29 So. 459; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. ed. 82, 8 Thomp. Corp. §§ 714, 721. A person induced to give a note for subscription to the capital stock of a railroad by representations that only a certain amount of stock would be issued when there had already been issued a larger amount, is relieved from his subscription. Weems v. Georgia &c. R. Co., 84 Ga. 356, 11 S. E. 503. So is one who is induced to subscribe by means of a false statement that certain stock has been subscribed. Arnison v. Smith, 59 L. T. R. 627; Spellier &c. Co. v. Leedom, 149 Pa. St. 185, 24 Atl. 197. Or that a government guaranty has been obtained. Kisch v. Central R. &c., 34 L. J. (Ch.) 545. So, a false statement by an officer that none of the

resentations were relied upon as true by the subscriber, and formed an inducement to make the subscription.[13] Any representations as to the future policy or intentions of the corporation[14] or any parol promises or agreements as to what the cor-

stock had been sold for less than par has been held sufficient to authorize a rescission. Hubbard v. International Mercantile Agency (N. J. Ch.), 59 Atl. 24. So, a representation that a certain prominent business man has subscribed for a large amount, when it was given to him without the payment of any purchase price therefor, is sufficient to render voidable any subscription induced by such representations. Coles v. Kennedy, 81 Iowa 366, 46 N. W. 1088, 25 Am. St. 503; and other cases cited in note in 29 L. R. A. (N. S.) 477. And so is a false representation that certain property has been purchased and is owned by the company, and that the company is in good condition and is earning on the completed portion of the road four and one-half per cent. on the entire cost of the road, when the agent knew that the company was almost bankrupt, having neither money nor credit and that its stock was almost worthless. Waldo v. Chicago &c. R. Co., 14 Wis. 575.

[13] Authorities cited in preceding note. Jennings v. Broughton, 22 L. J. (N. S.) Ch. 585; Grone v. Economic L. Ins. Co. (Del. Ch.), 80 Atl. 809; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Melendy v. Keen, 89 Ill. 395; Sinnett v. Moles, 38 Iowa 25; Oregon Central R. Co. v. Scoggin, 3 Ore. 161; 2 Pom. Eq. Jur. § 890. See Crump v. U. S. Mining Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116. It is said that the misrepresentations must not only be made without an honest belief in their truth, but must have been intended for the subscriber to act upon, and he must have acted in reliance upon them. But the authorities on the question cannot be said to bear out this rule any further than that the subscriber must have been so far influenced by the misrepresentations as to material facts concerning the enterprise that it would operate as a fraud upon him to hold him to a contract into which he would not knowingly have entered, although there are many dicta which go much further. In an action on a note given for subscription to the stock of a railroad, defendant claimed that plaintiff when soliciting the subscription represented that the road would be stocked and bonded only to a certain amount per mile, whereas it was stocked and bonded to a much larger amount per mile but he did not testify that he would not have subscribed and given his note if he had known how much stock and bonds had been or would be issued, and it appeared that other true representations were the chief inducement to his subscription. He was held bound by his subscription. Weems v. Georgia Midland &c. R. Co., 88 Ga. 303, 14 S. E. 583.

[14] Jefferson v. Hewitt, 95 Cal. 535, 30 Pac. 772; Weston v. Columbus &c. R. Co., 90 Ga. 289, 15 S. E.

poration will or will not do cannot be interposed as a defense to an absolute subscription,[15] even though made with a fraudulent

773; McCallister v. Indianapolis &c. R. Co., 15 Ind. 11; Topeka &c. Co. v. Hale, 39 Kans. 23, 17 Pac. 601; Anderson v. Middle &c. R. Co., 91 Tenn. 44, 17 S. W. 803, 52 Am. & Eng. R. Cas. 149.

[15] Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Smith v. Tallahassee Branch &c. R. Co., 30 Ala. 650; Dill v. Wabash Valley R. Co., 21 Ill. 91; Clem v. Newcastle &c. R. Co., 9 Ind. 488, 68 Am. Dec. 653; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; German National Banks' Receiver v. Nagel, 26 Ky. 748, 82 S. W. 433; Vicksburgh &c. R. Co. v. McKean, 12 La. Ann. 638; Swatara R. Co. v. Brune, 6 Gill. (Md.) 41; Walker v. Mobile &c. R. Co., 34 Miss. 245; LaGrange &c. Co. v. Mays, 29 Mo. 64; White Mountains R. Co. v. Eastman, 34 N. H. 124; Syracuse &c. R. Co. v. Gere, 4 Hun (N. Y.) 392; North Eastern R. Co. v. Rordigues, 10 Rich. (S. Car.) 278; Jewett v. Valley R. Co., 34 Ohio St. 601; Oregon Central R. Co. v. Scoggin, 3 Ore. 161; Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69; East Tennessee &c. R. Co. v. Gammon, 5 Sneed (Tenn.) 567; Milwaukee &c. R. Co. v. Field, 12 Wis. 340. Proof that the execution of the contract was procured by false and fraudulent representations by the company that the means were already provided for the construction of the road between two points within the time specified, where the subscription was made upon the condition that another portion of the road should be constructed within that time was held insufficient to constitute a defense to an action on the subscription. Blair v. Buttolph, 72 Iowa 31, 33 N. W. 349. A representation that payment will not be demanded until certain work is completed does not bind the company. LaGrange &c. R. Co. v. Mays, 29 Mo. 64; Clem v. Newcastle &c. R. Co., 9 Ind. 488, 68 Am. Dec. 653. Nor does a representation that the road will be extended to a certain point. Low v. Studabaker, 110 Ind. 57, 10 N. E. 301. Or that a branch road will be built. McAlister v. Indianapolis &c. R. Co., 15 Ind. 11; Guarantee &c. Co. v. Weil, 141 Pa. St. 511, 21 Atl. 665. But it is said that if a person is induced to subscribe for stock by means of an agreement made by an officer of the corporation within the scope of his authority, the subscriber may, upon failure of the corporation to perform the agreement, cancel his subscription and recover back the sums paid on the stock. Weeden v. Lake Erie &c. R. Co., 14 Ohio 563; Crossman v. Penrose Ferry Bridge Co., 26 Pa. St. 69. The fact that the subscription was made in reliance upon the statement of the company's agent who procured the subscription that the road would be economically built, and that the stock would prove a good investment, is no defense to an action to enforce pay-

intent by the company's agents in order to procure the subscription. Nor will any statement as to the legal effect of the contract of subscription, or as to the legal rights and liabilities assumed, prove a defense, for every one is bound to know the law.[16] Statements of facts, however, need not, ordinarily, be made with knowledge of their falsity; for, if the corporation or its agents mislead a subscriber by statements recklessly made in ignorance of the truth it may not take advantage of the acts induced by its own misstatements.[17] Statements which amount only to an expression of opinion, if honestly made without intent to deceive, or if made in relation to matters equally open to the knowledge of both parties, will not amount to fraudulent representations.[18] Thus, a representation that a sufficient amount of solvent stock was subscribed to complete the road within two years, and that the company was able and would complete it within that time, does not amount to a fraudulent representation even though untrue.[19] Nor would a statement that the construction company,

ment. Weston v. Columbus Southern R. Co., 90 Ga. 289, 15 S. E. 773.

[16] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Clem v. Newcastle &c. R. Co., 9 Ind. 488, 68 Am. Dec. 653; Parker v. Thomas, 19 Ind. 213, 81 Am. Dec. 385n; North Eastern R. Co. v. Rodrigues, 10 Rich. (S. Car.) 278. But see Upton v. Englehart, 3 Dill. (U. S.) 496, Fed. Cas. No. 16800, where a misrepresentation as to the legal liability of the stockholders in a corporation organized in another state was held to be a defense.

[17] Henderson v. Railroad Co., 17 Tex. 560, 67 Am. Dec. 675; Reese River &c. Co. v. Smith, L. R. 4 H. L. 64; Edington v. Fitzmaurice, L. R. 29 Ch. Div. 459; 2 Pom. Eq. Jur. § 887. The courts incline very strongly to uphold subscriptions to capital stock, and many cases intimate that the person making the statement must have had a fraudulent purpose, or such knowledge as would impute such fraudulent purpose to him. Nugent v. Cincinnati &c. R. Co., 2 Disney (Ohio) 302; Selma &c. R. Co. v. Anderson, 51 Miss. 829; Cunningham v. Edgefield, &c. R. Co., 2 Hed. (Tenn.) 23.

[18] Montgomery &c. R. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60; Walker v. Mobile R. Co., 34 Miss. 245; 2 Pom. Eq. Jur. § 878. See also German Nat. Bank's Receiver v. Nagel, 26 Ky. 748, 82 S. W. 433; West End &c. Co. v. Claiborne, 97 Va. 734, 34 S. E. 900. In re, National Pressed Brick Co., 212 Fed. 878.

[19] Brownlee v. Ohio &c. R. Co., 18 Ind. 68; Weston v. Columbus &c. R. Co., 90 Ga. 289, 15 S. E. 773.

which had undertaken to build and equip the road, was able to complete it by the use of its own resources, without any advance from the company.[20] Representations made by an agent of a railroad company in reference to the value of a donation of land made by congress to the company, and in relation to the amount of assets of the company, and its ability to complete the road within a certain time, and the probable cost and profits of the road, though false and exaggerated, and made to induce persons to subscribe for the stock, were held to be but expressions of opinion, and not to amount to fraudulent representations.[21] And representations that the road would be constructed over a certain route within a certain time, although offered as an inducement to subscribe for stock, and operating as such, have been held to be no defense to an action for payment of the subscription.[22] Where the directors, in good faith and by honest mistake of judgment, added to the assets certain debts which proved not to be collectible, and thereby showed the company to be solvent, when the loss of the money represented by such debts threw it into insolvency, it was held not fraudulent misrepresentation.[23] The same holding was made where it was stated in good faith that the corporation had a valid government contract, but, upon litigation, this was found to be untrue.[24] And it has even been held that a representation that title to land was good when in fact it was bad, if made in good faith with an honest belief that it is true is not a fraudulent misrepresentation.[25] The mere intent on the part of the company to deceive and defraud by misrepre-

See also Johnson v. National &c. Assn., 125 Ala. 465, 28 So. 2.

[20] Andrews v. Ohio &c. R. Co., 14 Ind. 169.

[21] Walker v. Mobile &c. R. Co., 34 Miss. 245. See also Union Nat. Bank v. Hunt, 76 Mo. 439.

[22] Montgomery &c. R. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60. The court, by Stone, C. J., says: "The representations set forth in each of the special pleas * * * could be nothing but opinion. These pleas are fatally bad, because they do not aver that Kirkpatrick did not honestly entertain the opinions he expressed." See also Blair v. Buttolph, 72 Iowa 31, 33 N. W. 349; Ellison v. Mobile &c. R. Co., 36 Miss. 572.

[23] Jackson v. Turquand, L. R. 4 H. L. 305.

[24] Kennedy v. Panama &c. Co., L. R. 2 Q. B. 580.

[25] New Brunswick &c. R. Co. v. Conybeare, 9 H. L. Cas. 711.

sentations is immaterial if it does not cause any damage to the subscriber.[26] Representations, false when made, but which become true by the force of intervening events before the subscription is completed, cannot afterward, it seems, be complained of by the subscribers.[27]

§ 147 (128). **Misrepresentations in prospectus and by agents generally.**—The fraudulent representations which will avoid a subscription may be made by statements contained in a prospectus issued by the authority of the directors or the stockholders of a corporation if they induced the subscription to be made.[28] Or they may be contained in a report made by the corporate officers to the stockholders; for a person may rely upon such a report when subscribing for stock.[29] And the corporation is chargeable with the frauds and misrepresentations of its authorized agents to procure subscriptions.[30] It was formerly held in England that

[26] Keller v. Johnson, 11 Ind. 337, 71 Am. Dec. 355; Cunningham v. Edgefield &c. R. Co., 2 Head (Tenn.) 23; 2 Pom. Eq. Jur. § 898.

[27] Ship v. Crosskill, L. R. 10 Eq. Cas. 73.

[28] Oakes v. Turquand, L. R. 2 H. L. Cas. 325. See also Bosher v. Richmond &c. Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. 879; 2 Pom. Eq. Jur. § 881; 8 Thomp. Corp. § 728. But due allowance must be made for high coloring and some exaggeration due to the sanguine expectations of the promoters. Directors &c. Central R. Co. v. Kisch, L. R. 2 H. L. Cas. 99. The language of the prospectus will be construed in favor of the validity of the subscription. 1 Cook Corp. (7th. ed.), § 143. See as to liability of promoter for fraud in prospectus. Downey v. Finucane, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307.

[29] New Brunswick &c. R. Co. v. Conybeare, 9 H. L. Cas. 711; National &c. Co. v. Drew, 32 Eng. Law & Eq. 1. See also Peterson v. People's &c. Assn., 124 Mich. 573, 83 N. W. 606.

[30] Montgomery &c. R. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60; Ranger v. Great Western R. Co., 5 H. L. Cas. 72. If the president had no authority to take subscriptions and did not in fact take the subscription, the subscriber can not charge the company with fraud because of any representations he may have made. Rives v. Montgomery South Plank R. Co., 30 Ala. 92. And the subscriber is bound to know that commissioners with statutory powers to take subscriptions cannot bind the corporation by any representations which they may make. Bavington v. Pittsburgh &c. R. Co., 34 Pa. St. 358; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am.

the corporation was only bound by such representations as the agent was authorized to make.[31] But the rule is said to be now well established both in that country and in this that a corporation cannot claim or retain the benefit of a subscription obtained through the fraud of its agents.[32] And the fact that the person making the fraudulent representations had no express authority from the corporation, or exceeded such authority, will not affect this rule, provided he was legally connected with the taking of the subscription.[33] If the corporation adopts a subscription taken without authority, it must also adopt the representations by which that subscription was procured.[34] But false representations by persons who have no authority from the company and who do not take the subscription for its benefit cannot affect the binding force and validity of the subscriptions.[35] Parol declarations and representations made by an officer of the corporation at a public meeting, though false and made with intent to deceive, will not ordinarily so far bind the corporation as to release a subscription made in reliance upon them.[36] The subscriber

Dec. 522; Syracuse &c. R. Co. v. Gere, 4 Hun (N. Y.) 392; North Carolina R. Co. v. Leach, 4 Jones L. (N. Car.) 340.

[31] Cook Corporations (7th. ed.), § 139. In Pennsylvania the corporation is held bound only when it has clothed the agent with actual or apparent authority to make representations. Custar v. Titusville &c Co., 63 Pa. St. 381.

[32] 8 Thomp. Corp. § 708; Wm. B. Joyce &c. v. Eifert, 56 Ind. App. 190, 105 N. E. 59.

[33] Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Waldo v. Chicago &c. R. Co., 14 Wis. 575.

[34] Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116. See also Walker v. Mobile &c. R. Co., 34 Miss. 245; Garrison v. Technic &c. Works, 55 N. J. Eq. 708, 37 Atl. 741. See also Virginia Land Co. v. Haupt, 90 Va. 533, 20 S. E. 824, 44 Am. St. 939.

[35] Cunningham v. Edgefield &c. R. Co., 2 Head. (Tenn.) 23. See also Miller v. Wild Cat &c. Co., 57 Ind. 541, holding that an agent taking subscriptions before the incorporation of the company cannot bind it by his misrepresentations. An agent must at least have implied or apparent authority before he can bind his principal. 2 Pom. Eq. Jur., § 909.

[36] Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; First Nat. Bank v. Hurford, 29 Iowa 579. A different rule is anounced in Wisconsin and Georgia, but the rule in the text is most consonant with the current of authority. See Atlanta &c. R. Co.

must be presumed to know that an officer has received no authority from the corporation to bind it in this manner;[37] and there could be but little security for the creditors of a corporation if it were held answerable for all the declarations of its officers made outside the scope of their authority.[38] The question as to whether the person making the false representations had authority from the corporation to act as its agent is usually a question of fact for the jury.[39]

§ 148 (129). **Fraud may be shown by parol evidence.**—The fraud may be established by parol evidence,[40] since this only goes to show that no contract was formed, and not to vary it as made.[41] This rule does not, therefore, conflict with the general rule that parol evidence is not admissible to alter or vary the terms of a written contract. On the contrary, it is in accord with the rule that parol evidence is admissible, especially in case of fraud, to show that there never was, in reality, a valid agreement.[42]

§ 149 (130). **Subscriber must be free from negligence, in order to be released upon the ground of fraud.**—In order to secure a release from his subscription upon the ground that his subscription was induced by fraud, the subscriber may have to show that

v. Hodnett, 36 Ga. 669; McClellan v. Scott, 24 Wis. 81. See also Weems v. Georgia &c. R. Co., 88 Ga. 303, 14 S. E. 583, where the question was submitted to the jury.

[37] Smith v. Tallahassee Branch &c. R. Co., 30 Ala. 650.

[38] Vicksburg &c. R. Co. v. McKean, 12 La. Ann. 638.

[39] Kelsey v. Northern &c. Co., 45 N. Y. 505; Crump v. United States Min. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116.

[40] Wert v. Crawfordsville &c. Co., 19 Ind. 242; St. Louis &c. R. Co. v. Tierman, 37 Kans. 606, 15 Pac. 544; New Orleans &c. R. Co. v. Williams, 16 La. Ann. 315; N. Y. Exchange Co. v. DeWolf, 31 N. Y. 273; Jewett v. Valley R. Co., 34 Ohio St. 601; Henderson v. Railway Co., 17 Tex. 560, 67 Am. Dec. 675; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. See also Anderson v. Scott, 70 N. H. 350, 47 Atl. 607.

[41] 1 Elliott Cont. § 1650; Henkley v. Sac Oil &c. Co., 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564.

[42] 1 Elliott Ev. §§ 592, 593; 3 Elliott Ev. § 1947; 1 Elliott Cont. § 1629.

he was not misled by his own negligence in not making prudent inquiries.[43] For where both parties have equal access to the means of information, the subscriber has no right to rely entirely upon the representations of the agent, unless some means or artifices are used to prevent investigation.[44] A subscriber who reads contradictory statements in different documents cannot rely upon a part only of such representations without investigation.[45] But where the facts are such as are within the knowledge of the corporation and its agents, the subscriber is only bound to exercise reasonable caution in accepting as true the representations made.[46] He is not bound to pursue independent inquiries, even though they would have shown him the falsity of the statements made by the agent or contained in the prospectus.[47]

§ 150 (131). Subscription induced by fraud is merely voidable —When it will be enforced.—A subscription induced by fraudulent representations is voidable only, and not void;[48] and is binding on both parties unless disaffirmed or rescinded.[49] If fraud

[43] Upton v. Englehart, 3 Dill. (U. S.) 496; Fed Cas. No 16800; Davis v. Dumont, 37 Iowa 47; Hughes v. Antietam Mfg. Co., 34 Md. 316; Custar v. Titusville &c. Co., 63 Pa. St. 381; Connecticut, &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. See also In re, American Nat. Beverage Co., 193 Fed. 772; Chicago Bldg. &c. Co. v. Peterson, 133 Ky. 596, 118 S. W. 384. But it is held that the burden is upon the corporation to show that the subscriber had knowledge. Bowen v. Aetna Indemnity Co., 151 Iowa 663, 131 N. W. 1086.

[44] Walker v. Mobile &c. R. Co., 34 Miss. 245; Jennings v. Braughton, 22 L. J. (Ch.) 585.

[45] Scholey v. Central R. Co., L. R. 9 Eq. Cas. 267n.

[46] Upton v. Englehart, 3 Dill. (U. S.) 496 Fed. Cas. No. 16800; New Brunswick &c. R. Co. v. Muggeridge, 1 Dr. & Sm. 363; Directors &c. Central R. Co. v. Kisch, L. R. 2 H. L. Cas. 99.

[47] Documents referred to in the prospectus need not be examined, even though they would show the falsity of statements made therein. Kisch v. Central R. Co., 34 L. J. (Ch.) 545; Directors &c. Central R. Co. v. Kisch, L. R. 2 H. L. Cas. 99.

[48] Upton v. Englehart, 3 Dill. (U. S.) 496, Fed. Cas. No. 16800; Cunningham v. Edgefield &c. R. Co., 2 Head (Tenn.) 23; Burleson v. Davis (Tex. Civ. App.), 141 S. W. 559; Reese River Min. Co. v. Smith, L. R. 4 H. L. 64.

[49] Tennent v. City of Glasglow Bank, L. R. 4 App. Cas. 615.

is established, however, it has been held that no action can be maintained by the corporation to recover, either upon the original subscription or upon a note given therefor,[50] unless the subscriber has ratified it or in some way become estopped, and the subscriber may recover back whatever money he has paid before discovery of the fraud.[51] Where, however, his subscription was made in pursuance of a fraudulent purpose he may not complain that his strict legal liabilities are enforced.[52] A subscription, absolute on its face, made under a secret agreement with the directors of the company, by which the subscriber was to be permitted to reduce the number of shares taken after it had operated as an inducement to others to subscribe, should be enforced according to its terms.[53] And, in general, a secret agreement between the company and subscriber, lessening his liability and changing the ostensible terms of the subscription, can neither be enforced nor successfully used as a defense to defeat his subscription. To release the subscriber would operate as a fraud upon the other subscribers and the corporate creditors.[54]

§ 151 (132). Ratification and estoppel—Rescission—Rights of creditors.—The subscriber should take steps to have his subscrip-

[50] I Occidental Ins. Co. v. Zanzhorn, 2 Mo. App. 205. But an innocent third person may enforce such a note where it is negotiable and is taken by him upon a valuable consideration in the usual course of business. Andrews v. Hart, 17 Wis. 297.

[51] Grangers' Ins. Co. v. Turner, 61 Ga. 561; Atkinson v. Pocock, 1 Exch. 796, 12 Jur. 60; Jarrett v. Kennedy, 6 C. B. 319.

[52] Litchfield Bank v. Peck, 29 Conn. 384. The subscribers "could not be permitted to set up any fraud to which they were a party, as a ground for their own discharge." Southern P. R. Co. v. Hixon, 5 Ind. 165, 169. See County of Crawford v. Pittsburgh &c. R. Co., 32 Pa. St. 141; Downie v. White, 12 Wis. 176, 78 Am. Dec. 731.

[53] White Mountain R. Co. v. Eastman, 34 N. H. 124.

[54] Lamar Ins. Co. v. Moore, 80 Ill. 446, 22 Am. Rep. 199; Meyer v. Blair, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. 500; York Park &c. Assn. v. Barnes, 39 Nebr. 834, 58 N. W. 440, 9 Lewis Am. R. and Corp. 240, 244; Graff v. Pittsburgh &c. R. Co., 31 Pa. St. 489; Miller v. Hanover &c. R. Co., 87 Pa. St. 95, 30 Am. Rep. 349. See also Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Howard v. Glenn, 85 Ga. 238, 11 S. E. 610; Schaeffer v. Missouri Home &c. Co., 46 Mo. 248; 1 Thomp. Corp. (2d. ed.), § 633.

tion canceled within a reasonable time after he discovers the fraud; for if he permits the interests of other subscribers and corporate creditors to attach by reason of his delay, his own laches will be a bar to his relief in equity.[55] And any acts on his part after he has knowledge of the fraud, which are inconsistent with an intention to disaffirm the subscription contract will be held to amount to a ratification, and render it absolutely binding.[56] Thus, it has even been held that one who subscribes in consideration of the extension of a railroad to a certain point is estopped to deny his obligation after the road has been built on the faith thereof, although such point is outside of the state which granted the charter and such charter does not purport to authorize a line beyond the limits of the state.[57] He may also be guilty of laches in failing to inform himself as to facts which would give him notice of the fraud that has been practiced upon him. It is held that it is the duty of a person taking shares in a company to inform himself as to the provisions of the articles of association, they being registered, and he must take the consequences of his neglect to do so,[58] and if they show that the representa-

[55] Chubb v. Upton, 95 U. S. 655, 24 L. ed. 523; Schaeffer v. Missouri Home Ins. Co., 46 Mo. 248; Graff v. Pittsburgh &c. R. Co., 31 Pa. St. 489; London &c. Ins. Co., Re, L. R. 24 Ch. Div. 149; Heymann v. European Central R. Co., L. R. 7 Eq Cas. 154; Cook Corporations (7th. ed.), § 161; 1 Thomp. Corp. (2d ed.), § 734, et seq. See also Wallace v. Bacon, 86 Fed. 553; Barcus v. Gates, 89 Fed. 783; Bartol v. Walton &c. Co., 92 Fed. 13.

[56] Upton v. Jackson, 1 Flipp. (U. S.) 413, Fed. Cas. No. 16802; Chubb v. Upton, 95 U. S. 667, 24 L. ed. 523; Martin v. Paul O'Burne &c. Co., 99 Cal. 355, 33 Pac. 1107; City Bank v. Bartlett, 71 Ga. 797; Wilson v. Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. 837; 2 Thomp. Corp. (2d. ed.), § 749. Selling part of his stock is a waiver. Ayre's Case, 25 Beav. 513. So also is instructing his broker to sell Briggs, Ex parte, L. R. 1 Eq. 483. And so is participation in Stockholders' meetings. Chaffin v. Cummings, 37 Maine 76. But attendance on a meeting has been held not to be a waiver. Stewart's Case, L. R. 1 Ch. App. 574. And the same has been held as to voting shares by proxy. Greenville &c. R. Co. v. Coleman, 5 Rich. L. (S. Car.) 118; McCully v. Pittsburgh &c. R. Co., 32 Pa. St. 25. Paying a call after knowledge of the fraud is held to be a waiver. Scholey v. Central R. Co., L. R. 9 Eq. 267n.

[57] Doherty v. Arkansas &c. R. Co., 5 Ind. Ter. 537, 82 S. W. 899.

[58] Oakes v. Turquand, L. R. 2 H. L. 325.

tions by which he was induced to subscribe were untrue, he must rescind within a reasonable time after he has an opportunity to know the truth by consulting them. But it has been held that he is not guilty of laches until after he has knowledge of the fraud, or of facts which should reasonably put him on inquiry, and that he is not chargeable with knowledge of facts disclosed at a stockholders' meeting at which he was not present but was represented by the perpetrator of the fraud, to whom he had given his proxy.[59] If he elects to rescind the contract, he must do so in toto, and must generally tender back his stock certificates.[60] In England,[61] and by a number of authorities in this country,[62] it is held that a subscription cannot be rescinded on the ground that it was induced by fraudulent representations unless proceedings are begun before the corporation becomes insolvent, or, at least, while it is a "going concern."[63] Other courts

[59] Virginia Land Co. v. Haupt, 90 Va. 533, 19 S. E. 168, 44 Am. St. 939n, 9 Lewis' Am. R. & Corp. 235.

[60] Parks v. Evansville &c. R. Co., 23 Ind. 567; Marion Trust Co. v. Blish (Ind. App.), 79 N. E. 415. A subscriber to stock cannot rescind for fraud, when he has had the stock transferred to his infant children, unless their right thereto is also tendered back. Francis v. New York &c. R. Co., 108 N. Y. 93, 15 N. E. 192. But compare West, Ex Parte, 56 Law Times (N. S.) 622.

[61] Tennent v. City of Glasgow Bank, L. R. 4 App. Cas. 615; Reese River Co. v. Smith, L. R. 4 H. L. 64; Oakes v. Turquand, L. R. 2 H. L. Cas. 325; Kent v. Freehold &c. Co., L. R. 3 Ch. App. 493.

[62] Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Duffield v. Barnum &c. Works, 64 Mich. 293, 31 N. W. 310; Olson v. State Bank, 67 Minn. 267, 69 N. W. 904; Saffold v. Barnes, 39 Miss. 399; Ruggles v. Brock, 6 Hun (N. Y.) 164; Clarke v. Thomas &c. Co., 34 Ohio St. 46; 1 Thomp. Corp. (2d ed.) § 737.

[63] This was the rule in our bankruptcy courts under the bankrupt act of 1867. Farrar v. Walker, 13 Nat. Bankr. Reg. 82. See also Upton v. Tribilcock, 91 U. S. 45; 23 L. ed. 203; Turner v. Grangers &c. Co., 65 Ga. 649, 38 Am. Rep. 801; Cunningham v. Edgefield &c. R. Co., 2 Head (Tenn.) 23. Certainly this is true where there is unreasonable delay and the rights of creditors are involved. Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727; Howard v. Turner, 155 Pa. St. 349, 26 Atl. 753, 35 Am. St. 883. In Bosher v. Richmond &c. Co., 89 Va. 455, 16 S. E. 360, 37 Am. St. 879,

hold that if the subscriber acts with due diligence and there is nothing to create an estoppel, he may obtain a rescission for fraud even after such a condition exists;[64] but, in any event, if he has been guilty of laches to the injury of creditors he cannot have rescission as against them after the corporation has become insolvent and is no longer a "going concern."[65]

where several subscriptions had been obtained by means of fraudulent representations in a prospectus, it was held that such subscribers had a common interest, and several might join in a bill for the benefit of themselves and others similarly situated, to set aside their subscriptions.

[64] Kentucky Mut. &c. Co. v. Schaefer, 120 Ky. 227, 85 S. W. 1098; Newton Nat. Bank v. Newbegin, 74 Fed. 135, 33 L. R. A. 727; Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721; Park v. Kribs, 24 Tex. Civ. App. 650, 60 S. W. 905. And see Hinkley v. Sac Oil &c. Co., 132 Iowa 396, 107 N. W. 629, 119 Am. St. 564; Gress v. Knight (Ga.), 68 S. E. 834, 31 L. R. A. (N. S.) 900. The cases on both sides are reviewed in the note to the above case as last reported. See also Morrisey v. Williams, (W. Va.), 82 S. E. 509, L. R. A. 1915D, 792.

[65] Meholin v. Carlson, 17 Idaho 742, 107 Pac. 755, 134 Am. St. 286; Earle v. Humphrey, 121 Mich. 518, 80 N. W. 370; Chamberlain v. Trogden, 148 N. Car. 139, 61 S. E. 628, 16 A. & E. Ann. Cas. 177; Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591. This is conceded in the cases cited in the last preceding note and is, of course, included in those which follow the English rule, as they go even further. See generally Grees v. Knight (Ga.), 68 S. E. 834, and note to that case as also reported in 31 L. R. A. (N. S.) 900.

CHAPTER VIII.

CALLS AND ASSESSMENTS.

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§ 155 (133). **When payment of subscription must be made.**—Where a subscription contains a promise to pay upon a certain day, the subscriber is bound to pay at that time without further notice or he is liable to suit immediately upon his default,[1] and

[1] Estell v. Knightstown &c. Tpk. Co., 41 Ind. 174; Beckner v. Riverside &c. Tpk. Co., 65 Ind. 468; Waukon &c. R. Co. v. Dwyer, 49 Iowa 121; Northwood Union Shoe Co. v. Pray, 67 N. H. 435, 32 Atl.

he is also bound, in the absence of any provision in the subscription, if the charter or a general statute specifies the time of payment, to pay at the designated time.[2] The same is true where the subscription is made payable upon the happening of a certain event and at stated periods thereafter. The subscriber must know when his subscription becomes payable.[3] The stockholder may pay his subscription as soon after the corporation is organized as he may choose, without awaiting the formality of a call,[4] if he act in good faith.[5] But where the capital stock is to be paid at such times and in such instalments as may be required by the president and directors, such a requirement, being an uncertain event, forms a condition which, as between the corporation and the stockholder, suspends the obligation to pay until it is made.[6] And an ordinary subscription made without any designated time for payment is generally held to become payable only after a formal declaration to that effect by the corporate authorities.[7]

770. A subscription may regulate the time of payment. New Jersey Midland R. Co. v. Strait, 35 N. J. L. 322; Roberts v. Mobile &c. R. Co., 32 Miss. 373. Even though the statute fixes the time of payment. Iowa &c. R. Co. v. Perkins, 28 Iowa 281. See also West v. Crawford, 80 Cal. 19, 21 Pac. 1123.

[2] Phoenix Warehousing Co. v. Badger, 67 N. Y. 294.

[3] Breedlove v. Martinsville &c. R. Co., 12 Ind. 114, where the subscription was payable in instalments of ten per cent. every sixty days after the work was put under contract.

[4] Marsh v. Burroughs, 1 Wood (U. S.) 463, Fed. Cas. No. 9112; Poole, Jackson & Whyte's Case, L. R. 9 Ch. D. 322. Where the corporation owes money to the subscriber, it is frequently applied to discharge his indebtedness without awaiting a call. Adamson's Case, L. R. 18, Eq. Cas. 670.

[5] If it be merely a colorable payment to escape liability in case of insolvency he will not be permitted to claim a release from indebtedness on his subscription. Syke's Case, L. R. 13 Eq. Cas. 255; Barge's Case, L. R. 5 Eq. Cas. 420.

[6] Purton v. New Orleans &c. R. Co., 3 La. Ann. 19. See also Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288.

[7] Ventura &c. R. Co. v. Hartman, 116 Cal. 260, 48 Pac. 65; Alabama &c. R. Co. v. Rowley, 9 Fla. 508; North &c. St. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478; Spangler v. Indiana &c. R. Co., 21 Ill. 276; Braddock v. Philadelphia &c. R. Co., 45 N. J. L. 363. See also Brookshire Canning &c. Co. v. Evan, 163 Mo. App. 564, 146 S. W. 828. A call is not applicable to stock which was subscribed for after the call was made. Pike v. Bangor &c. R. Co., 68 Maine 445. Some

§ 156 (134). **Calls—Nature and effect of.**—Such a declaration as that referred to in the preceding section is termed a "call,"[8] and the sum of money so rendered payable may be payable in one or more instalments, where the directors are invested with entire discretion and there is no contract to the contrary, according to the terms of the resolution.[9] Any declaration or resolution to the effect that the whole,[10] or a certain part,[11] of the unpaid subscriptions shall be paid in, though informal and irregular,[12] will

cases in New York have asserted the rule that unless the contract provides for calls, the subscription is payable absolutely and at once. Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Phoenix &c. R. Co. v. Badger, 67 N. Y. 294. But the point was not decided in either of these cases and other cases in that state recognize the doctrine of the text. Mann v. Pentz, 3 N. Y. 415; Seymour v. Sturgess, 26 N. Y. 134; Williams v. Meyers, 41 Hun (N. Y.) 545. See also South Georgia &c. R. Co. v. Ayres, 56 Ga. 230; Williams v. Taylor, 120 N. Y. 244, 24 N. E. 288. In a suit on a subscription to the capital stock of a company which provided that the subscriptions should be paid "in such instalments and at such times as may be decided by a majority of the stockholders or board of directors, or a trustee empowered for the purpose by a majority of the stockholders," no proof was offered to show that any provisions as to the amount of the installments or the time of payment of such had ever been so made, nor that any call for payment had ever been made in said manner, and it was held that there should be a judgment of non-suit against the plaintiff. North &c. R. Co. v. Spullock, 88 Ga. 283, 14 S. E. 478.

[8] Spangler v. Indiana &c. R. Co., 21 Ill. 276; Braddock v. Philadelphia &c. R. Co., 45 N. J. L. 363; Pittsburgh &c. R. Co. v. Clarke, 29 Pa. St. 146; Newry & Enniskillen R. Co. v. Edmunds, 2 Ex. R. 118. See also Wall v. Basin Min. Co., 16 Idaho 313, 101 Pac. 733. The term may also refer to a notice given of such resolution, or to the time which it names as the time of payment. Ambergate &c. R. Co. v. Mitchell, 4 Exch. 540.

[9] Haun v. Mulberry &c. Road, 33 Ind. 103; Hays v. Pittsburgh &c. R. Co., 38 Pa. St. 81; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Northwestern &c. R. Co. v. McMichael, 6 Exch. 273; Birkenhead &c. R. Co. v. Webster, 6 Exch. 277. But it is said that debt will not lie for one of such instalments until all are due and payable. Birkenhead &c. R. Co. v. Webster, 6 Exch. 277.

[10] Haun v. Mulberry &c. R. Co., 33 Ind. 103; Fox v. Allensville &c. R. Co., 46 Ind. 31.

[11] Spangler v. Indiana &c. R. Co., 21 Ill. 276; Ross v. Lafayette &c. R. Co., 6 Ind. 297.

[12] Philadelphia &c. R. Co. v. Hickman, 28 Pa. St. 318; Southhamp-

be a valid call if it be sufficient to show a clear official intent to render payable so much of the subscription as is embraced by the terms,[13] and is susceptible of legal proof.[14] The resolution need not state the time or place of payment,[15] but these may be left to be fixed by the administrative officers of the corporation.[16] It is perfectly competent for the directors to determine these matters at the same or a subsequent meeting. And it has been held that they may order that at a certain future time a call payable at a later date shall be made.[17] Where no place is designated, the resolution requiring payment will import a requirement that the payments should be made to the treasurer of the corporation at his office.[18]

§ 157 (135). **Directors may make calls—Delegation and ratification.**—In general, the directors are the proper authorities to make calls,[19] in the absence of any other provision in the charter, or in any statute or by-law. Where this power is not given to the directors, it is usually lodged with the stockholders at

ton Dock Co. v. Richards, 2 Eng. Railw. & Canal Cas. 215, 234. Irregularities may be waived. Hays v. Pittsburgh &c. R. Co., 38 Pa. St. 81; Macon &c. R. Co. v. Vason, 57 Ga. 314. But see Grosse Isle Hotel Co. v. l'Anson, 43 N. J. L. 442.

[13] Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169.

[14] An entry in the minutes of the corporation is sufficient proof. Fox v. Allensville &c. Tpk. Co., 46 Ind. 31. The passage of the resolution may be proven, though no entry was made in the minutes. Hays v. Pittsburgh &c. R. Co., 38 Pa. St. 81. See Bavington v. Pittsburgh &c. R. Co., 34 Pa. St. 358.

[15] Marsh v. Burroughs, 1 Wood (U. S.) 463, Fed. Cas. No. 9112; Andrew v. Ohio &c. R. Co., 14 Ind. 169; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Great North &c. R. Co. v. Biddulph, 7 M. & W. 243.

[16] They should be fixed by the notice. Andrew v. Ohio &c. R. Co., 14 Ind. 169; In re Cawley &c. Co., 42 Ch. Div. 209. And should be reasonable. Fairfield &c. Co. v. Thorp, 13 Conn. 173.

[17] Sheffield &c. R. Co. v. Woodcock, 7 Mees. & W. 574. See also Penobscot R. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654; Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430.

[18] Danbury &c. R. Co. v. Wilson, 22 Conn. 435.

[19] Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169, 172; Ambergate &c. R. Co. v. Mitchell, 4 Exch. 540.

large,[20] in which case it has been held they may delegate the power to the directors;[21] and it has been held in such a case that even without such a delegation of power, the directors may still make calls, if not expressly prohibited.[22] But the directors cannot delegate such a special authority entrusted to them,[23] though they may ratify a call made by one to whom they have attempted to delegate it, and so render such call valid.[24] And they may, it seems, authorize another to determine the amount of some of the instalments and to designate the times of payment.[25] Thus it is said that they may make a general declaration that the stock is payable, and give a general authority to the treasurer to require the payment of the stock, and calls made by him will be valid, even though the resolutions do not specify the amount of each instalment to be called for.[26]

§ 158 (136). Directors must act as a body—De facto board—Illegal calls.—A valid call cannot be made by a portion of the board of directors in the absence of a quorum for the transaction of business.[27] But that a de facto board was illegally elected cannot be set up as a defense to a call regularly made by them.[28]

[20] Estell v. Knightstown Tp Co., 41 Ind. 174; Ex parte Winsor, 3 Story (U. S.) 411.

[21] Rives v. Montgomery &c. R. Co., 30 Ala. 92. Contra, Winsor, Ex parte, 3 Story C. C. 411, Fed. Cas. No. 17884.

[22] Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169. But see Marlborough &c. Co. v. Smith, 2 Conn. 579.

[23] Banet v. Alton &c. R. Co., 13 Ill. 504; Pike v. Bangor &c. R. Co., 68 Maine 445; Silver Hook Road v. Greene, 12 R. I. 164; Rutland &c. R. Co. v. Thrall, 35 Vt. 536.

[24] Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Read v. Memphis &c. Co., 9 Heisk. (Tenn.) 545.

[25] Banet v. Alton &c. R. Co., 13 Ill. 404.

[26] Hays v. Pittsburgh &c. R. Co., 38 Pa. St. 81. But see Silver Hook Road v. Green, 12 R. I. 164.

[27] Price v. Grand Rapids &c. R. Co., 13 Ind. 58; Bottomley's Case, L. R. 16 Ch. Div. 681. Possibly such an act could be confirmed by the majority. Phosphate of Lime Co., Re, 24 L. T. 932.

[28] Fairfield &c. Tpk. Co. v. Thorp, 13 Conn. 173; Macon &c. R. Co. v. Vason, 57 Ga. 314; Eakright v. Logansport &c. R. Co., 13 Ind. 404; Steinmetz v. Versailles &c. R. Co., 57 Ind. 457; Ohio &c. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128. Contra, Howbeach, &c. Co. v. Teague, 5 H. & N. 151. And see People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440, where a call

If the corporation is unauthorized and illegal, calls made by it cannot, it seems, be enforced.[29] But it is generally held that the implied promise to pay upon call contained in a subscription to the capital stock of a legally incorporated company is sufficient to support an action, and of course an action may be maintained on an express promise to pay for such stock.

§ 159 (137). **Discretion of board in making calls.**—The corporate authorities who are empowered to make calls are the sole judges as to the advisability of making them,[30] subject, perhaps, to the condition that the power must be exercised in good faith for the purpose of raising money for the use of the corporation.[31] And where no limitations are placed upon their discretion, they may require the whole subscription to be paid, either at one time or in instalments.[32]

§ 160 (138). **Charter and statutory limitations upon discretion —Periodical instalments.**—The assessments are frequently required by charter or by statute to be limited to not more than a certain per centum of the subscription within a given time. And where the charter provides that after the payment of a certain

by directors elected at a meeting without notice was held invalid. Moses v. Tompkins, 84 Ala. 613, 4 So. 763. The rule in England seems to be opposed to the doctrine stated in the text. Swansea Dock Co. v. Levien, 20 L. J. (Ex.) 447. See also Moses v. Tompkins, 84 Ala. 613, 4 So. 763.

[29] Gillespie v. Ft. Wayne &c. R. Co., 17 Ind. 243.

[30] Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; American Alkali Co. v. Campbell, 113 Fed. 398; Visalia &c. R. Co. v. Hyde, 110 Cal. 632, 43 Pac. 10, 52 Am. St. 136; Judah v. American &c. Co., 4 Ind. 333; Anglo-American Land Co. v. Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. 437; Chouteau Ins. Co. v. Floyd, 74 Mo. 286; Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169. See also Stone v. Penn Yan &c. R. Co., 125 App. Div. 94, 109 N. Y. S. 374.

[31] Harbershon's Case, L. R. 5 Eq. 286. But where the money is raised for the use of the company, equity will not inquire whether such use is essential to its best interests. Bailey v. Birkenhead &c. R. Co., 12 Beav. 433; Yetts v. Norfolk &c. R. Co., 3 DeG. & Sm. 293. See also Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186.

[32] Haun v. Mulberry &c. Grav. R. Co., 32 Ind. 103.

per cent., no further assessment shall be made "unless with the assent of three-fourths of the stockholders," a shareholder cannot be made to pay the balance by the directors, without a three-fourths vote of the stockholders.[34] It has also been held that subscriptions to stock which is to be called for in proportions can only be recovered where the instalments were called for periodically, and that an attempt to make all the assessments at one time, without having given any notice to the subscriber that previous assessments were payable is invalid.[35] But where the subscription was made upon condition that not more than five per cent. should be assessed at any one time, it was held that an assessment of more than that sum, payable in instalments of not more than five per cent. each, must be levied by a single vote of the directors.[36] It seems, however, that the corporation cannot by contract, agree to postpone a call for an indefinite time.[37]

§ 161 (139). **Call should affect all alike—Motive and expediency.**—A call in order to be valid must ordinarily affect all similar stock of the corporation alike.[38] But the fact that wrong motives induced the directors to make the call does not constitute a valid objecion to it,[39] where the assessment is equal and the money is raised ostensibly for corporate uses. Thus, in the case cited, it was held that although the declaration alleged that the assessment was unnecessary and was made in pursuance of a scheme to embarrass the plaintiff and get possession of his stock at a nominal price, as it did not appear to be in excess of the power of the directors nor for an object foreign to the purposes

[34] Louisiana Paper Co. v. Waples, 3 Woods (U. S.) 34, Fed. Cas. No. 8540.

[35] Spangler v. Indiana &c. R. Co., 21 Ill. 276. But see Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430.

[36] Penobscot R. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654; Penobscot R. Co. v. Dunn, 39 Maine 587.

[37] McComb v. Credit Mobilier &c., 13 Phila. 468; Van Allen v. Ill. Central R. Co., 7 Bosw. (N. Y.) 515.

[38] Pike v. Bangor &c. R. Co., 68 Maine 445; Great Western &c. Co. v. Burnham, 79 Wis. 47, 47 N. W. 373. See also North Milwaukee Townsite v. Bishop, 103 Wis. 492, 79 N. W. 785, 45 L. R. A. 174, 24 Am. St. 698.

[39] Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186.

of the corporation, the court would not inquire into the motives which prompted it or the expediency of making it.

§ 162 (140). **Subscription payable upon demand—Notice.**—It is held in a number of jurisdictions that a subscription payable at such times and places as shall be directed by the directors of the company is payable upon demand,[40] that a suit to collect the installment called for is a sufficient demand,[41] and that no notice of such a call need be given before suit,[42] unless it is required by the charter or by-laws, or by statute.[43] In accordance with this doctrine, where no such requirement is found in the charter or general laws, a judgment for an instalment

[40] Ross v. Lafayette &c. R. Co., 6 Ind. 297; New Albany &c. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337, and note; Gray v. Monongahela &c. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500, and note. On the question of payment of subscriptions on call, see 4 Thomp. Corp. (2d. ed.), § 3685 et seq. The statutes of nearly all the states make the capital stock payable in such instalments, and at such times and places as the directors prescribe. A call for the payment of a subscription is a sufficient acceptance of the subscriber as a stockholder. Danbury &c. R. Co. v. Wilson, 22 Conn. 435; Wight v. Shelby R. Co., 16 B. Mon. (Ky.) 4, 63 Am. Dec. 522; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336.

[41] Smith v. Indiana &c. R. Co., 12 Ind. 61.

[42] Eppes v. Mississippi &c. R. Co., 35 Ala. 33; Grubbs v. Vicksburg &c. R. Co., 50 Ala. 398; Wilson v. Mills Valley R. Co., 33 Ga. 466; Peake v. Wabash R. Co., 18 Ill. 88; Hill v. Nisbet, 100 Ind. 341; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451, 464; Grubb v. Mahoning Nav. Co., 14 Pa. St. 302.

[43] Notice is required by statute in several states. Such a statute is generally held to be mandatory. Mississippi &c. R. Co. v. Gaster, 20 Ark. 455; Macon &c. R. Co. v. Vason, 57 Ga. 314; note in 93 Am. St. 384, 385. The Pennsylvania R. R. act requires notice of calls to be given. McCarty v. Selinsgrove &c. R. Co., 35 Led. Intel. 410. See also Scarlett v. Academy, 43 Md. 203; Muskingum Valley &c. Co. v. Ward, 13 Ohio 120, 42 Am. Dec. 191, 3 Thomp. Corp. (2d. ed.), § 3722 (notice by publication). When the trustees of a corporation, suing on a subscription to its capital stock, show that they have taken steps, which the law authorized them to take, the presumption is that they have taken them regularly; and, if there is any by-law which renders their action irregular, it is matter of defense and should be so pleaded. Puget Sound &c. R. Co. v. Ouillette, 7 Wash. 265, 34 Pac. 929.

on a subscription will be sustained even though it does not appear that the defendant had any notice whatever of a call for such instalment.[44] But respectable authority holds that notice of calls must be given before suit is brought to collect them,[45] since all stockholders cannot reasonably be presumed to know what the directors do without notice of that fact,[46] which is peculiarly within the knowledge of the corporate authorities seeking to enforce the subscription liability.[47]

§ 163 (141). **Requisites of notice.**—Where notice is required, it must be such a notice as will give the shareholder to understand that a call has been made, and that he is required to pay the amount on a named day,[48] and some authorities hold that it must designate the place of payment.[49] It must be given the full number of days prescribed before the call is made payable or before suit is brought,[50] but where actual personal notice is given this has been held effectual, although the charter, statute or by-laws provide for some other form of notice.[51] Actual

[44] Wilson v. Mills Valley R. Co., 33 Ga. 466.

[45] Wear v. Jacksonville &c. R. Co., 24 Ill. 594; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Edinburgh &c. R. Co. v. Hebblewhite, 6 M. & W. 707; Miles v. Bough, 3 Ad. & El. (N. S.) 845; Lindley Comp. L. (5th ed.) 417, 4 Thomp. Corp. (2d ed.), § 3720.

[46] Hughes v. Antietam Mfg. Co., 34 Md. 316.

[47] This rule is commended in 4 Thomp. Corp. (2d. ed.), § 3720. See also note in 73 Am. St. 385, 386, where it is stated that the weight of authority is that notice is unnecessary, but authorities on both sides are cited.

[48] Shackelford v. Dangerfield, L. R. 3 C. P. 407.

[49] Dexter &c. R. Co. v. Millerd, 3 Mich. 91, holding that a notice to pay to the treasurer does not sufficiently indicate the place of payment. But see Muskingum Valley Tpk. Co. v. Ward, 13 Ohio 120, 42 Am. Dec. 191, holding that it does. And see Danbury &c. R. Co. v. Wilson, 22 Conn. 435, where it is held that a call is impliedly payable to the treasurer at his office unless otherwise provided in the resolution.

[50] Mississippi &c. R. Co. v. Gaster, 20 Ark. 455. Fifty-nine days is insufficient where the statute prescribes sixty days. Macon &c. R. Co. v. Vason, 57 Ga. 314. See also Cole v. Joliet Opera House Co., 79 Ill. 96.

[51] Mississippi &c. R. Co. v. Gaster, 20 Ark. 455, where the statute provided for sixty days' notice by publication. Schenectady &c. R. Co. v. Thatcher, 11 N. Y. 102, where the defendant aided in send-

notice will be presumed where the subscriber expressly promises to pay a call which has already been made.[52] Notice by mail has been held to be effective only if actually received, in the absence of special provision for notice of this kind,[53] and it is for the jury to decide whether it was so received.[54]

§ 164 (142).**Constructive notice.**—Where constructive notice is relied upon proof must usually be made of a strict compliance with the provisions of the statute, charter, or by-law conferring authority to give notice by publication or otherwise.[55] Publication must be made the full number of days required before the call is payable,[56] but one publication has been held sufficient unless more are expressly required.[57] It has been held that this mode of giving notice of matters in which many persons are interested, such as a call by the directors of a corporation, has so long been an universal usage, and

ing out by mail notices required by charter. See also Grand Valley Irr. Co. v. Fruita Imp. Co., 37 Colo. 483, 86 Pac. 324; Lexington &c. R. Co. v. Chandler, 13 Metc. (Mass.) 311; McCarty v. Sellingsgrove R. Co., 87 Pa. St. 332. Contra, Tomlin v. Tonica &c. R. Co., 23 Ill. 429 (374).

[52] Miles v. Bough, 3 Ad. & El. (N. S.) 845; Fairfield Co. Tpk. Co. v. Thorp, 13 Conn. 173.

[53] Hughes v. Antietam &c. Co., 34 Md. 316; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451. But see Braddock v. Philadelphia &c. R. Co., 45 N. J. L. 363. See generally 4 Thomp. Corp. (2d ed.), § 3722.

[54] Braddock v. Philadelphia &c. R. Co., 45 N. J. L. 363. Only the person actually mailing the notice can testify that it was sent. Jones v. Sison, 6 Gray (Mass.) 288.

[55] Macon &c. R. Co. v. Vason, 57 Ga. 314; Cole v. Juliet &c. Co., 79 Ill. 96; Louisville &c. Turnpike Co. v. Meriwether, 5 B. Mon. (Ky.) 13. See 4 Thomp. Corp. (2d. ed.), §§ 3722, 3724, 3726.

[56] Macon &c. R. Co. v. Vason, 57 Ga. 314. The certificate of the secretary is not admissible to prove such publication. Tomlin v. Tonica &c. R. Co., 23 Ill. 429. The printed notice must be put in evidence. Rutland &c. R. Co. v. Thrall, 35 Vt. 536. But may be supplemented by the testimony of the publisher as to subsequent insertions. Unthank v. Henry Co. Tpk. Co., 6 Ind. 125; Andrews v. Ohio &c. R. Co., 14 Ind. 169.

[57] Marsh v. Burroughs, 1 Woods (U. S.) 463, Fed. Cas. No. 9112; Fox v. Allensville &c. Tpk. Co., 46 Ind. 31; Muskingum Val. Tpk. Co. v. Ward, 13 Ohio 120, 42 Am. Dec. 191.

of a notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land,[58] and that such a notice is sufficient where the mode of notice is left undetermined by express provision of law.[59] But the better authority seems to hold that such a notice would bind only those who could be proven to have actually read it;[60] and that, in general, showing that notice was given to others even of the immediate neighborhood will not be sufficient to charge a subscriber,[61] where constructive notice is not expressly provided for and such provisions carefully and exactly complied with.

§ 165 (143). **Waiver by stockholder of notice and formalities of call—Estoppel.**—The subscriber may waive notice, or he may waive the formalities which give validity to the call,[62] and may even waive the call itself.[63] Such a waiver may be by acts as well as by express agreement.[64] It is held that a director participating in a call cannot question its validity.[65] And a subscriber who, on receiving notice of a call, refuses to pay it and denies his liability as a stockholder, waives any further notice

[58] Hall v. United States Ins. Co., 5 Gill (Md.) 484.

[59] Louisville &c. Co. v. Meriwether, 5 B. Mon. (Ky.) 13; Grubbs v. Vicksburg &c. R. Co., 50 Ala. 398; Danbury &c. R. Co. v. Wilson, 22 Conn. 435. See also Fisher v. Evansville &c. R. Co., 7 Ind. 407.

[60] Alabama &c. R Co. v. Rowley, 9 Fla. 508; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451. And see Lincoln v. Wright, 23 Pa. St. 76; Tomlin v. Tonica &c. R. Co., 23 Ill. 429, 62 Am. Dec. 316n.

[61] New Jersey Midland R. Co. v. Strait, 35 N. J. L. 322.

[62] Campbell v. Santa Maria Oil &c. Co. 153 Cal. 282, 95 Pac. 39, 4 Thomp. Corp. (2d ed.) § 2798. The vote of a city to pay a call is no waiver of its invalidity. Pike v. Bangor &c. R. Co., 68 Maine 445. A waiver must be clearly proved. Rutland &c. R. Co. v. Thrall, 35 Vt. 536.

[63] Such a waiver is frequently made by an agreement to pay the subscription on a day certain. New Albany &c. R. Co. v. Pickens, 5 Ind. 247; Waukon &c. R. Co. v. Dwyer, 49 Iowa 121.

[64] Macon &c. R. Co. v. Vason, 57 Ga. 314.

[65] York Tramways Co. v. Willows, L. R. 8 Q. B. D. 685. But the fact that a director voted for a call and made a part payment of it, will not estop him to question his liability as a stockholder.

of future calls.[66] But voluntary payment of part of a subscription is not necessarily a waiver of the right to have calls made for the balance before payment.[67] And the payment of one illegal assessment does not estop the subscriber from setting up illegality as a defense to a second.[68]

§ 166 (144). **Demand and suit for assessment.**—After a call is rendered payable by resolution and due notice, suit may be brought to collect it without further demand.[69] Where several instalments are in default, it has been held that one suit may be brought for all.[70] The complaint in such a case must aver that all the several instalments are due and payable.[71] Interest may be collected from the time the instalments become due, in case they are not promptly paid.[72]

§ 167 (145). **Assignment of right to collect subscription on assessment.**—The claim arising from an unpaid call may be assigned like any other debt,[73] as may subscription contracts pay-

[66] Cass v. Pittsburgh &c. R. Co., 80 Pa. St. 31.

[67] Grosse Isle Hotel Co. v. L'Anson, 43 N. J. L. 442.

[68] Somerset &c. R. Co. v. Cushing, 45 Maine 524. Nor, on the other hand, does the illegality of one assessment vitiate a subsequent legal assessment. European &c. R. Co. v. McLeod, 3 Pugsley (16 N. B.) 3, 39.

[69] Winter v. Muscogee &c. R. Co., 11 Ga. 438; Penobscot R. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654. See generally as to pleadings and defences in such actions, 8 Thomp. Corp. §§ 3802-3880. The liability of a stockholder for unpaid subscription is controlled by law of state where corporation is created and exists. United States Cast Iron Pipe &c. Co. v. Henry Vogt Mach. Co., 182 Ky. 473, 206 S. W. 806.

[70] Spangler v. Indiana &c. R. Co., 21 Ill. 276.

[71] Bethel &c. Tpk. Co. v. Bean, 58 Maine 89.

[72] Casey v. Galli, 94 U. S. 673, 24 L. ed. 168; Rikhoff v. Brown's &c. Co., 68 Ind. 388; Gould v. Oneonta, 71 N. Y. 298. See also McCoy v. World's Columbian Exposition, 186 Ill. 356, 57 N. E. 1043, 78 Am. St. 288; May v. Ullrich, 132 Mich. 6, 92 N. W. 493, 4 Thomp. Corp. (2d ed.), § 3712. This, however, is a matter frequently regulated by statute. Thus, under the Virginia statute, it has been held interest may be collected from the date of the call. Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. ed. 184.

[73] Miller v. Malony, 3 B. Mon.

able upon a day certain.[74] But subscriptions made subject to call cannot be mortgaged or sold before payment has been called for,[75] since the discretion to make calls vested in the directors is not the subject of transfer,[76] and, generally, the power to enforce calls can only be exercised by the company to whose stock the subscription was made, unless there has been a consolidation or transfer of the franchises to another company in pursuance of full statutory authority.[77]

§ 168 (146). **When courts may compel call and payment.**—In case of corporate insolvency, a court of equity may compel the directors to make a call for the purpose of raising funds with which to pay the debts of the corporation.[78] Or it may dispense with a call and order that the unpaid subscriptions, or such a part of them as may be necessary to pay the corporate debts,[79]

(Ky.) 105; Morris v. Cheney, 51 Ill. 451; Wells v. Rodgers, 50 Mich. 294, 15 N. W. 462; Downie v. Hoover, 12 Wis. 174, 78 Am. Dec. 730.

[74] See Smith v. Hollett, 34 Ind. 519; Hays v. Branham, 36 Ind. 219.

[75] Rodgers v. Wells, 44 Mich. 411, 6 N. W. 860; Wells v. Rodgers, 50 Mich. 294, 15 N. W. 462; New Jersey Midland R. Co. v. Strait, 35 N. J. L. 322; Stanley, Ex parte, 33 L. J. (Ch.) 535.

[76] A mortgage on all the land, property and effects of the corporation does not cover unpaid subscriptions. Pickering v. Ilfracombe R. Co., 37 L. J. (C. P.) 118.

[77] Thrasher v. Pike County R. Co., 25 Ill. 393.

[78] Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Chandler v. Siddle, 3 Dill. (U. S.) 477, Fed. Cas. No. 2594; Germantown Pass. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546n, 4 Thomp. Corp. (2d ed.), § 3714. See also Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Calloway v. Glenn, 105 Ky. 648, 49 S. W. 440; Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88; Efird v. Piedmont Land &c. Co., 55 S. Car. 78, 32 S. E. 758, 896. But this remedy has been disapproved. Dalton &c. R. Co. v. McDaniel, 56 Ga. 191; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Ward v. Griswoldville &c. Co., 16 Conn. 593. Compare Glenn v. Howard, 81 Ga. 383, 8 S. E. 636, 12 Am. St. 318. See also Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. ed. 986.

[79] Citizens' &c. Co. v. Gillespie, 115 Pa. St. 564, 9 Atl. 73. See also Washington Sav. Bank v. Butchers' &c. Bank, 107 Mo. 133, 17 S. W. 644, 28 Am. St. 405; Henry v. Vermillion &c. R. Co., 17 Ohio 187; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919.

be paid to a receiver for the benefit of the corporate creditors.[80] The right of the court to do this is upheld even where the statute provides that calls shall be made only by the directors.[81]

§ 169 (147). **Extent of stockholder's liability for assessments —Agreements as affecting liability.**—The principle of law is now well settled that a stockholder is not liable for assessments beyond the par value of his stock,[82] unless made so liable by provisions of the corporate charter or by a constitutional statute.[83] Liability to such an assessment cannot be created by a by-law adopted by a majority vote of the directors or of the stockholders.[84] It has been held, however, that an agreement

[80] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Marsh v. Burroughs, 1 Woods (U. S.) 463, Fed. Cas. No. 9112; Glenn v. Sample, 80 Ala. 159, 60 Am. Rep. 92; Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Chandler v. Keith, 42 Iowa 99; Shockley v. Fisher, 75 Mo. 498; Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466; Henry v. Vermillion &c. R. Co., 17 Ohio 187; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Adler v. Milwaukee &c. Co., 13 Wis. 57. But see as to necessity for notice. Farwell v. Great Western &c. Tel. Co., 161 Ill. 522, 44 N. E. 891, with which compare, however, Brown v. Allebach, 156 Fed. 697.

[81] Glenn v. Saxton, 68 Cal. 353, 9 Pac. 420; Crawford v. Rohrer, 59 Md. 599. But see Trustees &c. v. Waples, 3 Woods (U. S.) 34, holding that the court cannot make a call where the charter provides for a call only upon a three-fourths vote of the stockholders. As to right of receiver or assignee to make calls, in a proper case, see 4 Thomp. Corp. (2d ed.), § 3715.

[82] Smith v. Huckabee, 53 Ala. 191; Redkey Citizens' &c. Gas Co. v. Orr, 27 Ind. App. 1, 60 N. E. 716; Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236; Coffin v. Rich, 45 Maine 507, 71 Am. Dec. 559; Inhabitants of Norton v. Hodges, 100 Mass. 241; Enterprise Ditch Co. v. Moffitt, 58 Nebr. 642, 79 N. W. 560, 45 L. R. A. 647n, 76 Am. St. 122; Great Falls &c. R. Co. v. Copp, 38 N. H. 124; Chase v. Lord, 77 N. Y. 1; Carr v. Iglehart, 3 Ohio St. 457.

[83] Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802. See post Chapter IX, Stockholders.

[84] Kennebec &c. R. Co. v. Kendall, 31 Maine 470; Trustees of Free Schools v. Flint, 13 Metc. (Mass.) 539; Flint v. Pierce, 99 Mass. 68; Enterprise Ditch Co. v. Moffitt, 58 Nebr. 642, 79 N. W. 560, 76 Am. St. 122, 45 L. R. A. 647n, 96 Am. Dec. 691. But see Hume v. Winyah Canal Co., 1 Carolina L. J. 217. See upon the general subject note in 22 L. R. A. (N. S.), 1013; and as to question of liability of holder of stock as collateral security, see note in Ann. Cas. 1916C, 567.

entered into by all the stockholders and printed upon the certificates, may make not only the stockholders but their assignees liable to further assessments.[85] And if the stockholders, by agreement among themselves, voluntarily contribute to the corporate treasury in proportion to the value of their shares to meet the needs of the corporation, such advances do not create corporate debts and cannot be recovered back.[86]

§ 170. **Liability of holder where stock purports to be paid up but is not.**—The general rule is that the corporation, in the absence of statutory authority or special power conferred upon it, has no authority to make calls and assessments upon paid up stock, and this has often been held, in the absence of fraud, as between the corporation or stockholder, even where the stock has not in fact been fully paid up.[87] But under a phase of the trust fund doctrine it is generally held that where the stock is not paid up the fact that it is designated or issued as paid up stock will not prevent creditors from attacking the transaction or having payment of the unpaid portion enforced in a proper case.[88]

[85] Weeks v. Silver &c. Co., 23 J. & S. (N. Y. Sup. Ct.) 1.

[86] Bidwell v. Pittsburgh &c. R. Co., 114 Pa. St. 535, 6 Atl. 729.

[87] Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. ed. 423; Wall v. Basin Min. Co., 16 Idaho 313, 101 Pac. 733, 22 L. R. A. (N. S.) 1013, and cases cited in note; Bent v. Underdown, 156 Ind. 516, 60 N. E. 307; Gary v. St. Joe Min. Co., 32 Utah 497, 91 Pac. 369, 12 L. R. A. (N. S.) 554. See also note in 45 L. R. A. 647.

[88] Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Merchants &c. Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091; Knight &c. Co. v. Tampa &c. Buck Co., 55 Fla. 728, 46 So. 285; Gillett v. Chicago &c. Trust Co., 230 Ill. 373, 82 N. E. 891; Utica Fire &c. Co. v. Waggoner &c. Clock Co., 166 Mich. 168, 132 N. W. 502; Holcombe v. Trenton &c. Co., 80 N. J. Eq. 122, 82 Atl. 618; Security Trust Co. v. Ford, 75 Ohio St. 322, 79 N. E. 474, 8 L. R. A. (N. S.) 263, and other cases there cited in note; Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489. See also First Nat. Bank v. Northrup, 82 Kans. 638, 109 Pac. 672, 136 Am. St. 119. But see Southworth v. Morgan, 205 N. Y. 293, 98 N. E. 490, 51 L. R. A. (N. S.) 56. As to when transferees of the stock are liable in such a case, see note to Perkins v. Cowles (157 Cal. 625, 108 Pac. 711), in 30 L. R. A. (N. S.) 283.

§ 171 (148). **Construction of charter and statutory provisions regarding assessments.**—Statutes and charter provisions authorizing such assessments will be strictly construed.[89] Where the charter provided "that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount has been paid in, except in equal proportions, and by the consent of the stockholders owning at least three-fourths of the shares of the capital stock of the corporation," it was held that paid-up stock was not liable to assessment in any event until the full amount of the capital stock as fixed by the charter had been subscribed for and actually paid in.[90] So, where the charter provided that "if at any time the stock paid into said corporation shall be impaired by loss or otherwise, the directors shall forthwith repair the same by assessment," this authority was held to be conferred only for the purpose of providing capital with which to continue business, and a receiver was not allowed to make an assessment with which to pay debts.[91]

§ 172 (149). **Remedies where stockholder fails to pay subscription or assessment—Forfeiture.**—A subscriber may ordinarily be sued for any unpaid instalment due on his stock, as for the breach of any other contract to pay money,[92] his subscrip-

[89] Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec 236; Libby v. Tobey, 82 Maine 397, 19 Atl. 904; O'Reilly v. Bard, 105 Pa. St. 569; Henderson v. Turngrew, 9 Utah 432, 35 Pac. 495.

[90] Atlantic De Laine Co. v. Mason, 5 R. I. 463.

[91] Dewey v. St. Albans Trust Co., 57 Vt. 332. But a similar statute in California (Civ. Code, §§ 331, 332) is construed to permit assessments to any extent "for the purpose of paying expenses, conducting business or paying debts." Santa Cruz R. Co. v. Spreckles, 65 Cal. 193, 3 Pac. 661, 802. See generally notes in 45 L. R. A. 647, and in 22 L. R. A. (N. S.) 1013.

[92] The corporation may levy execution on the stock and sell it to satisfy a judgment obtained in such suit. Chase v. East Tenn. &c. R. Co., 5 Lea (Tenn.) 415. In several of the New England States, however, the rule seems to be that the only remedy open to a corporation in case of the non-payment of stock subscribed is by forfeiture of the shares, unless the subscriber expressly promised to pay, or the charter expressly bound him to do so. Katama Land Co. v. Jernegan, 126 Mass. 155; Belfast &c. R. Co. v. Cottrell, 66 Maine 185; New Hampshire &c. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Piscataqua Ferry Co. v. Jones, 39

tion to the capital stock being construed as a promise to pay the face value of the shares subscribed for.[93] But the corporati

N. H. 491; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. Contra, Windsor Electric Light Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. 838. See also Dotson v. Hoggan (Utah), 140 Pac. 128. But in Connecticut it is held that the signing of a subscription paper and agreeing to "take" certain shares amounts to a promise to pay their face value. Hartford &c. R. Co. v. Kennedy, 12 Conn. 499. And this is the general rule throughout the United States and is the rule enforced in the federal court. Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Sanger v. Upton, 91 U. S. 56, 23 L. ed 220, and cases cited in next note infra. In other words, the prevailing rule is that even where there may be a forfeiture that remedy is merely cumulative and there may be an election. Nashua Sav. Bank v. Anglo-Am. Land &c. Co., 189 U. S. 221, 23 Sup. Ct. 517, 47 L. ed. 782; Campbell v. American &c. Co., 125 Fed. 207; 4 Thomp. Corp. (2d ed.), § 3739. A provision in the charter that the subscription may be enforced by suit or by forfeiture will fix a personal liability upon the subscriber without an express promise to pay. Kennebec &c. R. Co. v. Kendall, 31 Maine 470; Connecticut &c. R. Co. v. Bailey, 24 Vt. 465, 58 Am. Dec. 181. See Fry v. Lexington &c. R. Co., 2 Metc. (Ky.) 314. Pennsylvania, Nebraska, Maryland, Michigan, Wisconsin, Alabama, New Mexico and Arizona have general statutes providing that a railroad corporation may sue for unpaid instalments. Similar provision is made by statute in the following states: Page & Adams Ann. Code (1910), § 8674; Min. Gen. Stat. (1913), § 6642; Ark. Dig. (1916), § 954; W. Va. Code, 1916, Ch. 53, § 34; Courtright's Colo. Stat., 1913, § 850. An agreement to take and fill certain shares has been construed to be an agreement to pay for them. Buckfield Branch R. Co. v. Irish, 39 Maine 44. See also Penobscot &c. R. Co. v. Bartlett, 12 Gray (Mass.) 244.

[93] Selma R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Hartford &c. R. Co. v. Kennedy, 12 Conn. 499; Kirksey v. Florida &c. Plank R. Co., 7 Fla. 23, 68 Am. Dec. 426; Klein v. Alton &c. R. Co., 13 Ill. 514; Instone v. Frankfort Bridge Co., 2 Bibb. (Ky.) 576, 5 Am. Dec. 638; Hughes v. Antietam M. Co., 34 Md. 316; Freeman v. Winchester, 10 S. & M. (Miss.) 577; Northern R. Co. v. Miller, 10 Barb. (N. Y.) 260; Western R. Co. v. Avery, 64 N. Car. 491; Delaware &c. Canal Nav. v. Sanson, 1 Binn. (Pa.) 70; North Eastern R. Co. v. Rodriguez, 10 Rich. L. (S. Car.) 278; Stokes v. Lebanon &c. Tpk. Co., 6 Humph. (Tenn.) 241; Windsor El. Light Co. v. Tandy, 66 Vt. 248, 29 Atl. 248, 44 Am. St. 838. But an action on a stock assessment against one party on stock which is in the name of another party on the books of the corporation cannot ordinarily be maintained by the corporation.

is also, in many of the states, authorized by statute to declare a forfeiture of its stock for non-payment of calls, while others authorize a sale of the stock and an application of the proceeds to the payment of the instalment, for which a call has been issued and to which the owner does not respond, after due notice.[95] This remedy cannot be pursued except when it is given by charter or by statute,[96] or is created by consent of all the stockholders which is usually indorsed on the certificates.[97]

§ 173 (150). **Cumulative remedies—Election.**—Statutory permission to declare a forfeiture does not destroy the corporate right to collect the money due upon the subscription by other means, where such right is given by law or by contract,[98] and

Vale Mills v. Spalding, 62 N. H. 605.

[95] See where sale was held void and issue of new stocks in its place compelled, when stockholder duly tendered amount due, Wilson v. Duplin &c. Co., 139 N. Car. 395, 52 S. E. 62.

[96] Westscott v. Minnesota &c. Co., 23 Mich. 145; Minnehaha &c. Assn. v. Legg, 50 Minn. 333, 52 N. W. 898; Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169; Budd v. Multnomah, 15 Ore. 404, 15 Pac. 654, 40 Am. & Eng. R. Cas. 551; Perrin v. Granger, 30 Vt. 595; Barton's Case, 4 DeG. & J. 46.

[97] Weeks v. Silver &c. Co., 23 J. & S. (N. Y.) 1; Lesseps v. Architects Co., 4 La. Ann. 316. It cannot be created by a by-law, except where authority to make such by-law is conferred by statute, and a sale under an attempted forfeiture without such authority conveys no title. Long Island R. Co., Matter of, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. See Kirk v. Nowill, 1 Term R. 118; Kennebec &c. R. Co. v. Kendall, 31 Maine 470. And compare Detweiler v. Breckenkamp, 83 Mo. 45; Lesseps v. Architects Co., 4 La Ann. 316.

[98] Selma &c. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Hartford &c. R. Co. v. Kennedy, 12 Conn. 499; Kirksey v. Florida &c. Co., 7 Fla. 23, 68 Am. Dec. 426; Hightower v. Thornton, 8 Ga. 486, 502, 52 Am. Dec. 412; Peoria &c. R. Co. v. Elting, 17 Ill. 429; Gratz v. Redd, 4 B. Mon. (Ky.) 178; New Orleans &c. Co. v. Briggs, 27 La. Ann. 318; South Bay &c. Co. v. Gray, 30 Maine 547; Boston &c. R. Co. v. Wellington, 113 Mass. 79; Atlantic Dynamite Co. v. Andrews, 97 Mich. 466, 56 N. W. 858; White Mountain R. Co. v. Eastman, 34 N. H. 124; Rensselaer &c. R. Co. v. Wetsel, 21 Barb. (N. Y.) 56; Ogdensburg &c. R. Co. v. Frost, 21 Barb. (N. Y.) 541; Tar River &c. Co. v. Neal, 3 Hawks. (N. Car.) 520; Delaware &c. Co. v. Sansom, 1 Binn. (Pa.) 70; Greenville &c. R. Co. v.

the corporation may, in a proper case, elect which remedy it will pursue.[99] It has been held that the remedy for forfeiture and sale could be pursued, and that the shareholder could then be sued for any unpaid balance not discharged by the proceeds arising from a sale of the stock, as in a foreclosure of a mortgage, where the mortgaged property does not sell for enough to pay the debt.[1] It is argued that where provision is made for the payment to the subscriber of any surplus arising from a sale, after paying the delinquent assessment,[2] the contention that the forfeiture destroys the contract relation between him and the corporation cannot be upheld, but he will be impliedly liable for any deficiency in the sum necessary to discharge

Cathcart, 4 Rich L. (S. Car.) 89; Stokes v. Lebanon &c. Co., 6 Humph. (Tenn.) 241; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; Puget Sound &c. R. Co. v. Ouellette, 7 Wash. 265, 34 Pac. 929. The liability of a stockholder in a foreign corporation is generally determined by the law of the state which created it, but it may be enforced by the courts of other jurisdictions, and "the general rule in the states of this county is, where a corporation has a right under the statute creating it, to declare a forfeiture of shares for nonpayment of calls, it may exercise its option to forfeit the stock or bring its action to collect the amount of the calls, but cannot forfeit the stock and afterwards sue at law, as the exercise of the first option would end the relation of the parties and exclude a resort to the other." Mandel v. Swan Land &c. Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. 124, citing Small v. Herkimer &c. Co., 2 N. Y. 330; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; Rutland &c. R. Co. v. Thrall, 35 Vt. 536.

[99] 4 Thomp. Corp. (2d ed.), § 3739; 1 Cook Corporations (7th. ed.), § 124; White v. McCullagh, 74 W. Va. 160, 81 S. E. 720; 8 Thomp. Corp. § 3735.

[1] Carson v. Arctic Min. Co., 5 Mich. 228. But see Mandel v. Swan &c. Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. 124. For other cases in which legislative provision is made by charter or otherwise, for such procedure see Brockenbrough v. James River &c. Co., 1 Patton & H. (Va.) 94; Mann v. Cooke, 20 Conn. 178; Danbury &c. R. Co. v. Wilson, 22 Conn. 435. One who acquired his shares by transfer is held liable under this rule equally with an original subscriber. Merrimac Min. Co. v. Bagley, 14 Mich. 501, and cases cited supra.

[2] Provisions that the shareholder shall have the surplus or be liable for any deficiency is found in the general statutes of Massachusetts, Vermont, Maryland and Wisconsin.

such assessment.[3] And it has been held that the company may declare a forfeiture after suit brought to recover unpaid calls, and that such a forfeiture cannot be pleaded in bar of the further maintenance of the suit where the value of the stock forfeited is not equal to the money due the company,[4] although the stockholder may insist, in diminution of damages, that such value shall be subtracted from the sum for which the corporation would otherwise have judgment.[5] But it is generally held that while the corporation may proceed either by suit or by forfeiture, the adoption of the statutory remedy by forfeiture or sale excludes the other,[6] except where the statute gives an action for the balance of the subscription not canceled by the proceeds of the sale.[7] Where such an action was given by statute in Massachusetts it was held that a personal action could not be maintained until there had been a formal declaration of forfeiture and a sale based upon such forfeiture.[8] But a mere threat to enforce a forfeiture, or an unsuccessful attempt to sell

[3] Carson v. Arctic Min. Co., 5 Mich. 288. See also Hartford &c. R. Co. v. Kennedy, 12 Conn. 499; Instone v. Frankfort Bridge Co., 2 Bibb. (Ky.) 576, 5 Am. Dec. 638; Great Northern R. Co. v. Kennedy, 4 Exch. 417.

[4] Herkimer Mfg. Co. v. Small, 21 Wend. (N. Y.) 273, reversed, however, in 2 N. Y. 330.

[5] Herkimer Mfg. Co. v. Small, 21 Wend. (N. Y.) 273, reversed, however, in 2 N. Y. 330.

[6] Ashton v. Burbank, 2 Dill. (U. S.) 435, Fed. Cas. No. 582; Allen v. Montgomery &c. Co., 11 Ala. 437; Macon &c. R. Co. v. Vason, 57 Ga. 314; Mandel v. Swan &c. Co., 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, and note, 45 Am. St. 124; Macauly v. Robinson, 18 La. Ann. 619; Athol &c. R. Co. v. Inhabitants of Prescott, 110 Mass. 213; Mechanics' &c. Co. v. Hall, 121 Mass. 272; Mills v. Stewart, 41 N. Y. 384; Ogdensburg &c. R. Co. v. Frost, 21 Barb. (N. Y.) 541; Rutland &c. R. Co. v. Thrall, 35 Vt. 536; King's Case, L. R. 2 Ch. 714.

[7] Such a provision is frequently found in special charters granted to corporations. See New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Danbury &c. R. Co. v. Wilson, 22 Conn. 435; Great Northern R. Co. v. Kennedy, 4 Exch. 417, 425. It is also given by general statute in Massachusetts, Vermont, Maryland and Wisconsin. And in West Virginia and Arkansas, Barnes' W. Va. Code, 1916, Ch. 53, § 33; Ark. Dig. (1916), § 954.

[8] Athol &c. R. Co. v. Prescott, 110 Mass. 213. But the holding would probably be different in those states where a personal action is given in the first instance by the common law, as construed by their courts

the shares, will not bar a suit to enforce the subscription contract.[9] Notice that a forfeiture will be enforced in the future unless payment is made is not a forfeiture,[10] nor is a threat of forfeiture for non-payment.[11] And a stockholder's obligation to pay continues so long as his right to the shares, with the privileges and emoluments attached to them, remains.[12] It has also been held that an action to collect a subscription, when prosecuted to judgment, will preclude the enforcement of a forfeiture.[13] The remedy is such a case would seem to be by execution levied upon the stock.[14]

§ 174 (151). **Effect of forfeiture.**—Except where the statute makes provision for the payment to the shareholder of the surplus arising from a sale of the forfeited shares after payment of the instalments due,[15] it is held that such surplus belongs to the corporation.[16] After proper forfeiture, the stockholder can claim none of the rights of an owner of stock,[17] nor can he be charged as a stockholder, with the corporate liabilities at the suit of the corporate creditors,[18] even, it is held, for debts contracted before

[9] Macon &c. R. Co. v. Vason, 57 Ga. 314; Instone v. Frankfort Bridge Co., 2 Bibb. (Ky.) 576, 5 Am. Dec. 638. See Walter Valley M. Co. v. Seaman, 53 Miss. 655; Cockerell v. Van Diemen's Land Co., 26 L. J. (C. P.) 203.

[10] Macon &c. R. Co. v. Vason, 57 Ga. 314; Bigg's Case, L. R. 1 Eq. 309; Hays v. Franklin County Lumber Co., 35 Nebr. 511, 53 N. W. 381. See also Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193.

[11] Water Valley. M. Co. v. Seaman, 53 Miss. 655.

[12] Instone v. Frankfort Bridge Co., 2 Bibb. (Ky.) 576, 581, 5 Am. Dec. 638; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336, 347.

[13] Giles v. Hutt, 3 Exch. 18.

[14] For an instance of the sale of stock on such an execution, see Chase v. East Tenn. &c. R. Co., 5 Lea (Tenn.) 415.

[15] Statutes of Massachusetts, Vermont, Maryland and Wisconsin have made such provision.

[16] Small v. Herkimer &c. Co., 2 N. Y. 330. See Freeman v. Harwood, 49 Maine 195; Cook Corporations (7th. ed.), § 133. But compare Henkel v. Pioneer Sav. &c. Co., 61 Minn. 35, 63 N. W. 243.

[17] St. Louis &c. Co. v. Sandoval &c. Co., 116 Ill. 170, 5 N. E. 370.

[18] Allen v. Montgomery R. Co., 11 Ala. 437, 450; Macauley v. Robinson, 18 La. Ann. 619; Snell's Case, L. R. 5 Chan. 22. See also Crissey v. Cook, 67 Kans. 20, 72 Pac. 541; Ford v. Chase, 118 App. Div. 605.

the forfeiture.[19] But to have this effect, the forfeiture must be enforced in good faith. A forfeiture of shares by collusion of the shareholder and the directors will be set aside for fraud by a court of equity at the suit of the creditors of an insolvent corporation,[20] and the shareholder will be held liable to the same extent as if no forfeiture had been attempted.[21]

§ 175 (152). **Statutory method of forfeiture must be pursued.** —The method of forfeiture prescribed by the statute authorizing this remedy must be strictly pursued, and all the prescribed formalities complied with,[22] in order to divest the stockholder's title. Where, as is true in many of the states,[23] the statute

103 N. Y. S. 30, aff'd. 189 N. Y. 504, and cases cited in note in Ann. Cas. 1912B, 494.

[19] Mills v. Stewart, 41 N. Y. 384 (unless it is collusive and fraudulent).

[20] Germantown &c. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546n.

[21] Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. ed. 361; Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Gower's Case, L. R. 6 Eq. 77; Stanhope's Case, L. R. 1 Ch. 161. Abandonment of the shares by the stockholder, without a declaration of forfeiture by the corporation will not release the subscriber from liability on his subscription. Rockville &c. Tpk. Co. v. Maxwell, 2 Cranch C. C. (U. S.) 451, Fed. Cas. No. 11984.

[22] Moses v. Tompkins, 84 Ala. 613, 4 So. 763; Occidental &c. Assn. v. Sullivan, 62 Cal. 394; Alabama &c. R. Co. v. Rowley, 9 Fla. 508; York &c. R. Co. v. Ritchie, 40 Maine 425; Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236; Portland &c. R. Co. v. Graham, 11 Metc. (Mass.) 1; Downing v. Potts, 23 N. J. L. 66; Eastern &c. P. R. Co. v. Vaughan, 20 Barb. (N. Y.) 155; Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193; Germantown &c. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546n; Morris v. Metalline Land Co., 164 Pa. St. 326, 30 Atl. 240, 27 L. R. A. 305, and note, 44 Am. St. 614; London &c. R. Co. v. Fairclough, 2 Mann. & G. 674; Garden Gulley &c. Co. v. McLister, L. R. 1 App. Cas. 39. See Rutland &c. R. Co. v. Thrall, 35 Vt. 536. Some of the old cases that a substantial compliance with the requirements is sufficient, but the modern rule is as stated in the text. Cook Corporations (7th. ed.), § 129. 8 Thomp. Corp. § 3727. But neglect to comply strictly with a matter of mere form will not necessarily invalidate a forfeiture. In re, North Hollenbeagle Min. Co., Knight's Case, L. R. 2 Chan. 321, 15 L. T. (N. S.) 546.

[23] Several of these states permit other modes of sale to be prescribed by by-laws.

authorizes a sale of the forfeited shares at public auction, they cannot legally be sold at private sale.[24] And a sale for the payment of several assessments, including one which was illegal or unauthorized, may be avoided.[25] It has been held that only a properly constituted board of directors has authority to declare a forfeiture,[26] and the stockholder may enjoin an attempted forfeiture of his shares by a board that has not been legally chosen.[27] The company may defer the exercise of its power of forfeiture until all the instalments become due,[28] but if it elects to sell stock that is only partially paid for by payment of the delinquent assessment, it has been held that the purchaser at the forfeiture sale must assume the payment of the instalments to become due in the future; and if he fails to pay them the stock must be sold again.[29] And where the statute is silent as to details, the procedure must be just and reasonable.[30]

[24] Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236. See Birmingham &c. R. Co. v. Locke, 1 Q. B. 256; Catchpole v. Ambergate &c. R. Co., 1 Ellis & B. 111, as to what is a sufficient compliance with prescribed formalities.

[25] Stoneham &c. R. Co. v. Gould, 2 Gray (Mass.) 277; Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236.

[26] Garden Gully &c. Co. v. McLister, L. R. 1 App. Cas. 39, 55. See also Ormbsy v. Vermont &c. Co., 56 N. Y. 623; Bottomley's Case, L. R. 16 Ch. Div. 681.

[27] Moses v. Tompkins, 84 Ala. 613, 4 So. 763.

[28] Brockenbrough v. James River, &c. Co., 1 Patton & H. (Va.) 94.

[29] Sturgess v. Stetson, 1 Biss. (U. S.) 246, 251, Fed. Cas. No. 13568.

[30] Rutland &c. R. Co. v. Thrall, 35 Vt. 536, holding that a resolution of the board of directors that all stock remaining unpaid at a day named in the future shall be sold to satisfy the assessment levied is reasonable. But see Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193, to the effect that a general resolution to forfeit all stock remaining unpaid at a certain day in the future is insufficient to effect a forfeiture without further action by the corporation. But where the stockholder is shown to have received notice of such determination, it is held that the court will presume that the necessary steps were taken to perfect the forfeiture. Knight's Case, L. R. 2 Chan. 321, 15 L. T. (N. S.) 546. A thirty days' notice is reasonable and sufficient. Rutland &c. R. Co. v. Thrall, 35 Vt. 536. But a three days' notice is not; at least, where the owner lives at a distance in another state. Lexington &c. R. Co. v. Staples, 5 Gray (Mass.) 520.

§ 176 (153). **Notice of forfeiture.**—Notice to the delinquent subscriber that his shares will be forfeited unless calls are paid within a certain time is generally required to precede the enforcement of the forfeiture,[31] and this requirement must be strictly complied with.[32] While the manner of giving notice is usually prescribed by the statute authorizing a forfeiture, personal notice is said to be sufficient.[33] And it is intimated that one having actual notice cannot object to the mode by which it is given.[34] But a notice which did not purport to be given by the proper officer of the company has been held insufficient, and the sale based thereon was held voidable.[35] The notice

[31] Under an Indiana statute, after notice of the call is given, one who fails to pay cannot insist that an additional notice of forfeiture should be given. Hill v. Nisbet, 100 Ind. 341.

[32] Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 79 Am. Dec. 430n; Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236; Hughes v. Antietam &c. R. Co., 34 Md. 316; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451; Morris v. Metalline &c. Co., 164 Pa. St. 326, 31 Atl. 114, 27 L. R. A. 305n, 44 Am. St. 614; Rutland &c. R. Co. v. Thrall, 35 Vt. 536, 546. See also Eppes v. Mississippi &c. R. Co., 35 Ala. 33; Cockrell v. Van Dieman's Land Co., 26 L. J. (C. P.) 203; Lexington &c. R. Co. v. Chandler, 13 Metc. (Mass.) 311, where a notice required by a by-law was held merely directory. See also Mississippi &c. R. Co. v. Gaster, 20 Ark. 455; Knight's Case, L. R. 2 Ch. 321, 15 L. T. (N. S.) 546. But a notice after forfeiture was presumed to have been given, when the substantial requirements were complied with. Where notice of an assessment must be given thirty days before the order of the directors to sell the shares, it is not sufficient to give the notice thirty days before the sale. Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236. See Louisville &c. Tpk. Co. v. Meriwether, 5 B. Mon. (Ky.) 13.

[33] Mississippi &c. R. Co. v. Gaster, 20 Ark. 455; Lexington &c. R. Co. v. Chandler, 13 Metc. (Mass.) 311. See Knight's Case, L. R. 2. Chan. 321, 15 L. T. R. 546; Birmingham &c. R. Co. v. Locke, 1 Q. B. 256; South Staffordshire R. Co. v. Burnside, 5 Exch. 129. But see Lewey's Isalnd R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236.

[34] Mississippi &c. R. Co. v. Gaster, 20 Ark. 455; Lexington &c. R. Co. v. Chandler, 13 Metc. (Mass.) 311.

[35] Portland &c. R. Co. v. Graham, 11 Metc. (Mass.) 1. See also Lewey's Island R. Co. v. Bolton, 48 Maine 441, 77 Am. Dec. 236. It should usually be served upon the person who is registered as owner. Graham v. Van Diemen's Land Co., 1 H. & N. 541, 26 L. J. Exch. 73.

should be certain and unequivocal as to the time of the forfeiture,[36] and time and place of sale.[37]

§ 177. (154). **Defeating and annulling forfeiture—Estoppel.**—The forfeiture can generally be defeated by a tender of the full amount due on the subscription to the proper officer of the corporation at any time before a sale actually takes place.[38] An irregular or defective forfeiture may be voidable only, and not void, and long acquiescence[39] may estop both the shareholder and the company from denying its validity.[40] But the shareowner[41] may, in a proper case, by calling upon a court of chan-

[36] Watson v. Eales, 23 Beav. 294.

[37] Lexington &c. R. Co. v. Staples, 5 Gray (Mass.) 520. See also Shannan v. Tooker, 167 Cal. 484, 140 Pac. 10.

[38] Mitchell v. Vermont &c. Co., 67 N. Y. 280. This is true though the tender be accompanied by a protest. Sweny v. Smith, L. R. 7 Eq. 324. And, it would seem, even though a declaration of strict forfeiture had been entered on the books of the company. Walker v. Ogden, 1 Biss. (U. S. C. C.) 287, Fed. Cas. No. 17081. See also Iron R. Co. v. Fink, 41 Ohio St. 321, 52 Am. Rep. 84. The owner has been allowed to redeem in several cases involving peculiar circumstances. See Stubbs v. Lister, 1 Younge & C. Ch. Cas. 81; Walker v. Ogden, 1 Biss. (U. S.) 287, Fed. Cas. No. 17081.

[39] Phosphate &c. Co. v. Green, L. R. 7 C. P. 43. By statute in California application for relief from an irregular forfeiture must be made within six months. Civ. Code Cal., § 347.

[40] Sayre v. Citizens' Gas &c. Co. 69 Cal. 207, 7 Pac. 437, 10 Pac. 408; Lesseps v. Architects Co., 4 La. Ann. 316; Knight's Case, L. R. 2 Ch. 321; Austin's Case, 24 L. T. (N. S.) 932; Woollaston's Case, 4 DeG. & J. 437; Evans v. Smallcombe, L. R. 3 H. of L. 249; Prendergast v. Turton, 1 Younge & C. Ch. Cas. 98, 5 Jur. 1102. But see Garden Gulley &c. Co. v. McLister, L. R. 1 App. Cas. 39, 55, holding that mere laches will not bar the shareholder from equitable relief against an invalid declaration of forfeiture. See also Ormsby v. Vermont &c. Co., 56 N. Y. 623.

[41] Mitchell v. Vermont &c. Co., 67 N. Y. 280; Sweny v. Smith, L. R. 7 Eq. 324. An unauthorized forfeiture may be enjoined. Moore v. New Jersey &c. Co., 5 N. Y. S. 192; Green v. Abietine &c. Co., 96 Cal. 322, 31 Pac. 100. But an injunction to restrain the sale of shares for assessments will not be granted where the plaintiff does not offer to pay the calls. Burnham v. San Francisco &c. Co., 76 Cal. 24, 17 Pac. 939. Where the forfeiture is legal equity will seldom interfere because of hardship or the like. Clark v. Barnard, 108 U. S. 436, 456, 2 Sup. Ct. 878, 27 L. ed. 780; Taylor v.

cery, obtain a decree annulling such a forfeiture; and so, too, may corporate creditors whose interests are injured thereby.[42] It was held, however, in one of the cases to which we have referred in support of our last proposition, that where a corporation had made an assignment for the benefit of creditors, and the directors afterwards made a call and forfeited the plaintiff's stock for non-payment, without any express objection or assent on the part of the assignee, the plaintiff could not, without tendering the amount due or taking any steps to prevent the forfeiture, maintain a suit to annul the forfeiture and restore to him his right as a stockholder.[43]

North Star &c. Co., 79 Cal. 285, 21 Pac. 753; Marshall v. Golden Fleece &c. Co., 16 Nev. 156; Vatable v. New York &c. R. Co., 96 N. Y. 49; Sparks v. Liverpool Water-Works, 13 Ves. 428. But see Glass v. Hope, 16 Grant (Upper Can.) Ch. 420; Iron R. Co. v. Fink, 41 Ohio St. 321, 22 Am. & Eng. R. Cas. 20, 52 Am. Rep. 84. Mandamus will not lie to compel a foreign corporation to annul a forfeiture. North State &c. Co. v. Field, 64 Md. 151, 20 Atl. 1039. Damages may also be recovered where stock is wrongfully forfeited and sold. Allen v. American &c. Assn., 49 Minn. 544, 52 N. W. 144, 32 Am. St. 581; Ormsby v. Vermont &c. Co., 56 N. Y. 623; Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169; New Chile &c. Co., Re, 63 L. T. R. 344; Catchpole v. Ambergate &c. R. Co., 1 El. & Bl. 111, 22 L. J. Q. B. 35.

[42] Germantown &c. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546; Grand Rapids Savings Bank v. Warren, 52 Mich. 557, 18 N. W. 356. It seems that the corporation itself cannot, after forfeiting shares, set the forfeiture aside or irregularity in the notice, and hold the subscriber liable as a stockholder. Austin's Case, 24 L. T. (N. S.) 932. See as to rights and remedy of creditors where stock is forfeited and bought in by the corporation. Tiger v. Rogers Cotton Cleaner &c. Co., 96 Ark. 1, 130 S. W. 585, Ann. Cas. 1912B, 488, and note.

[43] Germantown &c. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546.

CHAPTER IX.

STOCKHOLDERS.

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§ 180 (155). **When one becomes a stockholder.**—It is sometimes said that one who has subscribed for stock in an incorporated company does not become a stockholder until he has paid for such stock,[1] and, on the other hand, it is said that he does become a stockholder as soon as he subscribes to an unconditional agreement to take a certain number of shares.[2] It seems to us that it will not do to affirm as a general rule that payment of a subscription is essential to constitute the subscriber a stockholder, although this may doubtless be made essential by charter, statute, or authorized by-law;[3] nor will it do to say that a mere subscription, without anything more, will always be sufficient, but a complete and valid subscription is undoubtedly sufficient, as a general rule, where the subscriber is accepted by the corporation as a stockholder.[4] So, even where the subscrip-

[1] Bates v. Great Western Tel. Co., 134 Ill. 546, 25 N. E. 521; Busey v. Hooper, 35 Md. 15; Baltimore &c. R. Co. v. Hambleton, 77 Md. 341, 26 Atl. 279; St. Paul &c. R. Co. v. Robbins, 23 Minn. 439; Minneapolis Harvester Works v. Libby, 24 Minn. 327.

[2] Hartford &c. R. Co. v. Kennedy, 12 Conn. 499; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Kennebec &c. R. Co. v. Palmer, 34 Maine 366; Brigham v. Mead, 10 Allen (Mass.) 245; Sagory v. Dubois, 3 Sandf. Ch. (N. Y.) 466; Hartford &c. R. Co. v. Croswell, 5 Hill (N. Y.) 383; Union Turnpike Co. v. Jenkins, 1 Caines (N. Y.) 381; Spear v. Crawford, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; Burr v. Wilcox, 22 N. Y. 551. See also Waukon &c. R. Co. v. Dwyer, 49 Iowa 121; Harrison v. Remington &c. Co., 140 Fed. 385. But compare 1 Thomp. Corp. (2d ed.), §§ 550, 560.

[3] And where the contract is not a subscription, but a purchase of new shares, payment may be required, as the delivery of a certificate and payment may be intended to be concurrent acts. Clark v. Continental Imp. Co., 57 Ind. 135; Quick v. Lemon, 105 Ill. 578; Weiss v. Mauch Chunk Co., 58 Pa. St. 295. A mere pledgee is not, ordinarily, a stockholder. Beecher v. Wells &c. Co., 1 McCarty (U. S.) 62, 1 Fed. 276; Baker v. Woolston, 27 Kans. 185, although he may become such to most intents and purposes by being registered as owner upon the books of the company; note to Argus Printing Co., In re, 12 L. R. A. 781. See also notes in 19 L. R. A. (N. S.) 252; 20 L. R. A. (N. S.) 996; and L. R. A. 1916F, 491.

[4] Authorities cited in next to last note, supra. See also 1 Cook Corporations (7th. ed.), § 10; note in Ann. Cas. 1913C, 418; State v. Harris, 3 Ark. 570, 36 Am. Dec. 460;

tion is irregular, or incomplete, or conditional, the subscriber may become a stockholder by acting as such and being treated as such by the corporation. And one may also become a stockholder by purchasing stock and having it transferred to him upon the books of the company. But where stock is issued in excess of the amount authorized by the charter or governing law, a purchaser of certificates for shares so issued cannot compel the corporation to accept him as a stockholder, even though he may have an action for damages, and, as he does not obtain the rights of a stockholder he cannot be held liable as a stockholder.[5] On the other hand, however, "if a corporation is authorized by law to increase its capital stock upon complying with certain prescribed forms or conditions, and the corporation or its agents appear to have endeavored to comply with the prescribed forms or conditions, and have in fact increased the company's capital stock by issuing new shares, on the assumption that the legal right to increase the capital stock had been acquired, and if the holder of such new shares has acted as a shareholder and enjoyed the rights of a shareholder, then the creation of such new shares will be recognized by the courts and given effect according to the intention of the parties, although the statutory forms or conditions were not complied with, and no legal right to create the new shares was in fact obtained."[6]

Wheeler v. Millar, 90 N. Y. 355; Henderson v. Hogan, 7 Ohio Dec. (Reprint) 173. In Dunn v. Howe, 107 Fed. 849, 850, it is said that notwithstanding expressions in many cases and books to the effect that the record is conclusive evidence, one who never accepts but refuses to accept stock is not a stockholder even though the secretary enters his name on the books as such. See generally 3 Elliott Ev. § 1946.

[5] 1 Thomp. Corp. (2d ed.) § 3545; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968. See also Laredo Imp. Co. v. Stevenson, 66 Fed. 633; Rood v. Whorton, 67 Fed. 434; Green v. Signa Iron Co., 76 Fed. 947; McCord v. Ohio &c. R. Co., 13 Ind. 220; Wheeler v. Thayer, 121 Ind. 64, 22 N. E. 972; Oler v. Baltimore &c. R. Co., 41 Md. 583; First Ave. Land Co. v. Parker, 111 Wis. 1, 86 N. W. 604, 87 Am. St. 84. Union R. Co. v. Sneed, 99 Tenn. 1, 41 S. W. 364. But compare Dupont v. Ball (Del.), 106 Atl. 39, 7A, L. R. 955.

[6] See Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Grangers' Life &c. Ins. Co. v. Kamper, 73 Ala. 325; Kansas

§ 181 (156). Rights of stockholders—Right to vote.—A stockholder cannot, ordinarily, be deprived of the property rights which attach to his membership, including his right to participate in the management of the company's business,[7] except by a regularly enforced forfeiture of his stock under charter or statutory authority.[8] The most important of these rights are those of sharing in the profits earned by the corporation,[9] and in the property remaining for distribution upon a dissolution of the corporation;[10] of helping to select the persons to manage the affairs of the corporation; and of aiding to shape its policy and control its action, or, in other words, of voting at stockholders' meetings. The right to vote usually belongs to the person in whose name the stock is registered,[11] or in case of his decease to his legally qualified administrator or executor,[12] although it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate that the holders shall not have or exercise the right to vote at stockholders'

City Hotel Co. v. Hunt, 57 Mo. 126; Veeder v. Mudgett, 95 N. Y. 295, 310. See generally as to estoppel to deny that one is a stockholder, Clark v. Hamilton, 217 Fed. 229, L. R. A. 1918E, 750, and note.

[7] Hill v. Nisbet, 100 Ind. 341; Kennebec &c. R. Co. v. Kendall, 31 Maine 470; Long Island R. Co., In re, 19 Wend. (N. Y.) 37; Perrin v. Granger, 30 Vt. 595.

[8] If one has title to corporate stock, it can not be defeated by a subsequent resolution of the directors of the corporation. Gurney v. Union Transfer &c. Co., 25 Jones & S. 444, 29 N. Y. St. 274, 8 N. Y 549.

[9] See generally Dividends, Ch. XIV.

[10] See generally Insolvency and Dissolution, Ch. XXIV.

[11] Vowell v. Thompson, 3 Cranch (U. S.) 428, Fed. Cas. No. 17023; Northrop v. Newton &c. Turnpike Co., 3 Conn. 544; Beckett v. Houston, 32 Ind. 393; Monsseaux v. Urquhart, 19 La. Ann. 482; Long Island R. Co., In re, 19 Wend. (N. Y.) 37; See also Lucas v. Milliken, 139 Fed. 816.

[12] North Shore &c. Ferry Co., Matter of, 63 Barb. (N. Y.) 556; Cape May &c. Co., Matter of, 51 N. J. L. 78, 16 Atl. 191. Stock sold by three executors of the deceased owner can not be voted unless they agree upon the vote to be cast. Tunis v. Hestonville &c. R. Co., 149 Pa. St. 70, 24 Atl. 88, 15 L. R. A. 665. See also Pioneer Paper Co., Re, 36 How. Prac. (N. Y.) 111. As to right of partner to vote, see Allen v. Hill, 16 Cal. 113; Kenton Furnace &c. Co. v. McAlpin, 5 Fed. 737.

meetings and persons accepting such shares will be bound thereby.[13] But, ordinarily, the right to vote is an incident to the ownership of shares of stock,[14] and the corporation cannot by by-laws restrict[15] nor enlarge[16] the right to vote as fixed by the charter or by general statute.[17]

§ 182 (157). Who has right to vote—How determined.—The books and records of a corporation determine who are its stockholders for the time being, and who have a right to vote, although the stock may have been sold or pledged as collateral security,[18] and the inspectors and tellers cannot, as a rule, as-

[13] Miller v. Ratterman, 47 Ohio St. 141, 26 N. E. 496, 43 Am. & Eng. R. Cas. 339.

[14] Kreiger v. Shelby R. Co., 84 Ky. 66; Lord v. Equitable &c. Soc., 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420.

[15] Beckett v. Houston, 32 Ind. 393; Rex v. Spencer, 3 Burr. 1827.

[16] Taylor v. Griswold, 14 N. J. L. 222, holding that a by-law of the Hackensack Bridge Co. could not confer upon stockholders the right to one vote for each share they owned, where the number of votes was limited by the charter.

[17] But some of the states have statutes authorizing the corporations to make by-laws regulating the number of shares that shall entitle the members to one or more votes. And as between the parties the agreement of pledge may determine who has the right to vote. Commonwealth v. Dalzell, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. 640; Pennsylvania R. Co. v. Pennsylvania L. Ins. Co., 205 Pa. St. 219, 54 Atl. 783; Goetzniger v. Donahue, 138 Wis. 103, 119 N. W. 823.

[18] Parker, C. J., in State v. Ferris, 42 Conn. 560; Scholfield v. Union Bank, 2 Cranch (U. S.) 115, Fed. Cas. No. 12475; Vowell v. Thompson, 3 Cranch (U. S.) 428, Fed. Cas. No. 17023, where it was mortgaged. Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Wilcocks, Ex parte, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525, where the stock was pledged; Cohen v. Big Stone &c. Iron Co., 111 Va. 468, 69 S. E. 359, Ann. Cas. 1912A and authorities there cited in note. If mortgaged stock is transferred to the mortgagee, upon the books of the corporation, he and not the mortgagor will be entitled to vote it. So, generally, where the stock has been duly transferred upon the books of the company, and registered in the name of the pledgee, he is entitled to vote. 4 Thomp. Corp. (2d. ed.), § 4237; In re Barker, 6 Wend. (N. Y.) 509; Argus Printing Co., In re, 1 N. Dak. 434, 48 N. W. 347, 12 L. R. A. 781, 26 Am. St. 639; Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291. Compare State v. Smith, 15 Ore 98, 14 Pac. 814, 15 Pac. 137, 386. These cases state, however, that a court of equity may

sume to go into a hearing and decision of the question as to who is in fact the owner of the stock sought to be voted.[19] The registry on the transfer books of the corporation is, as a general rule, prima facie, if not conclusive, evidence of the holder's right to vote the shares so registered in his name.[20] It is generally

compel the pledgee to give the pledgor a proxy in a proper case. Ex parte Wilcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525. In order that a stockholder may vote at a corporation election, it is not necessary that he be the sole or only owner. A creditor holding stock as collateral security may agree with the debtor owning the stock as to which shall vote at a corporate election, and they may appoint a third person to hold the stock and vote for them. Ervin v. Philadelphia &c. R. Co. (C. P. Phila. Pa.) 7 R. & Corp. L. J. 87.

[19] See 1 Thomp. Corp. §§ 856, 857. Held contra, under New York statute, in Strong v. Smith, 15 Hun (N. Y.) 222.

[20] Turnbull v. Payson, 95 U. S. 418, 24 L. ed. 437; Semple v. Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. 894; State v. Ferris, 42 Conn. 560. 568 (Where a bankrupt was permitted to vote); Morrill v. Little Falls &c. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; Long Island R. Co., In Matter of, 19 Wend. (N. Y.) 37, 44; and authorities cited in 8 Thompson Corporations § 857. See also note in Ann. Cas. 1912A, 206. But one railroad corporation, having acquired a majority of the stock of another railroad corporation, unless expressly authorized by statute, will not be allowed to vote such stock in the corporation elections or in matters concerning the management or control of the latter company; at least where the two roads are rivals in the same field of operation, and a conflict of interest may arise in the matter of expenditure, or in division of patronage or of earnings or where the profits of one company may be increased by a diminution of those of the other. Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605. See also O'Connor v. International &c. Co., 68 N. J. Eq. 680, 62 Atl. 408. Where the contract for the present sale of shares of stock has been entered into and the stock delivered to a third person in escrow, to be delivered to the purchaser only on fulfillment of the terms of the sale, and by the terms of the contract the purchaser was to have the right to vote the stock, while the sale remained executory, it was held that the seller had no right to vote, although the statute made the certificates of stock and the transfer books of the corporation prima facie evidence of the right to vote the stock. Commonwealth v. Patterson, 158 Pa. St. 476, 27 Atl. 998. Held not to be conclusive in Mudgett v. Horrell, 33 Cal. 25; Stephens v. Follett, 43 Fed. 842, 31 Am. & Eng. Corp. Cas. 466; Smith v. San Francisco &c. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. 119; Chaffin v. Cummings 37 Maine

immaterial that he has no certificates of stock,[21] or has sold and transferred his certificates,[22] or that he owes the subscription price,[23] or that he is a mere nominal holder of stock belonging to another,[24] which has been registered newly for the purpose of voting.[25] But where the owner of the stock is not entitled to vote, as in a case where stock is owned by a non-resident under a charter which provides that only resident stockholders may vote, it has been held that a resident of the state who receives a colorable transfer of the stock, for the purpose of voting it, does not thereby become a legal voter.[26] Although the corporate books are the proper evidence of the right of an owner of shares to exercise a stockholder's rights and privileges, he is entitled to have a certificate issued to him as a voucher for his title, and to enable him the more readily to put his shares upon the market,[27] and where the books do not show who is the owner, the certificate is prima facie evidence of ownership.[28]

76; Waterford &c. R. Co. v. Pidcock, 8 Exch. 279. In Archer v. American &c. Co., 50 N. J. Eq. 33, 24 Atl. 508, the books are held conclusive evidence so far as the election officers are concerned, but only prima facie evidence when the right to vote is the subject of judicial investigation.

[21] Hawley v. Upton, 102 U. S. 314, 26 L. ed. 179; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110, 1 Am. & Eng. Corp. Cas. 40; Beckett v. Houston, 32 Ind. 393; New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, 64 Am. Dec. 300; Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627, 22 S. E. 90. See also 4 Thomp. Corp. (2d. ed.), § 3455 and authorities cited.

[22] Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 637, 22 L. ed. 840. People v. Robinson, 64 Cal. 373, 1 Pac. 156; State v. Ferris, 42 Conn. 560.

[23] Birmingham &c. R. Co. v. Locke, 1 Q. B. 256; Downing v. Potts, 23 N. J. L. 66. Where nothing had been paid; Savage v. Ball, 17 N. J. Eq. 142, where the stock was issued in payment for work which had not been performed.

[24] State of Nevada v. Leete, 16 Nev. 242.

[25] The corporation cannot require him to take oath as to the real ownership of the stock. People v. Kip, 4 Cow. (N. Y.) 382, note. And it may be compelled to register a transfer made for the purpose of qualifying the transferee to vote. Moffatt v. Farquhar, L. R. 7 Ch. D. 591. But see post, § 199.

[26] State v. Hunton, 28 Vt. 594. See also Barker, Re, 6 Wend. (N. Y.) 509.

[27] Johnson v. Albany &c. R. Co., 40 How. Prac. (N. Y.) 193.

[28] Broadway Bank v. McElrath, 13 N. J. Eq. 24; ante, § 92.

Where his subscription is made upon a condition not yet performed, if the stockholder has been registered, he may vote upon the question whether such condition shall or shall not be performed.[29] The holder of shares issued as a stock dividend may vote upon such stock after registry, the same as upon any other,[30] and a transferee usually receives this right with the stock transferred.[31] It is frequently provided, however, that no stockholder can vote on stock, unless it has been standing in his name on the books of the corporation at least a certain number of days prior to the election or meeting.

§ 183 (158). **Right of trustees and receivers to vote.**—If the stock be registered in the name of the holder as trustee, he may vote it,[33] unless he be a trustee for the corporation itself, in which case the officers are chargeable with notice of the title which he holds, and his holding is subject to the rule that stock owned by the corporation cannot be voted.[34] The fact that the holder of shares is designated as "cashier" or "president" on the company's books will not influence his right to vote, as such words are merely descriptive. And it has been held that a person who succeeds him in that position has no right to vote the shares so held unless they are regularly transferred to him by

[29] Greenville &c. R. Co. v. Coleman, 5 Rich. Law (S. Car.) 118.

[30] Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 637, 22 L. ed. 840. But the rule is different as to scrip dividends, convertible into stock. Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 637, 22 L. ed. 840.

[31] See Commonwealth v. Stevens, 168 Pa. 582, 32 Atl. 111.

[33] Barker, Matter of, 6 Wend. (N. Y.) 509; Hoppin v. Buffum, 9 R. I. 513. See also Clowes v. Miller, 60 N. J. Eq. 179, 47 Atl. 345; Commonwealth v. Dalzell, 152 Pa. St. 217, 25 Atl. 535, 34 Am. St. 640. Executor allowed to vote in Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 72 Am. St. 427.

[34] Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237. Holmes, Ex parte, 5 Cow. (N. Y.) 426; American Railway-Frog Co. v. Haven, 101 Mass. 398, 3 Am. Rep. 377. See also Union &c. Assn. v. Seligman, 92 Mo. 635, 15 S. W. 630, 1 Am. St. 776n; McNeely v. Woodruff, 13 N. J. L. 352; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773, 775; O'Connor v. International &c. Co., 68 N. J. Eq. 67, 680, 59 Atl. 321; Parsons v. Tacoma Co., 25 Wash. 492, 65 Pac. 765. 1 Thomp. Corp. (2d ed.), § 869.

name.[35] The right of a receiver of stock to vote seems generally to have been conceded without question,[36] and it has been held that the court appointing him may direct him how to vote.[37]

§ 184 (159). Right of corporations and voting trusts to vote. —Corporations authorized to hold stock in another corporation are usually entitled to vote it.[38] And this they may do by an agent.[39] But one corporation cannot, ordinarily, acquire and vote stock in another without statutory authority,[40] and a rival company which has acquired a majority of the stock in a corporation, without statutory authority, may be enjoined from voting it.[41] And so may a trust company which is a stockholder of a corporate stock pledged as collateral for bonds of another corporation and which is also a trustee of the indebtedness of the corporation and an agent for its creditors, or a voting trust which holds a majority of the stock of a railroad company to be voted in the interest of another corporation.[42] The subject of

[35] Mohawk &c. R. Co., Ex parte, 19 Wend. (N. Y.) 135. A contrary rule is upheld as more reasonable and just in Farmers' &c. Co. v. Chicago &c. R. Co., 27 Fed. 146, 156. See also Mousseaux v. Urquhart, 19 La. Ann. 482. But it would seem that a transfer on the corporate book is a reasonable means of proving that such successor has been selected to fill the former officer's place.

[36] As to preferred stockholders, see 8 Thomp. Corp. § 859.

[37] American Inv. Co. v. Yost, 25 Abb. N. C. (N. Y.) 274, note.

[38] Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755; Rogers v. Nashville &c. Co., 91 Fed. 299; Davis v. United States &c. Co., 77 Md. 35, 25 Atl. 982.

[39] State v. Rohlffs (N. J.), 19 Atl. 1099.

[40] Central R. Co. v. Collins, 40 Ga. 582; McGinness &c. Co. v. Boston &c. Co., 29 Mont. 428, 75 Pac. 89; State v. McDaniel, 22 Ohio St. 354; Valley R. Co. v. Lake Erie &c. Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; Parsons v. Tacoma Co., 25 Wash. 495, 65 Pac. 765; Woods v. Memphis &c. R. Co., 5 R. & Corp. L. J. 372.

[41] Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, and note; Mack v. DeBardeleben &c. Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650n; Milbank v. New York &c. R. Co., 64 How. Prac. (N. Y.) 20. See also Buckeye &c. Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427. Contra, Camden &c. R. Co. v. Elkins, 37 N. J. Eq. 273.

[42] Clarke v. Central R. &c. Co., 50 Fed. 338, 15 L. R. A. 683, and note. See also In re Argus Printing Co., 1 N. Dak. 435, 48 N. W. 347, 26 Am. St. 639. The federal courts have

voting trusts as illegal combinations or monopolies under the act of congress will be hereafter considered, but it may be said in this connection that while fair agreements among stockholders to vote as a unit as the majority may determine have been upheld,[43] yet an unfair agreement among the officers for their own benefit or between two corporations having common directors,[44] or an irrevocable voting trust or holding company creating a monopoly has recently been held illegal as against public policy or the statute.[45]

held that the purchase of stock in sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States is not in violation of the act of congress of July 2, 1890, and does not involve a monopoly or restraint of interstate commerce within the meaning of that act. United States v. E. C. Knight Co., 60 Fed. 934, affirmed in 156 U. S. 1, 15 Sup. Ct. 249; Greene, In re, 52 Fed. 104. The authorities are reviewed in the opinion of the court and in the dissenting opinion in the case in the United States Supreme Court cited supra. See also Harvey v. Linville &c. Co., 118 N. Car. 693, 24 S. E. 489. But see Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

[43] Ziegler v. Lake &c. R. Co., 69 Fed. 176; Mobile &c. R. Co. v. Nicholas, 98 Ala. 98, 12 So. 723; Smith v. San Francisco &c. R. Co., 115 Cal. 584, 47 Pac. 582, 35 L. R. A. 309, 56 Am. St. 119; Brightman v. Bates, 175 Mass. 105, 55 N. E. 809; Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. 459. See also Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. 81, 7 L. R. A. 605, and note; Weber v. Della Mountains Min. Co., 14 Idaho 404, 94 Pac. 441. Proper pooling or voting trusts are not illegal and have often been upheld. Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A, 1174; Carnegie Trust Co. v. Security L. Ins. Co., 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186; Winsor v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63. But see Bridges v. Staton, 150 N. Car. 216, 63 S. E. 892; Shepard v. Rockingham Power Co., 150 N. Car. 776, 64 S. E. 894.

[44] Withers v. Edmonds, 26 Tex. Civ. App. 189, 62 S. W. 795; Goodell v. Verdugo &c. Co., 138 Cal. 308, 71 Pac. 354.

[45] Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773. See also Shepang Voting Trust Cases, 60 Conn. 576, 24 Atl. 34; Fisher v. Bush, 35 Hun (N. Y.) 641; Harvey v. Linville &c. Co., 118 N. Car. 693, 24 S. E. 489, 54 Am. St. 749; article in 35 Am. Law Reg. (N. S.) 50; 1 Thomp. Corp. (2d ed), §§ 898-900.

§ 185 (160). Number of votes to which stockholder is entitled—Cumulative voting.—It seems under the common law, in the absence of any statute on the subject, that each stockholder is entitled to but one vote.[46] But this is not the natural and reasonable rule in corporations whose capital represents a money investment, and it is generally provided in the laws for the creation of railroad corporations, that the stockholders shall have one vote for each share of stock which they own,[47] although the total number of votes that may be cast by one stockholder is sometimes limited. It is also provided by constitution or statute in several of the states that, in voting for directors, each shareholder shall be entitled to as many votes as will equal the number of his shares, multiplied by the number of directors to be elected.[48] This system of cumulative voting is intended to enable the minority to obtain a representation upon the board. Such a provision, however, is generally held not to apply to corporations previously existing and would be unconstitutional so far as it applied to corporations previously chartered,[49] unless, perhaps, where the power to amend or repeal remains in the legislature.[50]

[46] Corporation cannot acquire and vote its own stock. Clark v. National Steel &c. Co., 82 Conn. 178, 72 Atl. 930.

[47] Hays v. Commonwealth, 82 Pa. St. 518. Such provision is made by general statute in most of the states.

[48] 2 Cook Corporations (7th ed.), § 609a; Wright v. Central &c Co., 67 Cal. 532, 8 Pac. 70, 13 Am. & Eng. Corp. Cas. 89, in which the system is fully explained. See also 3 Cyclopedia of Political Science, 526; 1 Thomp. Corp. (2d ed.), § 886.

[49] State v. Greer, 78 Mo. 188. 8 Am. & Eng. Corp. Cas. 328; Hays v. Commonwealth, 82 Pa. St. 518; Baker's Appeal, 109 Pa. St. 461; Commonwealth v. Butterworth, 160 Pa. St. 55, 28 Atl. 507. Such a statute is not retroactive. Loewenthal v. Rubber &c. Co., 52 N. J. Eq. 440, 28 Atl. 454; Looker v. Maynard, 179 U. S. 46, 21 Sup. Ct. 21, 45 L. ed. 79; Smith v. Atchinson &c. R. Co., 64 Fed. 272.

[50] Cross v. West Va. &c. R. Co., 35 W. Va. 174, 12 S. E. 1071. See also Renn v. United States Cement Co., 36 Ind. App. 149, 73 N. E. 269; Gregg v. Granby Min. Co., 164 Mo. 616, 65 S. W. 312.

§ 186 (161). **Quorum must be present.**—Before votes may be cast at a meeting, it is necessary that a certain number of stockholders or the holders of a certain number of shares[51] (called a quorum) shall be present. This number is frequently fixed by the by-laws, and is generally a majority of the stock entitled to vote.[53] But if the body consists of an indefinite number and no provision is made upon the subject, those who actually assemble at a regularly called meeting may constitute a quorum.[54] And if the required number, or a quorum, be present, a majority of the votes actually cast at the meeting will generally control in the absence of any special provisions as to the number of votes necessary to bind the corporation,[55] although it is frequently said or intimated that it requires a majority of those

[51] Tennessee &c. R. Co. v. East Alabama R. Co., 73 Ala. 426.

[53] 1 Thomp. Corp. (2d. ed.), § 850; Hill v. Town, 172 Mich. 508, 138 N. W. 334, 42 L. R. A. (U. S.) 799.

[54] Brown v. Pac. Mail &c. Co., 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2025; Morrill v. Little Falls &c. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; Columbia &c. Co. v. Meier, 39 Mo. 53; Field v. Field, 9 Wend. (N. Y.) 394; Craig v. First Presbyterian Church, 88 Pa. St. 42; Rex v. Bellringer, 4 Term Rep. 810; 1 Thomp. Corp. (2d ed.), § 846. See also Green v. Felton, 42 Ind. App. 675, 84 N. E. 166.

[55] State v. Green, 37 Ohio St. 227; Gowen's Appeal, 10 Week. N. Cas. 85. See also Durfee v. Old Colony &c. R. Co., 5 Allen (Mass.) 230, 242; New Orleans &c. R. Co. v. Harris, 27 Miss. 517, 537; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Stevens v. Rutland &c. R. Co., 29 Vt. 545. "If a quorum is present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. A majority of the number of members required to constitute a quorum is sufficient." Rushville Gas Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315; followed in State v. Dillon, 125 Ind. 65, 25 N. E. 130. In such a case, "silence is acquiescence rather than opposition." Cases just cited. See also County of Cass v. Johnston, 95 U. S. 360, 369, 24 L. ed. 416; Launtz v. People, 113 Ill. 137; State v. Chute, 34 Minn. 135, 24 N. W. 353; Attorney General v. Shepard, 62 N. H. 383, 13 Am. St. 576; Oldknow v. Wainright, 2 Burr. 1017; 1 Thomp. Corp. (2d. ed.), § 848; How & Bemis Munic. Police Ord. 42. Contra, Commonwealth v. Wickersham, 66 Pa. St. 134; Lawrence v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. 870. Withdrawal to break a quorum is not favored, 8 Thomp. Corp. § 850.

present.[56] It is held that a single shareholder, even though he owns a majority of the stock, cannot hold a corporate meeting alone. There must generally be at least two to constitute a meeting.[57] But the holding would probably be different where a single individual is allowed to form a corporation,[58] as under a statute in Iowa,[59] if the meeting was regular in other respects.

§ 187 (162). **Voting by proxy.**—At common law the stockholder must cast his vote in person.[60] But authority to vote by proxy upon certain conditions and under certain restrictions is given by general statute in many of the states,[61] and it may be and very often is conferred by a by-law.[62] And the suggestion has been made that the modern custom of voting by proxy in moneyed corporations, without any regard to any express authority, which prevails in the United States, may have modified the common law so far as to permit evidence of such a usage to establish the right where it is not expressly conferred by charter or by statute.[63] A proxy should be in writing, and

[56] 1 Thomp. Corp. (2d. ed.), §848; Lawrence v. Ingersoll, 88 Tenn. 512, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. 870. See also State v. Fagan, 42 Conn. 32 (Under a statute), with which compare State v. Chapman, 44 Conn. 595.

[57] England v. Dearborn, 141 Mass. 590, 6 N. E. 837; Hopkins v. Roseclare Lead Co., 72 Ill. 373; Sharpe v. Dawes, 46 L. J. Q. B. 104.

[58] See Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; where one stockholder owned all the stock and was held to be, in effect, the corporation itself.

[59] Code of Iowa (1913), § 1608; McClain's Ann. Code Iowa, § 1638.

[60] McKee v. Home &c. Co., 122 Iowa 731, 98 N. W. 609; Philips v. Wickman, 1 Paige (N. Y.) 590; Commonwealth v. Bringhurst, 103 Pa. St. 134, 49 Am. Rep. 119; 1 Thomp. Corp. (2d. ed.), § 875. See also In re Schwartz (N. J. L.), 72 Atl. 70.

[61] People's Home Sav. Bank v. Superior Court, 104 Cal. 649, 38 Pac. 533, 43 Am. St. 147; Lighthall Mfg. Co., Matter of, 47 Hun (N. Y.) 258.

[62] State v. Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162; People v. Crossley, 69 Ill. 195; Commonwealth v. Detwiller, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357. Many of the states give statutory authority for the making of by-laws to regulate this matter. People v. Crossley, 69 Ill. 195; 1 Thomp. Corp. (2d ed.), § 877. But the existence of such authority at common law is doubted in Philips v. Wickham, 1 Paige (N. Y.) 590, and is denied in Taylor v. Griswold, 14 N. J. Law 222, 27 Am. Dec. 33.

[63] See generally 1 Thomp. Corp. (2d. ed.), § 875.

should be in such form and so executed as to bear reasonable evidence of being genuine and valid.[64] And the corporate officers may insist upon reasonable evidence of that fact before allowing it to be voted,[65] but it has been held that they cannot require sworn proof that the person executing the proxy is the owner of the stock it represents.[66] A proxy only confers the right to vote upon the measures contemplated by the person giving it,[67] and frequently only gives authority to vote for officers.[68] One who holds stock of a railroad company in trust for corporations owning competing lines, and is forbidden by law to hold such stock, and who is largely interested in such competing lines, does not, by a relinquishment of such stock

64 But the mere omission of a date will not justify its rejection. St. Lawrence Steamboat Co., Matter of Election of, 44 N. J. L. 529. The by-laws may require proxies to be witnessed. Harben v. Phillips, L. R. 23 Ch. D. 14, 22. One to whom a testator has by will directed his executors to give a proxy to cast the vote for stock held by the testator cannot vote when the executors refuse the proxy, because of inability to agree as to how the vote shall be cast. Tunis v. Hestonville &c. R. Co., 149 Pa. St. 70, 24 Atl. 88, 15 L. R. A. 665.

65 St. Lawrence Steamboat Co., Matter of Election of, 44 N. J. L. 529. But it has every appearance of genuineness and is regular in form, the officers cannot refuse it. Cecil, Matter of, 36 How. Prac. (N. Y.) 477.

66 People v. Tibbets, 4 Cow. (N. Y.) 358.

67 Or fairly within its scope, Farish v. Cieneguita &c. Co., 12 Ariz. 235, 100 Pac. 781. A proxy to vote is not a proxy to demand a poll. Haven &c. Co., In re L. R. 20 Ch. D. 151; Reg. v. Gov. Stock Co., L. R. 3 Q. B. D. 442. The appointment of a proxy without limitation, gives him authority to bind his principal by a vote against his interest as well as for it, to the same extent as if the vote were cast in person. Mobile &c. R. Co. v. Nicholas, 98 Ala. 92, 12 So. 723.

68 But it may, of course, give greater powers to the holder either generally or specifically. See 1 Thomp. Corp. (2d ed.), §§ 879, 880. He cannot vote to dissolve the corporation or to sell the entire corporate property and business. Id. § 880. A proxy at a stockholders' meeting to elect directors may vote on motions to take ballot and to adjourn the same as a stockholder. Forsyth v. Brown, 13 Pa. Co. Ct. 576.

made by such competing corporations in his favor, acquire any right to vote the same.[69] A naked proxy is revocable.[70]

§ 188 (163). Other powers of stockholders—Rights of minority.—Besides electing officers, the corporate shareholders in meeting assembled usually have power to make the by-laws of the corporation,[71] to increase or decrease the capital stock under authority of the legislature,[72] to accept or authorize amendments of a certain kind to the charter,[73] to dissolve the corpo-

[69] Clarke v. Central R. &c. Co., 50 Fed. 338. A railroad which owns stock of a competing line may be enjoined from voting the same at the suit of stockholders of the competitor, who have acquiesced in its ownership of such stock and control of such line for more than six years. George v. Central R. &c. Co., 101 Ala. 607, 14 So. 752.

[70] Woodruff v. Dubuque &c. R. Co., 30 Fed. 91; Vanderbilt v. Bennett, 2 R. and Corp. L. J. 409; Reed v. Bank, 6 Paige (N. Y.) 337. See also Cone v. Russell, 48 N. J. Eq. 208, 21 Atl. 847. And this is the general rule in regard to proxies. 2 Cook Corp. (7th ed.), § 610; 1 Thomp. Corp. (2d ed.), § 884.

[71] 1 Cook Corporations (7th. ed.), § 4a; 1 Thomp. Corp. (2d. ed.), §§ 965, 968; Morton &c. Co. v. Wysong, 51 Ind. 4. But it is frequently provided by charter or otherwise that the by-laws shall be made by the directors. 1 Thomp. Corp. (2d. ed.), § 970.

[72] Railway Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Crandall v. Lincoln, 52 Conn. 73, 99, 52 Am. Rep. 560; Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Percy v. Millaudon, 3 La. 568, 585; Finley &c. Co. v. Kurtz, 34 Mich. 89.

[73] Marlborough Mfg. Co. v. Smith 2 Conn. 579; Peoria &c. R. Co. v. Preston, 35 Iowa 115; Taggart v. Western R. Co., 24 Md. 563, 89 Am. Dec. 760n; Brown v. Fairmount Mine Co., 10 Phila. (Pa.) 32. A material of fundamental amendment must be accepted by a unanimous vote of the stockholders. Marietta, &c. R. Co. v. Elliott, 10 Ohio St. 57; New Orleans &c. R. Co. v. Harris, 27 Miss. 517. A dissenting stockholder will not be bound thereby. Snook v. Georgia Improvement Co., 83 Ga. 61, 9 S. E. 1104. Where the amendment does not work any material change in the corporation, the will of the majority should govern. Sprague v. Illinois River R. Co., 19 Ill. 174. But the right to amend without any acceptance by the stockholders is generally reserved by the legislature.

[74] Mobile &c. R. Co. v. State, 29 Ala. 573, 586; Chesapeake &c. Co. v. Baltimore &c. Co., 4 Gill & J. (Md.) 1, 121; Denike v. New York &c. Co., 80 N. Y. 599, 606; McIntyre Poor School v. Zanesville Canal &c. Co., 9 Ohio 203, 34 Am. Dec. 436; Houston v. Jefferson College, 63 Pa. St. 428; LaGrange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420.

ration in a proper case for an authorized cause,[74] and the like.[75] The right to vote includes the right to a voice in the settlement of these various questions. But the rights of the minority must be respected, and a single stockholder has been held to be able, by refusing his assent, to prevent a material amendment to the charter,[76] as he may a dissolution,[77] where it is not authorized or not made with a bona fide intention to pay the corporate debts and discontinue the business.

§ 189 (164). Stockholders' meetings.—In matters which must be settled by the body of the stockholders, the assent of a majority of them, expressed elsewhere than at a meeting—as, where the assent of each is given separately and at different times to a person who goes to them privately—is not binding upon the company.[78] But provision is sometimes made by statute for the stockholders to perform certain acts, such as the adoption of by-laws, by giving a written consent thereto, without the formality of a meeting.[79] Stockholders' meetings should be held within the state by which the corporation is created.[80]

[75] Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Metropolitan &c. R. Co. v. Manhattan &c. R. Co., 11 Daly (N. Y.) 367.

[76] Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Fry v. Lexington &c. R. Co., 2 Metc. (Ky.) 314; Tuttle v. Mich. Air Line Co., 35 Mich. 247; New Orleans &c. R. Co. v. Harris, 27 Miss. 517. Delaware &c. R. Co. v. Irick, 23 N. J. L. 321; Marietta &c. R. Co. v. Elliott, 10 Ohio St. 57; ante, § 56.

[77] Ervin v. Oregon R. &c. Co., 27 Fed. 625; Von Schmidt v. Huntington, 1 Cal. 55; Barton v. Enterprise &c. Assn., 114 Ind. 226, 16 N. E. 486, 5 Am. St. 608, where the corporation charter had not expired; Kean v. Johnson, 9 N. J. Eq. 401; Black v. Delaware &c. Canal Co., 22 N. J. Eq. 130, where the object was to continue business under a new organization.

[78] Duke v. Markham, 105 N. Car. 131, 10 S. E. 1017, 18 Am. St. 889; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Dennis v. Joslin &c. Co., 19 R. I. 666, 36 Atl. 129, 61 Am. St. 805. But it is held that a certificate signed by the president of a corporation, who holds nearly all of its stock, stating that a majority of the stockholders has assented thereto, implies that he has assented, and such certificate is sufficient assent of the majority of the stockholders unless the statute provides some particular form or place for such assent. Humphreys v. St. Louis &c. R. Co., 37 Fed. 307.

[79] The written assent of two-thirds of the stock is sometimes made sufficient to adopt by-laws without a meeting.

[80] Bank of Augusta v. Earle, 13

It is sometimes said that acts performed at a meeting in a foreign jurisdiction are void,[81] but the better rule would seem to be that, in the absence of any provision to the contrary, the acts of the stockholders at such a meeting are voidable rather than void, and may be valid where all the stockholders give their consent.[82] In other words, the corporation and the stockholders in such a case are estopped from questioning upon this ground the validity of the meeting and proceedings, to which they consented and in which they participated. If the corporation is consolidated or incorporated in two or more states, so as to be a citizen of each, it seems that the stockholders may lawfully meet in either state.[83] Where the officers of a corporation neglect and refuse to call a meeting which it is their duty to call, they may be compelled to do so, in a proper case, by mandamus at the suit of a stockholder.[84] In order to bind absent

Pet. (U. S.) 519, 10 L. ed. 274. Jones v. Pearl Min. Co., 20 Colo. 417, 38 Pac. 700; Harding v. American &c. Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. 189; Hodgson v. Duluth &c. R. Co., 46 Minn. 454, 49 N. W. 197; 1 Thomp. Corp. (2d ed.), § 814.

[81] Miller v. Ewer, 27 Maine 509, 46 Am. Dec. 619; Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329. See also Mack v. De Bardeleben &c. Co., 90 Ala. 396, 8 So. 150; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 332; Craig Silver Co. v. Smith, 163 Mass. 262, 39 N. E. 1116; Hodgson v. Duluth &c. R. Co., 46 Minn. 454, 49 N. W. 197; Hilles v. Parrish, 14 N. J. Eq. 380; Ormsby v. Vermont &c. Co., 56 N. Y. 623; Franco-Texan Land Co. v. Leigle, 59 Tex. 339.

[82] Missouri Lead &c. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227, appeal from Stutz v. Handley, 41 Fed. 531; Heath v. Silverthorn &c. Co., 39 Wis. 146; 2 Cook Corporations (7th. ed.), § 589; 1 Thomp. Corp. (2d. ed.), § 814. See also Wright v. Lee, 2 S. Dak. 596, 51 N. W. 705; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196. Council of Jewish Women v. Council, 212 Mass. 219, 98 N. E. 862. There is more reason, perhaps, for holding that meetings for the purpose of accepting the charter and organizing should be held within the state. Smith v. Silver Valley, &c. Co., 64 Maine 85, 54 Am. Rep. 760; Freeman v. Machias &c. Co., 38 Maine 343; see also Camp v. Byrne, 41 Mo. 525; ante, § 23.

[83] Covington &c. Bridge Co. v. Mayer, 31 Ohio St. 317; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; ante, § 37. But see Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329.

[84] People v. Cummings, 72 N. Y. 433; State v. Wright, 10 Nev. 167;

and dissenting stockholders, the meeting must be duly assembled.[85] Members are bound to take notice of regular stated meetings fixed by the charter or by-laws;[86] but they should be duly notified of special or called meetings,[87] and the statute or by-laws may, of course, provide for notice of all meetings. The provisions of the charter or by-laws in regard to the time and manner of calling meetings and the nature of the notice should be followed;[88] but a by-law providing that notice may be given in a certain way is not necessarily exclusive.[89] In the absence of any express provision, personal notice, if not absolutely essential, is certainly the safest.[90] The essential elements of the notice are the time of the meeting,[91] the place of the meeting,[92]

McNeely v. Woodruff, 13 N. J. L. 352. See also American Railway-Frog. Co. v. Haven., 101 Mass. 398, 3 Am. Rep. 377.

[85] It should be called by the authorized officers or persons. See Reilly v. Oglebay, 25 W. Va. 36; Cassell v. Lexington &c. Co. (Ky.), 9 S. W. 502; Evans v. Osgood, 18 Maine 213; Johnston v. Jones, 23 N. J. Eq. 216.

[86] Warner v. Mower, 11 Vt. 385; People v. Batchelor, 22 N. Y. 128; State v. Bonnell, 35 Ohio St. 10; 8 Thomp. Corp. § 817.

[87] Farwell v. Houghton Copper Works, 8 Fed. 66; Stow v. Wyse, 7 Conn. 214, 13 Am. Dec. 99, and note; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Kynaston v. Mayor, 2 Strange 1051; Rex v. Hill, 4 Barn. & Cress. 426; 1 Thomp. Corp. (2d. ed.), §§ 832, 834.

[88] Stockholders of Shelby R. Co. v. Louisville &c. R. Co., 12 Bush (Ky.) 62; Tuttle v. Michigan Air Line R. Co., 35 Mich. 247; Hunt v. School Dist., 14 Vt. 300, 39 Am. Dec. 225.

[89] Citizens' Mut. Ins. Co. v. Sortwell, 8 Allen (Mass.) 217.

[90] Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99. See also Wiggin v. Freewill Baptist Church, 8 Metc. (Mass.) 301; Harding v. Vandewater, 40 Cal. 77.

[91] It has been held that the hour, as well as the day, must be stated. San Buenaventura &c. Co. v. Vassault, 50 Cal. 534, 537. The fact that there is some delay in calling the meeting to order will not, as a rule, invalidate it, but holding it before the time designated may operate as a surprise upon some of the stockholders and give those who do not participate just cause for attacking its validity as to them. People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344. The notice should also be served a reasonable time before the meeting, although this is usually fixed by the statute or by-laws. Long Island R. Co., In re, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; Brown v. Republican &c. Mines, 55 Fed. 7; Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319.

[92] 1 Thomp. Corp. (2d. ed.), § 828; Jones v. Milton Tpk. Co., 7

and the business to be transacted,[93] unless the stockholders, by reason of some provision in the charter or by-laws, are already chargeable with knowledge of one or more of these things. An appearance at the meeting without objection will usually operate as a waiver of objections to the notice.[94] And where a meeting is duly called and held, the corporation may adjourn and transact any business at the adjourned meeting which they could have transacted at the original meeting, without giving any additional notice other than that implied in the adjournment.[95] It will be presumed, in the absence of anything to the contrary, that a meeting attended by a quorum was duly called.[96]

Ind. 547; United States v. McKelden, 8 Reporter 778, 11 D. C. 162.

[93] Notice of the ordinary business to be transacted at a general stated meeting is usually unnecessary. Chicago &c. R. Co. v. Union Pac. R. Co., 47 Fed. 15; Merritt v. Ferris, 22 Ill. 303; Sampson v. Bowdoinham &c. R. Co., 36 Maine 78; Warner v. Mower, 11 Vt. 385; But notice of the business to be transacted at a special meeting is generally essential and no other business can be regularly transacted than that specified in the notice. Atlantic Delaine Co. v. Mason, 5 R. I. 463; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Rex v. Mayor &c. of Doncaster, 2 Burr. 738. See also Bridport Old Brewery Co., In re, L. R. 2 Ch. 191; London &c. Co., In re, L. R. 31 Ch. D. 223; Tuttle v. Michigan Air Line R. Co., 35 Mich. 247; 1 Thomp. Corp. (2d. ed.), § 835.

[94] Handley v. Stutz, on appeal, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227; Kenton Furnace Co. v. McAlpin, 5 Fed. 737; Stutz v. Handley, 41 Fed. 531; Wood v. Corry &c. Co., 44 Fed. 146; Campbell v. Argenta &c. Co., 51 Fed. 1; Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309; Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Jones v. Milton Tpk. Co., 7 Ind. 547; Bucksport &c. R. Co. v. Buck, 68 Maine 81; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

[95] Smith v. Law, 21 N. Y. 296; Granger v. Grubb, 7 Phila. (Pa.) 350; Warner v. Mower, 11 Vt. 385; Rex v. Carmarthen, 1 Maule & S. 697; Scadding v. Lorant, 3 H. L. Cas. 418. But see, where there is bad faith and stockholders are taken advantage of, State v. Bonnell, 35 Ohio St. 10; New York &c. Co. v. Parrott, 36 Fed. 462; also State v. Phillips, 79 Maine 506, 10 Atl. 447; Reg. v. Grimshaw, L. R. 10 Q. B. 747 (new and different business can not be transacted).

[96] Lane v. Brainerd, 30 Conn. 565; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671; Beardsley v. Johnson, 121 N. Y. 224; McDaniels v. Flower Brook &c. Co., 22 Vt. 274.

§ 190 (165). **Remedies of stockholders.**—A stockholder has the further right to bring an action to obtain redress for wrongs done to the corporate rights or to restrain ultra vires acts done in the name of the corporation in cases where the corporation, upon request, refuses to bring the suit,[97] and where the persons who are despoiling the corporation or who have caused it to exceed its powers, are in control of it.[98] Thus a suit brought by

[97] Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; Foster v. Mansfield &c. R. Co., 36 Fed. 627; Putnam v. Ruch, 56 Fed. 416; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605n, 16 Am. St. 81; Mack v. DeBardeleben &c. Co., 90 Ala. 396, 8 So. 150, 9 L. R. A. 650, and note; Teachout v. Des Moines &c. St. R. Co., 75 Iowa 722, 38 N. W. 145; Wilkie v. Rochester &c. R. Co., 12 Hun (N. Y.) 242; Stevens v. Rutland &c. R. Co., 29 Vt. 545; Atwood v. Merryweather, L. R. 5 Eq. 464, note; 4 Thomp. Corp. (2d ed.), § 4552. A request and refusal of the corporation to sue must generally be shown or a sufficient excuse for failure to make the request. Weidinfelder v. Allegheny &c. R. Co., 47 Fed. 11; Whitney v. Fairbanks, 54 Fed. 985; Macon &c. R. Co. v. Shailer, 141 Fed. 585; Johns v. McLester, 137 Ala. 283, 34 So. 174, 97 Am. St. 27, and note; Beshoar v. Chappell, 6 Colo. App. 323, 40 Pac. 244; Atchison &c. R. Co. v. Board, 51 Kans. 617, 33 Pac. 312; Latimer v. Richmond &c. R. Co., 39 S. Car. 44, 17 S. E. 258. Where a corporation expired by limitation in its charter, but its existence was continued thereafter by statute for the purpose of winding up its business, such limitation in its charter is not sufficient ground for bringing suit in the name of some of the stockholders in behalf of the corporation, to recover its property, where no application has been made to the directors. Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179.

[98] Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347, Fed. Cas. No. 6306; Parrott v. Byers, 40 Cal. 614; Board &c. v. Lafayette &c. R. Co., 50 Ind. 85; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Currier v. New York &c. R. Co., 35 Hun (N. Y.) 355; Doud v. Wisconsin &c. R. Co, 65 Wis. 108, 25 N. W. 533, 56 Am. Rep. 620; Oshkosh &c. Co., Re, 77 Wis. 366, 46 N. W. 441, 9 L. R. A. 273, and note. See also Jones v. Missouri &c. Co., 144 Fed. 765. The minority stockholders can not enjoin acts of the majority stockholders or directors of a corporation in relation to its internal management, such as executing a perpetual lease of its railroad and franchises, where the acts complained of are neither fraudulent nor illegal. And the mere fact that defendants are also the majority stockholders and officers of the corporation to which

a stockholder on behalf of his corporation against the directors and others, has been sustained, where he sought redress for frauds, wrongs, and breaches of trust, and to recover from them money of which the corporation had been defrauded.[99] In such a suit, the corporation should be joined as a defendant,[1] as the court cannot pass upon its rights unless it is brought into court. It has also been held that a stockholder may enjoin the perform-

the proposed lease is to be made is not sufficient to establish fraud. Shaw v. Davis, 78 Md. 308, 28 Atl 619, 23 L. R. A. 294. Where the suit is against those in control of the corporation, no request that they shall bring the suit is necessary. George v. Central R. Co., 101 Ala. 607, 14 So. 752; Smith v. Dorn, 96 Cal. 73, 30 Pac. 1024; Landis v. Sea Isle &c. Co., 53 N. J. 654, 31 Atl. 755; Sage v. Culver, 71 Hun 42, 24 N. Y. S. 514. See also Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 302, and note in 97 Am. St. 34. Where a majority stockholder of a railroad company elects and controls its board of directors, and obtains a lease of its railroad at a nominal rental, any minority stockholder may sue in his own name for the fraud committed on the company. Pondir v. New York &c. R. Co., 72 Hun 384, 25 N. Y. S. 560; Earle v. Seattle &c. R. Co., 56 Fed. 909. Where it is merely a question of corporate policy, and no question of fraud or illegality of the proposed action of the corporation is raised, equity will not interpose to control the action of directors to whom the charter confides the management of corporate affairs. Ellerman v. Chicago Junct. R. &c. Co., 49 N. J. Eq. 217, 23 Atl. 287; Wheeler v. Pullman &c. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Manufacturers &c. Co. v. Cleary, 121 Ky. 403, 89 S. W. 248.

[99] Beach v. Cooper, 72 Cal. 99, 13 Pac. 161; Putnam v. Ruch, 54 Fed. 216. A stockholder may bring an action to enjoin the directors from unlawfully transferring the stock to a consolidated corporation, and he need not consult with the directors with reference thereto. Botts v. Simpsonville &c. Tpk. Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594.

[1] Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Heath v. Erie &c. Co., 8 Blatchf. (U. S.) 347, 394, Fed. Cas. No. 6306; Kennebec &c. R. Co. v. Portland &c. R. Co., 54 Maine 173, 181; Brewer v. Boston Theater, 104 Mass. 378; Bagshaw v. Eastern R. Co., 7 Hare 114; 3 Cook Corporations (7th ed.), § 738, and numerous authorities cited. The general rule is that the corporation is a necessary party, either as a plaintiff or defendant. Davenport v. Dows, 18 Wall. (U. S.) 626, 21 L. ed 938; Beach v. Cooper, 72 Cal. 99, 13 Pac. 161; Hersey v. Veazie, 24 Maine 9, 41 Am. Dec. 364; Wilson v. American Palace Car Co., 64 N. J. 534, 54 Atl. 415, note in 97 Am. St. 45, 46; Greaves v. Gouge, 69 N. Y. 154, 52

ance of an ultra vires contract to which all the other stockholders have consented although he is not specially injured thereby.[2]

§ 191 (166). **Suits by unregistered assignees and third persons.**—It has been held that an assignee of railroad stock, who has not registered his stock, nor obtained recognition as a stockholder, cannot bring suit in behalf of himself and other stockholders to restrain the officers of the corporation from ultra vires and illegal acts.[3] Parties who never paid, or agreed to pay, anything for corporate stock issued to them, are not, ordinarily, shareholders, and cannot, as a rule, maintain an action as such.[4] The merely expectant owner of stock in a corpora-

How. Prac. (N. Y.) 58; Western R. Co. v. Nolan, 48 N. Y. 513; Zinn v. Mendel, 9 W. Va. 580.

[2] Byrne v. Schuyler &c. Co., 65 Conn. 330, 31 Atl. 833, 28 L. R. A. 304, and cases cited. See also Central R. Co. v. Collins, 40 Ga. 582; Davis v. Congregation, 40 App. Div. 424, 57 N. Y. S. 1015.

[3] Brown v. Duluth &c. R. Co., 53 Fed. 889. See also Heath v. Erie R. Co., 8 Blatchf. (U. S.) 347, Fed. Cas. 6306; Hersey v. Veasie, 24 Maine 9, 41 Am. Dec. 364n; Ramsey v. Erie R. Co., 7 Abb. Pr. N. S. (N. Y.) 156. But compare Ervin v. Oregon &c. Co., 28 Hun (N. Y.) 269; Parrott v. Byers, 40 Cal. 614; Moore v. Silver &c. Co., 104 N. Car. 534, 10 S. E. 679; Bagshaw v. Eastern &c. R. Co., 7 Hare 114. It is not absolutely essential in most jurisdictions, it seems, that the transfer should be registered and there are many cases in which actual stockholders have been allowed to sue even though their right was eqitable rather than a strict legal one. Arkansas &c. Canal Co. v. Farmers' &c. Trust Co., 13 Colo. 587, 22 Pac. 954; Fisher v. Patton, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096; O'Connor v. International Silver Co., 68 N. J. Eq. 67, 59 Atl. 321; 4 Thomp. Corp. (2d ed.), § 4630. A bill to enjoin corporate acts which does not allege fraud on the part of the directors, or that they are threatening to do some act ultra vires or for their own interests, in a manner injurious to, or destructive of, the rights of other shareholders, but that the plaintiffs have made an earnest effort to obtain redress within the corporation itself, is insufficient on demurrer. Latimer v. Richmond &c. R. Co., 39 S. Car. 44, 17 S. E. 258; Roman v. Woolfolk, 98 Ala. 219, 13 So. 212; Atchison &c. R. Co. v. Board &c., 51 Kans. 617, 33 Pac. 312. But where the complaint shows that a rival corporation has secured control of the company, and acts of itself and its officers amounting to fraud upon the rights of plaintiff are stated, the complaint is sufficient. Earle, v. Seattle &c. R. Co., 56 Fed. 909.

[4] Arkansas River &c. Co. v. Farmers' &c. Trust Co., 13 Colo. 587, 22

tion, before becoming a stockholder, can neither be heard to complain of acts of the corporation which may be ultra vires, nor be permitted to interfere in any way in the affairs of the company.[5] To enable one or more stockholders to maintain in a federal court of equity, a suit which should properly be brought by the corporation itself, it has been held that they must show that they were shareholders at the time of the transaction complained of, or that the shares have devolved on them since by operation of law.[6]

§ 192 (167). When stockholders may sue or become parties. —Stockholders have been permitted to sue on behalf of the corporation to remove a cloud from the corporate title to real estate,[7] and to compel payment of subscriptions.[8] But, on the

Pac. 954; Hinchley v. Pfister, 83 Wis. 64, 53 N. W. 21. See also Busey v. Hooper, 35 Md. 15. If he is the actual owner it may not be necessary that he should have paid for the stock. Landes v. Globe &c. Co., 73 Ga. 176. Purchasers of stock have the right to demand that a contract of the corporation be canceled on the ground that it is ultra vires, and a wrongful refusal to transfer stock on the books of the company can not defeat that right. Carson v. Iowa City Gaslight Co., 80 Iowa 638, 45 N. W. 1068.

[5] Mayer v. Denver &c. R. Co., 38 Fed. 197, 6 R. & Corp. L. J. 49.

[6] Dimpfell v. Ohio &c. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827. Rule 94, U. S. Rules of Practice in Equity Cases, 104 U. S. ix. But new equity rules may change this, and while some states follow that rule as a general principle others refuse to follow the rule. See 4 Thomp. Corp. § 4631; Polliz v. Gould, 202 N. Y. 11, 94 N. E. 1088, Ann. Cas. 1912D, 1098, and cases on both sides reviewed in opinion and note. A suit removed to the federal court from a state court will not be dismissed for failure to comply with this rule since it applies only to suits originally begun in the federal court. Earle v. Seattle &c. R. Co., 56 Fed. 909. Where stock was transferred merely by indorsement and not by issuing certificates, the stockholder must show that he purchased the stock in good faith and not for mere purpose of vexation, before he can sue for redress for fraudulent transaction committed by officers or others before he became a stockholder. Moore v. Silver Valley Min. Co., 104 N. Car. 534, 10 S. E. 679.

[7] Baldwin v. Canfield, 26 Minn. 43, 56, 1 N. W. 261.

[8] Wallworth v. Holt, 4 Mylne & Cr. 619. Other illustrative cases are referred to in Hiscock v. Yacy, 9 Misc. 578, 30 N. Y. S. 860, quoted in note in 97 Am. St. 41. Stockholders, as shown in a subsequent

other hand, a stockholder has been denied the right to sue for a trespass upon the company's property,[9] and he cannot take an appeal in a suit which it has lost.[10] In cases involving fraud and collusion he must move promptly to assert his rights upon gaining knowledge of the wrongful acts complained of, for if he participates or acquiesces in unwarrantable acts of the officers or of a majority of the stockholders, he will usually be bound by them.[11] He will not be permitted to wait until he can see whether the unauthorized act is for the advantage of the corporation, and in case it proves disastrous, sue to set it aside.[12]

section have often been allowed to sue in behalf of the corporation to set aside a fraudulent transaction. See Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088, Ann. Cas. 1912D, 1100 and cases cited in notes.

[9] Dale v. Grant, 34 L. J. 142.

[10] Silk Mfg. Co. v. Campbell, 27 N. J. L. 539. For other illustrative cases see Van Kirk v. Adler, 111 Ala. 104, 20 So. 336; Hendrickson v. Bradley, 85 Fed. 508; Flynn v. Brooklyn City R. Co., 158 N. Y. 493, 53 N. E. 520; note in 97 Am. St. 42, 43.

[11] Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. ed. 179; Memphis &c. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. 69; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337; Burgess v. St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050. But see Appleton v. American Malt. Co., 65 N. J. Eq. 375, 54 Atl. 454. See as to when there must be a refusal by the corporation or dictators to sue before a stockholder can do so. Continental Securities Co. v. Belmont, 206 N. Y. 7, 99 N. E. 138, Ann. Cas. 1914A, 777, and cases cited in opinion and note; Fitzgerald v. Fitzgerald, 41 Nebr. 374, 59 N. W. 838. An act not expressly prohibited by law, but unauthorized in the charter of the corporation, which affects only the interests of the stockholders, may be made good by the assent of the stockholders, so as to protect strangers dealing with them in good faith. Hollins v. St. Paul &c. R. Co., 29 N. Y. St. 208, 9 N. Y. S. 909, 8 R. & Corp. L. J. 117. So, a purchaser of stock with notice that it was voted in favor of the illegal act cannot complain of such act. Brown v. Duluth &c. R. Co., 53 Fed. 889; Wood v. Corry &c. Co., 44 Fed. 146; Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145; Syracuse &c. R. Co., In re, 91 N. Y. 1. Several of these cases apply this doctrine even to transferees without notice of fraud, but in Parsons v. Joseph, 92 Ala. 403, 8 So. 788, its application to bona fide purchasers is denied.

[12] Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Burgess v. St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050. For an instance in which it was held that the stockholder acted with sufficient promtness, see Byrne v. Schuyler &c. Co., 65 Conn. 336, 31 Atl. 833.

The fact that the plaintiff bought his stock expressly to enable him to bring the suit is not necessarily a ground for refusing relief.[13] If it appears that the plaintiff is prosecuting the suit at the instance and for the benefit of others who are not stockholders, and who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction.[14] Nor will it readily grant this extraordinary relief before hearing, where the measures are of evident expediency, and have the approbation of all the other stockholders, although proper relief will not be denied upon final hearing if the acts complained of are shown to be ultra vires.[15] The fact that a rival company merely instigated the suit is not a reason for denying relief of which the stockholders are shown to be entitled,[16] although the

[13] Ramsay v. Erie R. Co., 8 Abb. Pr. N. S. (N. Y.)174; Young v. Drake, 8 Hun (N. Y.) 61; Chicago v. Cameron, 22 Ill. App. 91, aff'd 120 Ill. 447; Winsor v. Bailey, 55 N. H. 218; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 5; Cook Corporations (7th ed.), § 736. But see ante, note 3, page 240, and Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337. The fact that the certificates of stock were not issued to him until after a corporation had accepted an unconstitutional amendment to its charter will not preclude one having a vested right to stock of the corporation by virtue of stock receipts from enforcing his rights against an attempt to misappropriate funds under such amendment: Hill v. Glasgow R. Co., 41 Fed. 610. The fact that plaintiff became a stockholder after commission of the acts complained of does not defeat his right to begin the action, which is brought directly for the benefit of the corporation. Chicago v. Cameron, 22 Ill. App. 91 aff'd in 9 West. R. 507, 120 Ill. 447, 11 N. E. 899. But it has been held that where the transfer is merely nominal the transferee cannot maintain the suit. McDonnell v. Grand Canal Co., 3 Ir. Ch. R. 578; Robson v. Dodd, L. R. 8 Eq. 301.

[14] Beshoar v. Chappell, 6 Colo. App. 323, 40 Pac. 244; Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637; Filder v. London &c. R. Co., 1 H. & Miller 489; Forrest v. Manchester &c. R. Co., 4 DeG., F. & J. 126. But see Dinsmore v. Central R. Co., 19 Fed. 153; Central R. Co. v. Collins, 40 Ga. 582; Sandford v. Railroad, 24 Pa. St. 378. He must not act in bad faith or the court will usually refuse to aid him. Beshoar v. Chappell, 6 Colo. App. 323, 40 Pac. 244; Tevis v. Hammersmith, 161 Ind. 74, 66 N. E. 79, 67 N. E. 672.

[15] DuPont v. Northern Pacific R. Co., 18 Fed. 467. But not where he has knowingly accepted and retained the benefit. Wormser v. Metropolitan St. R. Co., 184 N. Y. 83, 76 N. E. 1036.

[16] Colman v. Eastern Counties R. Co., 10 Beav. 1.

court may decline to entertain a suit by shareholders in such a company who have purchased shares in the rival company for purpose of litigation.[17] And in cases where the corporation neglects or refuses to defend a suit because of fraud and collusion on the part of the corporate officers, a stockholder may, according to some authorities, be admitted as a defendant, and allowed to set up any defenses which the corporation might have offered to the suit.[18] But other authorities hold that the proper means by which the stockholders should protect their rights is to file an original bill in equity to have the judgment in such suit set aside for fraud.[19]

§ 193 (168). Right to recover insurance.—Where the corporation neglects properly to insure its property, it is held that a stockholder may insure it in his own name, and may, in case of loss, recover upon such a policy for a sum which will make up any deficiency in the amount of the company's insurance necessary to cover his interest.[20] But the corporation is generally held to be a legal entity separate and apart from the owners of its stock, even though all the stock belong to one person.[21] It

[17] Ffooks v. London &c. R. Co., 17 Jur. 365.

[18] Koehler v. Black River &c. Co., 2 Black (U. S.) 715, 17 L. ed. 339; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Bayliss v. Lafayette &c. R. Co., 8 Biss. (U. S.) 193, Fed. Cas. 1140; Farmers &c. T. Co. v. Toledo &c. R. Co., 67 Fed. 49; Mussina v. Goldthwaite, 34 Tex. 125. A stockholder cannot defend against a suit to foreclose a mortgage upon its property for default in the payment of interest upon the ground that the railroad company has misapplied its earnings in order to bring about the default, even where the majority stockholder is a heavy bondholder and desires the mortgage foreclosed. Farmers &c. T. Co. v. New York &c. R. Co., 78 Hun 213, 28 N. Y. S. 933; Oelbermann v. New York &c. R. Co., 7 Misc. 352, 27 N. Y. S. 945.

[19] Blackman v. Central R. Co., 58 Ga. 189; Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4926; Kelley v. Mississippi &c. R. Co., 1 Fed. 564, holding that at common law a stockholder cannot defend, even though the corporation is in no position to do so.

[20] Warren v. Davenport Fire Ins. Co., 31 Iowa 464; Riggs v. Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. 716. See also Seaman v. Enterprise Fire Ins. Co., 18 Fed. 250.

[21] Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. St. 131. See Hopkins v. Roseclare &c. Co., 72

would seem, therefore, that he cannot insure as absolute owner of the property,[22] whatever may be the rule as to his qualified interest therein.

§ 194 (169). **Other rights and remedies of stockholders.**—A stockholder may, in general, contract with the corporation upon the same terms, in the same manner, and to the same extent that another person may.[23] And it is held that he may be interested in the construction company to which a corporate contract is given, even though he owns a majority of the stock and thereby may have control.[24] But this right would seem to be held subject to the principle which is now firmly established, that where a majority of the stockholders assume control of the corporation, they take upon themselves the trust relation occupied by the corporation toward its stockholders,[25] and are

Ill. 373; Newton &c. Co. v. White, 42 Ga. 148. But see Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336, where it is held that a person owning all the stock may bind the corporation by his individual acts.

[22] See Philips v. Knox &c. Ins. Co., 20 Ohio 174; Riggs v. Commercial &c. Ins. Co., 19 J. & S. (N. Y. Super. Ct.) 466.

[23] Hartford &c. R. Co. v. Kennedy, 12 Conn. 499, 509; Central &c. R. Co. v. Claghorn, 1 Speers (S. Car.) 545, 562. It is held that stockholders of a corporation have the same right to purchase its property and take possession thereof that strangers would have during the pendency of a suit to forfeit the charter. Havemeyer v. Superior Ct., 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. 192. See also Crymble v. Mulvaney, 21 Colo. 203, 40 Pac. 499; Merrick v. Peru Coal Co., 61 Ill. 472; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103. Stockholders in a corporation may purchase its mortgage bonds and enforce payment in the usual manner, though the object in purchasing the bonds was to cause a foreclosure and to purchase the property at the sale. Farmers &c. Co. v. New York &c. R. Co., 78 Hun 213, 28 N. Y. S. 933. See also Oelbermann v. New York &c. R. Co., 7 Misc. 352, 27 N. Y. S. 945.

[24] Porter v. Pittsburgh &c. Co., 120 U. S. 649, 670, 7 Sup. Ct. 741, 30 L. ed. 830, holding that the mere fact of such ownership does not raise a legal inference that he dominates the board of directors.

[25] Ervin v. Oregon R. &c. Co., 27 Fed. 625, 20 Fed. 577 (Irvin v.), 28 Fed. 833. See also Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412.

bound to equity and fair dealing.[26] Upon this principle depends the well-established right of a minority stockholder to have set aside a fraudulent sale of the corporate property, by the majority of the stockholders,[27] or by the directors,[28] to themselves, or a fraudulent sale of property to the corporation by them.[29] He may, in good faith, obtain security for his debt,[30] and may sue or be sued by the corporation both at law and in

[26] And a court of equity will review their action at the instance of the minority. Menier v. Hooper's Tel. Works, L. R. 9 Ch. 350; Meeker v. Winthrop &c. Co., 17 Fed. 48. See Barr v. New York &c. R. Co., 96 N. Y. 444.

[27] Reilly v. Oglebay, 25 W. Va. 36; Mason v. Pewabic Min. Co., 25 Fed. 882. A creditor of the old corporation who is injured thereby may have the sale set aside for fraud. San Francisco &c. R. Co. v. Bee, 48 Cal. 398.

[28] Jones v. Arkansas &c. Co., 38 Ark. 17; Buell v. Buckingham, 16 Iowa 284, 85 Am. St. 516; Hoyle v. Plattsburgh &c. R. Co., 54 N. Y. 314, 13 Am. Rep. 595, setting aside a purchase by a director at a sale on execution. The director can hold property of the corporation which he may purchase only as a trustee for the corporation, and, on being repaid the purchase money he must make it over to his cestui que trust. Harts v. Brown, 77 Ill. 226; Munson v. Syracuse &c. R. Co., 103 N. Y. 58, 29 Hun 76; Covington &c. R. Co. v. Bowler's Exrs., 9 Bush (Ky.) 468, holding a purchaser from the director with notice subject to the same liability as his vendor. But a sale to a syndicate of which a director is a member, if made in good faith and for an adequate price, will not be set aside. Du-Pont v. Northern Pac. R. Co., 18 Fed. 467; Hill v. Nisbet, 100 Ind. 341. See Ashhurst's Appeal, 60 Pa. St. 209, where a sale to a director was upheld. But where the sale was made to the directors through "dummies" the corporate creditors cannot have it set aside after the lapse of a long time, even though made for an inadequate price. Graham v. Railroad Co., 102 U. S. 148, 26 L. ed. 106.

[29] Where a director fraudulently conveys land to the corporation, the stockholder should not sue in equity to dissolve the corporation on account of such sale, but his remedy is in an action by the corporation through its proper agents, or, in case they refuse to sue, then by the stockholder himself, to set aside the fraudulent sale. Tutwiler v. Tuscaloosa Coal &c. Co., 89 Ala. 391, 7 So. 398.

[30] Reichwald v. Commercial Hotel Co., 106 Ill. 439; Foster v. Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63.

equity.[31] And in case of its insolvency he may be competent and qualified to act as its receiver or assignee.[32]

§ 195 (170). Stockholders as agents of the corporation.—A stockholder cannot, as such, bind the corporation by a contract made in its name,[33] although, of course, he may act as its agent by appointment.[34] And it is held that all the stockholders in meetings assembled cannot, ordinarily, make a valid contract,[35] but that this power belongs to the directors or to agents acting under their authority.[36] Since he is not the corporation nor necessarily its agent, a stockholder's admissions will not bind

[31] Booker, Ex parte, 18 Ark. 338; Sanborn v. Lefferts, 58 N. Y. 179; Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397; Waring v. Catawba Co., 2 Bay (S. Car.) 109; Wausau &c. Co. v. Plumber, 35 Wis. 274. A stockholder may recover damages for an injury caused by the negligence or misconduct of the corporation. Morbach v. Home Min. Co., 53 Kans. 731, 37 Pac. 122.

[32] Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319n; Bowery Bank, Matter of, 16 How. Prac. (N. Y.) 56. But a stockholder should be appointed only with the consent of the parties having opposing interests. Atkins v. Wabash &c. R. Co., 29 Fed. 161. A corporate officer cannot be a receiver in New Jersey. Freeholders v. State Bank, 28 N. J. Eq. 166.

[33] Morelock v. Westminister Water Co. (Md.), 4 Atl. 404; Central Trust Co. v. Bridges, 57 Fed. 753; Allemong v. Simmons, 124 Ind. 199, 23 N. E. 768 (Where a stockholder and director owning most of the stock in a railroad company made a contract in its name which was held invalid); England v. Dearborn, 141 Mass. 590, 6 N. E. 837; Mays v. Foster, 13 Ore. 214, 10 Pac. 17.

[34] Spear v. Ladd, 11 Mass. 94. The rule has been held to be the same where he owns all the stock. Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131. But the contrary is held in Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336.

[35] Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. ed. 473; Gashwiler v. Willis, 33 Cal 11, 91 Am. Dec. 607; Conro v. Port Henry &c. Co., 12 Barb. (N. Y.) 27; McCullough v. Moss, 5 Denio (N. Y.) 567; Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156. See post, §§ 277, 290, 293.

[36] 1 Thomp. Corp. (2d ed.), § 1070.

it,[37] and service of process upon him is not service upon the corporation.[38]

§ 196 (171). **Notice to stockholder.**—Notice to an individual stockholder is not, as a rule, notice to the corporation.[39] A stockholder is not, ordinarily, chargeable with knowledge of corporate contracts,[40] or entries in the books of the corporation,[41] unless his relations are such as to render it reasonably probable that he had actual knowledge thereof. In the latter case, of course, actual knowledge may be inferred.[42] It has also been held that a stockholder is not chargeable with constructive notice of the corporate by-laws;[43] but this is certainly not the general rule.

[37] Fairfield &c. Co. v. Thorp, 13 Conn. 173; Mitchell v. Rome R. Co., 17 Ga. 574, 586; Morrell v. Dixfield, 30 Maine 157; Soper v. Buffalo &c. R. Co., 19 Barb. (N. Y.) 310; Magill v. Kauffman, 4 Serg. & Rawle (Pa.) 317, 321, 8 Am. Dec. 713n. Excepting, of course, where he is acting as agent for the corporation by its authority in a matter which it has entrusted to him. Norwich &c. R. Co., v. Cahill, 18 Conn. 484; American Fur Co. v. United States, 2 Pet. (U. S.) 358, 7 L. ed. 450.

[38] Lillard v. Porter, 2 Head (Tenn.) 177; DeWolf v. Mallett, 3 Dana (Ky.) 214.

[39] Union Canal Co. v. Loyd, 4 Watts & S. (Pa.) 393; Racine &c. Co. v. Joliett &c. Co., 27 Fed. 367. See also dissenting opinion in City of Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79n, and authorities there cited.

[40] Tarbox v. Gorman, 31 Minn. 62; Baker v. Woolston, 27 Kans. 185, 4 Thomp. Corp. (2d ed.) § 4470.

[41] Hill v. Manchester &c. Co., 5 B. & Ad. 866; Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 273n, 22 Am. St. 816. But see Hamilton &c. Co. v. Iowa &c. Co., 88 Iowa 364, 55 N. W. 496.

[42] See Bedford R. Co. v. Bowser, 48 Pa. St. 29. In Graff v. Pittsburgh &c. R. Co., 31 Pa. St. 489, 495, the court holds a stockholder bound by an entry made while he was present and assenting to it. If he is also a director he is as fully chargeable with notice of entries in the books as a partner would be with entries in the partnership books. Montgomery v. Exchange Bank (Pa.), 6 Atl. 133; First Nat. Bank v. Tisdale, 18 Hun (N. Y.) 151; aff'd 84 N. Y. 655. Between stockholders the books of the corporation control as to what it has done. Hubbell v. Meigs, 50 N. Y. 480. A stockholder is an integral part of the corporation to the extent that, in view of the law, he is privy to the proceedings touching the body of which he is a member. Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 38 L. ed. 184; Lewis v. Glenn, 84 Va. 947, 6 S. E. 866.

[43] Pearsall v. Western U. Tel.

§ 197 (172). Stockholders' right to inspect books.—A stockholder is entitled to inspect the corporate books at reasonable intervals, either in person,[44] or by an expert or an agent, when he is too ignorant to do it himself intelligently.[45] The directors cannot exclude a member from this right because his motives in making the inspection are hostile to the interests of the corporation,[46] and he may enforce the right by mandamus if it is

Co., 44 Hun (N. Y.) 532, on appeal, 124 N. Y. 256, 26 N. E. 534, 21 Am. St. 662. See also Rice v. Peninsular Club, 52 Mich. 87, 17 N. W. 708. But see post, § 221, contra.

[44] Stone v. Kellogg, 165 Ill. 192, 46 N. E. 222, 56 Am. St. 240; Steinway, Matter of, 159 N. Y. 250, 53 N. E. 1103; Commonwealth v. Philadelphia &c. R. Co., 3 Pa. Dist. R. 115; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; Kimball v. Dern, 39 Utah 181, 116 Pac. 28. The corporation can not refuse stockholders the right to inspect the transfer books simply because it would be inconvenient to grant it, nor because a by-law required the transfer books to be closed thirty days before election. State v. St. Louis &c. R. Co., 29 Mo. App. 301. State v. Laughlin, 53 Mo. App. 542.

[45] Foster v. White, 86 Ala. 467, 6 So. 88; Ellsworth v. Dorwart, 95 Iowa 108, 63 N. W. 588, 58 Am. St. 247; State v. Bienville &c. Co., 28 La. Ann. 204; People v. Nassau Ferry Co., 83 Hun (N. Y.) 128, 33 N. Y. S. 244; Cincinnati &c. Co. v. Hoffmeister, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. 707; Phoenix Iron Co. v. Commonwealth, 113 Pa. St. 563, 6 Atl. 75. See also Thomp. Corp. (2d ed.), §4515, et seq. Such a provision is contained in the statutes of nearly all the states. Under Wis. Rev. Stat. § 1757, which is similar to the statutes of most of the other states, it is held that a stockholder has the right to examine not only the books containing the stock accounts, but those containing the general accounts. State v. Bergenthal, 72 Wis. 314, 39 N. W. 566.

[46] Chable v. Nicaragua &c. Co., 59 Fed. 846; Cobb v. Lagarde, 129 Ala. 488, 30 So. 326; Weihenmayer v. Bitner, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446n; State v. Sportsman's &c. Assn., 29 Mo. App. 326; People v. Throop, 12 Wend. (N. Y.) 183; Commonwealth v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; Regina v. Wilts &c. Canal Navigation Co., 29 L. T. R. (N. S.) 922, where the shareholder was an attorney, who sought to make an inspection in the interest of his clients, who were in litigation with the company. But see People v. Northern Pac. Co., 18 Fed. 471; People v. Walker, 9 Mich. 328; State v Einstein, 46 N. J. L. 479; Lyon v American Screw Co., 16 R. I. 472, 17 Atl 61. Nor does the fact that he requests to see some of the books which he is not entitled to see, justify a refusal to permit him to inspect those which he is entitled to see. Ellsworth v. Dorwart, 95 Iowa

wrongfully denied.[47] The writ should be directed to the officer or person having the custody of the books.[48]

§ 198 (173). **Stockholder is disqualified to serve as judge or juror where corporation is interested.**—A stockholder is incompetent to serve as a judge,[49] or juror,[50] in a case to which the corporation is a party, and, at common law, is incompetent to testify as a witness in such a case.[51] But many of the states have statutes rendering interested parties competent as witnesses, and in other states this last rule may usually be evaded by a transfer of the shareholder's stock.[52] A bona fide transfer of the stock

108, 63 N. W. 588, 58 Am. St. 427. But where the right is not statutory there may be cases where inspection can be refused because not for a legitimate purpose and a corporation may usually make reasonable by-laws as to the time, place or manner. 4 Thomp. Corp. §§ 4517, 4524.

[47] Cockburn v. Union Bank, 13 La. Ann. 289; People v. Lake Shore &c. R. Co., 11 Hun (N. Y.) 1; People v. Pacific &c. Co., 50 Barb. (N. Y.) 280; Commonwealth v. Phoenix Iron Co., 105 Pa. St. 111, 51 Am. Rep. 184; 8 Thomp. Corp. § 4539. A stockholder of a private corporation, or his attorney in fact, has a right to inspect the books and records of a corporation at any reasonable time, without giving a reason therefor. His remedy is mandamus. Foster v. White, 86 Ala. 467, 6 So. 88, 6 R. & Corp. L. J. 88. Contra, Investment Co. v. Eldridge, 2 Pa. Dist. 394. But the refusal of such right by the secretary is not of itself ground for damages against the corporation. Legendre v. New Orleans &c. Assn., 45 La. Ann. 669, 12 So. 837, 40 Am. St. 243.

[48] People v. Throop, 12 Wend. (N. Y.) 183; People v. Mott, 1 How. Prac. (N. Y.) 247; State v. Bergenthal, 72 Wis. 314, 39 N. W. 566.

[49] Dimes v. Prop. of Grand Junction Canal, 3 H. of L. Cas. 759; Peninsular R. Co. v. Howard, 20 Mich. 18; Cregin v. Brooklyn &c. R. Co., 19 Hun (N. Y.) 349. But relationship to a stockholder does not disqualify. Searsburgh Tpk. Co. v. Cutler, 6 Vt. 315; Butler v. Glens &c. R. Co., 121 N. Y. 112, 24 N. E. 187.

[50] Page v. Contoocook Valley R. Co., 21 N. H. 438; Peninsular R. Co. v. Howard, 20 Mich. 18; Georgia Railroad v. Hart, 60 Ga. 550, where a stockholder's son was also held incompetent. See 2 Elliott's Gen. Prac. § 518.

[51] Porter v. Bank of Rutland, 19 Vt. 410; Delaware &c. R. Co. v. Irick, 23 N. J. L. 321; 2 Elliott on Ev. § 739.

[52] 1 Cook Corporations (7th ed.), § 11.

before the commencement of the suit has been held sufficient, although "the debt sued for existed at the time of the transfer, and continued to exist until the suit was brought."[53]

§ 199 (174). **Unlawful combination and conspiracies to vote or prevent voting—Injunction.**—Where a fraudulent purpose to vote stock in a particular way, and thereby to control the election to the irreparable and permanent injury of the corporation or of other stockholders is shown,[54] or where a conspiracy to control the election by qualifying others to vote stock which the owner is not authorized to vote;[55] or by excluding the votes of certain stockholders[56] is shown; or where a rival corporation has obtained control of stock by ultra vires act, and seeks to vote it to the injury of the company's interests,[57] an injunction may issue to restrain the holding of an election until further order of the

[53] Smith v. Tallahassee &c. Co., 30 Ala. 650; Illinois Mutual Fire Ins. Co. v. Marseilles &c. Co., 6 Ill. 236; Utica Ins. Co. v. Cadwell, 3 Wend. (N. Y.) 296; Union Bank v. Owen, 4 Humph. (Tenn.) 338.

[54] Reed v. Jones, 6 Wis. 680. Ordinarily, however, the purpose or motive of the shareholder is immaterial if he does no illegal act.

[55] Webb v. Ridgely, 38 Md. 364, where the charter permitted a single stockholder to vote only twenty shares. But though a court of equity may do so, the corporation cannot question the holder's right to vote because the shares were transferred to him by one who owned a greater number of shares than any one person is permitted to vote. Stranton &c. Co., In re, L. R. 16 Eq. 559; State v. Smith, 48 Vt. 266; People v. Kip, 4 Cow. (N. Y.) 382, note. See ante, § 182.

[56] Camden &c. R. Co. v. Elkins, 37 N. J. Eq. 273; People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344, where it is held that the inspectors may be enjoined from receiving the votes of certain stockholders until the votes of others have been deposited. Hafer v. New York &c. R. Co., 14 Wkly. Law Bul. 68.

[57] Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81, where the rival company owned a majority of the stock and had elected its own directors to serve as directors of the company in which plaintiffs were interested, who used their power against the interests of that road, the defendant company and all persons representing it where enjoined from voting the shares of stock which it held; ante, § 184. See also 1 Thomp. Corp. (2d ed.), §§ 873, 874. See also Milbank v. New York &c. R. Co., 64 How. Prac. (N. Y.) 20; George v. Central R. &c. Co., 101 Ala. 607, 14 So. 752.

court,[58] or to restrain the offending stockholder or his agents from voting his stock,[59] or a particular portion of it,[60] either altogether, or until the petitioner's rights have been protected.[61] But an injunction will not issue to prevent stockholders holding large interests from gaining control of the corporation, by legal means, because they will probably misuse their power.[62] Nor can the right to vote be denied because of the alleged wrongful motives of the holder in buying his stock.[63] And it is perfectly competent for stockholders owning a majority of the stock to combine and elect a board of directors,[64] if the combination is formed without fraud.[65] Where the application for an injunction is not made a sufficient number of days before the election to afford the defendants an opportunity to be heard, it may, as a rule, be summarily dismissed.[66] But where the persons sought to be enjoined can have no legal right to vote any stock they own, or in the case of a railroad owning stock in a rival corporation, there may be reason for issuing an injunction restraining them.[67] And, in a proper case, the court may order that an election shall be temporarily postponed,[68] though an order that it

58 People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344. But an injunction forbidding the holding of an election at all is void.

59 Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81.

60 Reed v Jones, 6 Wis. 680; Webb v. Ridgely, 38 Md. 364.

61 Brown v. Pacific Mail &c. Co., 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2025, where the defendants were enjoined from participating in any election unless plaintiff's votes were received at the election.

62 Camden &c. R. Co. v. Elkins, 37 N. J. Eq. 273. One stockholder can do nothing to control or direct the vote of another stockholder. Ryder v. Alton &c. R. Co., 13 Ill. 516.

63 Pender v. Lushington, L. R. 6 Ch. D. 70. Parties who are interested in opposition to a corporation have the right to purchase its stock in order to defeat a contract which it is about to make. Carson v. Iowa City Gaslight Co., 80 Iowa 638, 45 N. W. 1068.

64 Havemeyer v. Havemeyer, 86 N. Y. 618 aff'g 43 N. Y. Super. Ct. 506; Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24.

65 People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344.

66 Hilles v. Parrish, 14 N. J. Eq. 380. See also Lucas v. Milliken, 139 Fed. 816.

67 Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81.

68 People v. Albany &c. R. Co., 55

should never be held would be erroneous.[69] An injunction directed against the voting of particular stock may cause what would otherwise be the minority to become the majority, and so change the result, but it will not prevent the holding of the election.[70] A stockholder may also enjoin the directors from interfering with and postponing an annual election and thereby extending their term.[71] Further than the right to vote in the management of corporate affairs, the stockholder has not, during the continuance of the corporation, any direct legal interest in its property.[72]

§ 200 (175). **Liability of stockholders for unpaid subscription.** —A stockholder is, of course, liable to the corporation for any unpaid balance due on the shares for which he has subscribed, and this liability may be enforced in a proper case by suit in the name of the corporation, or in equity at the suit of any corporate creditor who is injured by its non-payment, upon the insolvency and winding up of the corporation.[73] And one who subscribes or

Barb. (N. Y.) 344; Scholfield v. Union Bank, 2 Cr. C. C. (U. S.) 115, Fed. Cas. No. 12475.

[69] People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344.

[70] Brown v. Pacific Mail &c. Co., 5 Blatchf. (U. S.) 525, Fed. Cas. No. 2025.

[71] Elkins v. Camden &c. R. Co., 36 N. J. Eq. 467.

[72] Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. ed. 473; Curry v. Woodward, 44 Ala. 305; Phelps v. Farmers &c. Bank, 26 Conn. 269; Goodwin v. Hardy, 57 Maine 143, 99 Am. Dec. 758n; Granger v. Bassett, 98 Mass. 462; Lockhart v. Van Alstyne, 31 Mich. 76, 78, 18 Am. Rep. 156; Jones v. Terre Haute &c. R. Co., 57 N. Y. 196; Burroughs v. North Carolina R. Co., 67 N. Car. 376, 12 Am. Rep. 611.

[73] The courts of America generally hold that the capital stock of a corporation, upon insolvency, and especially the unpaid subscriptions, constitute a trust fund for the benefit of the creditors of the corporation. Note to Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68; 3 Am. St. 797, 808, et. seq.; 1 Cook Corporations (7th ed.), § 199, note in 8 L. R. A. (N. S.) 263, 45 L. R. A. (N. S.) 1013, and 51 L. R. A. (N. S.) 56. Ante, §§ 105, 128. Where a consolidation between two corporations is effected under a law providing that all property, rights of action and other interests of the consolidating companies shall rest in and become the property of the consolidated corporation, and provides that stock of the new corporation shall be issued in exchange for the stock of the corporations merged, a

takes part as a stockholder after the corporation is formed is estopped to deny that it is legally incorporated, although some of the statutory formalities may not have been complied with.[74] But one who merely subscribes to a preliminary agreement to take stock after the corporation is formed is usually entitled to insist upon the regular organization of a legal corporation, and if he does not by subsequent acts acquiesce in the mode of incorporation, recognize it as a legal corporation or in any way act as a stockholder, he is not estopped to deny his liability as such, where the incorporation is defective and invalid.[75] Ordinarily, subscriptions are required to be paid in money; but where the state law allows subscriptions to be paid in property, the transfer of property in payment of shares made in good faith at an honest valuation entitles the owner to hold his shares as fully paid up even against creditors of the corporation in the event of its solvency.[76] So, it is held that a bona fide purchaser of

subscription to the stock of one of the old corporations becomes assets for the payment of the debts of the new corporation. Hamilton v. Clarion &c. R. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779n.

[74] Casey v. Galli, 94 U. S. 673; 24 L. ed. 168; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Upton v. Hansbrough, 3 Biss. (U. S.) 417, Fed. Cas. No. 16801; Hickling v. Wilson, 104 Ill. 54; Anderson v. Newcastle &c. R. Co., 12 Ind. 376, 74 Am. Dec. 218; Cravens v. Eagle Cotton Mills, 120 Ind. 6, 21 N. E. 981, 16 Am. St. 298; Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797, and note; Dutchess &c. Co. v. Davis, 14 Johns. (N. Y.) 238, 7 Am. Dec. 459; Clarke v. Thomas, 34 Ohio St. 46; Hamilton v. Clarion &c. Co., 144 Pa. St. 34, 23 Atl. 53, 13 L. R. A. 779n; Slocum v. Warren, 10 R. I. 112 and 116; 1 Cook Corporations (7th ed.), §§ 184, 185; 8 Thomp. Corp., §§ 1951, 1953, 1981.

[75] Indianapolis &c. Co. v. Herkimer, 46 Ind. 142; Reed v. Richmond St. R. Co., 50 Ind. 342; Richmond Factory Assn. v. Clarke, 61 Maine 351; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760n; Capps & McCapps v. Hastings &c. Co., 40 Nebr. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. 677; Dorris v. Sweeney, 60 N. Y. 463; Fairview &c. Co. v. Spillman, 23 Ore. 587, 32 Pac. 688; note to Parker v Thomas, 81 Am. Dec. 392.

[76] Grant v. East & West R. Co., 54 Fed. 569. Ante, § 106. Where the property was transferred to the corporation at an overvaluation and accepted by a board of directors chosen by the votes of the subscribers, it was held that the pretended payment for the stock subscribed was fraudulent, and that the subscriber could be compelled to pay

stock in open market, where the certificate, on its face, purports to be fully paid up and non-assessable, is not liable for assessments, although, in fact, it was not fully paid.[77] An unpaid subscription may be collected in payment of damages for a tort the same as for a contract debt.[78]

§ 201 (176). **Release of stockholder—Withdrawal.**—This liability is one from which the stockholder cannot ordinarily claim release after the corporation has become insolvent, in cases where such release was not legally ascertained and established before such insolvency.[79] And he can only be released from lia-

the difference between the actual value of the property and the par value of the stock. Lloyd v. Preston, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. ed. 1111. See also Boulton Carbon Co. v. Mills, 78 Iowa 460, 43 N. W. 290, 5 L. R. A. 649.

[77] Rood v. Whorton, 67 Fed. 434, and authorities there cited; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814; Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750. See also Hess v. Trumbo, 27 Ky. L. 320, 84 S. W. 1153; First Nat. Bank v. Gustin &c. Co., 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. 510; Hospes v. Northwestern &c. Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; Easton Nat. Bank v. American &c. Co., 69 N. J. Eq. 839, 60 Atl. 54. But compare Howe v. Illinois &c. Works, 46 Ill. App. 85. As elsewhere shown this is not a universal rule although where properly limited and applied it is sustained by nearly all of the recent cases. See also note in 30 L. R. A. (N. S.) 283; and notes in Ann. Cas. 1914B, 748 and 754.

[78] Powell v. Oregonian Railway, 36 Fed. 726, 38 Fed. 187; Grindle v. Stone, 78 Maine 176, 3 Atl. 183.

[79] He cannot then rescind his contract of subscription for fraud of the company's agents in obtaining it. Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Turner v. Grangers' &c. Ins. Co., 65 Ga. 649, 38 Am. Rep. 801; Duffield v. Barnum &c. Works, 64 Mich. 293, 31 N. W. 310; Saffold v. Barnes, 39 Miss. 399; Ruggles v. Brock, 6 Hun (N. Y.) 164; Farrar v. Walker, 13 Nat. Bankr. Reg. 82; Kent. v. Freehold &c. Co., L. R. 3 Ch. App. 493. And the company cannot agree to a rescission to the detriment of the creditors' interests. Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. ed. 361; Zirkel v. Joliet &c. Co., 79 Ill. 334; Vick v. La. Rochelle, 57 Miss. 602; Gill v. Balis, 72 Mo. 424. See also Anglo-American &c. Co. v. Lombard, 132 Fed. 721; Knickerbocker &c. Co. v. Myers, 133 Fed. 764; Tiger v. Rogers Cotton Cleaner Co., 96 Ark. 1, 130 S. W. 585, Ann. Cas. 1912B, 488, and cases cited in note.

bility not induced by fraud on the part of the corporation by the unanimous consent, express or implied,[80] of all the other stockholders.[81] Even a majority of the stockholders, it has been held, cannot withdraw and refuse to proceed.[82] A cancellation of the subscription, even where made with the unanimous consent of the other stockholders, may be impeached and set aside, in a proper case, by any corporate creditor injured thereby.[83] Any attempt on the part of the corporation to release a subscriber from liability will be subjected to rigid scrutiny by a court of equity, at the instance of corporate creditors,[84] and will only be upheld where the release is fairly and honestly made for a valuable considera-

[80] Knowledge and acquiescence for years will bind a stockholder who did not know of the release before it was affected. Evans v. Smallcombe, L. R. 3 H. L. 249; Stuart v. Valley R. Co., 32 Grat. (Va.) 146. Retaining and using benefits arising from a cancellation of the subscription will prevent the corporation and the stockholders from objecting to the release. Miller v. Second &c. Assn., 50 Pa. St. 32.

[81] Selma &c. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542; Johnson v. Wabash &c. R. Co., 16 Ind. 389; Lake Ontario &c. R. Co. v. Mason, 16 N. Y. 451, 463; Garrett v. Dillsburg &c. R. Co., 78 Pa. St. 465; Miller v. Hanover &c. R. Co., 87 Pa. St. 95, 30 Am. Rep. 349; Gulf Coast &c. R. Co. v. Neely, 64 Tex. 344.

[82] Busey v Hooper, 35 Md. 15, 6 Am. Rep. 350. A tender of payment for stock and refusal on the part of the corporate officers to accept the same is no defense in an action by corporate creditors for the unpaid balance due on such stock, after the corporation has become insolvent, where the subscriber continued an active member of the corporation after such tender and refusal. Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135.

[83] Vick v. La Rochelle, 57 Miss. 602; Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349; Appeal of Miller, 1 Penny. (Pa.) 120; 2 Thomp. Corp (2d ed.), § 763. But in England it is held the creditor can obtain nothing but what the company is entitled to get from the shareholders. Dronfield &c. Co., In re, L. R. 17 Ch. Div. 76.

[84] Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Morgan v. Allen, 103 U. S. 498, 26 L. ed. 498; Putnam v. New Albany, 4 Biss. (U. S.) 365, Fed Cas. No. 11481; Upton v. Hansbrough, 3 Biss. (U. S.) 417, 425, Fed. Cas. No. 16801; South Mountain &c. Mining Co., In re, 7 Sawyer (U. S.) 30, 5 Fed. 403; Goodwin v. McGehee, 15 Ala. 232; Union Ins. Co. v. Fear &c. Co., 97 Ill. 537, 37 Am. Rep. 129; Thompson v. Meisser, 108 Ill. 359; Chisholm v. Forny, 65 Iowa 333, 21 N. W. 664; Gill v. Balis, 72 Mo. 424.

tion.[85] Neither the board of directors of the corporation,[86] nor any officer,[87] has power to agree with a subscriber that his subscription shall be canceled, unless such power is given by charter or statute, or by the by-laws of the company; and entries caused by them to be made in the books of the company showing a release will be disregarded.[88] The money refunded for calls paid before such an attempted release may be recovered in a proper case at the suit of any stockholder, by a bill in equity, and the subscriber's liability upon his canceled subscription may be established.[89] If loss accrues to the corporation by reason of the

[85] This is the rule in the federal courts. New Albany v. Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155; Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. ed. 361; Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135. And is followed in Illinois courts. Zirkel v. Joliet &c. Co., 79 Ill. 334.

[86] Ryder v. Alton &c. Co., 13 Ill. 516; Rider v. Morrison, 54 Md. 429; White Mts. R. Co. v. Eastman, 34 N. H. 124; Tuckerman v. Brown, 33 N. Y. 297, 88 Am. Dec. 386; Jewett v. Valley R. Co., 34 Ohio St. 601; Bedford R. Co. v. Bowser, 48 Pa. St. 29; Lafayette &c. Corp. v. Ryland, 80 Wis. 29, 49 N. W. 157; London &c. Co., In re, L. R. 5 Ch. Div. 525; Thomas' Case, L. R. 13 Eq. 437.

[87] Cartmell's Case, L. R. 9 Ch. 691.

[88] The general manager of a corporation, who is also its largest stockholder, secretary and treasurer, cannot release a stockholder from his contract by charging off balance due on the books for unpaid calls and crediting sums already paid, where no attempt is made to transfer the shares, although the manager secures new subscriptions as substitutes therefor, and both parties at the time believe that he has authority to release old contracts and substitutes new ones; and the fact that an over-issue of stock will result on account of the new subscriptions unless there is a cancellation of earlier subscriptions, will not justify such invalid cancellation. Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. 910.

[89] Melvin v. Lamar Ins. Co., 80 Ill. 446, 22 Am. Rep. 199; South Bend Toy &c. Co. v. Pierre &c. Ins. Co., 4 S. Dak. 173, 56 N. W. 98. A secret agreement by which the officers of the corporation agree that the subscribers shall not be compelled to pay for his subscription, but shall be permitted to withdraw when he chooses, is invalid and does not affect the subscription nor the subscriber's liability. Great Western Tel. Co. v. Haight, 49 Ill. App. 633.

improper cancellation of a subscription by the directors, they may be held personally liable for such loss.[90]

§ 202 (177). **Compromise with stockholders.**—But the corporate authorities may compromise a subscription debt, as they may other debts, if there be a reasonable doubt as to the liability of the subscriber,[91] or if he be insolvent,[92] where it is done in good faith. If there be no real controversy, the compromise will not be binding.[93] It has been held, however, that where a subscriber fails to pay his subscription or to act as a stockholder, the corporation may treat his subscription as abandoned and permit others to fill it.[94] It has also been held that one subscription may be substituted for another upon request of the parties where a regular transfer of shares is not yet possible.[95]

§ 203 (178). **Liability where stock is transferred.**—An original subscriber cannot, however, by a transfer of his stock, discharge himself from liability for unpaid installments without the consent of the corporation; and where he does transfer on the books of the company as required by its by-laws, a receiver of the com-

[90] Bank of St. Mary's v. St. John, 25 Ala. 566; Hodgkinson v. National &c. Co., 26 Beav. 473. It seems that the subscriber may set up this fact as a defense. Southern Hotel Co. v. Newman, 30 Mo. 118.

[91] Bath's Case L. R. 8 Ch. Div. 334; Lord Belhaven's Case, 3 DeG., J. & S. 41. See Whitaker v. Grummond, 68 Mich. 249, 36 N. W. 62; New Albany v. Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155.

[92] Philadelphia &c. R. Co. v. Hichman, 28 Pa. St. 318. A receiver cannot be empowered by a court of equity to compromise a subscription, unless all the subscribers are parties to the suit in connection with which he is appointed. Chandler v. Brown, 77 Ill. 333.

[93] Phosphate &c. Co. v. Green, L. R. 7 C. P. 43; Spackman v. Evans, L. R. 3 H. L. 171, 188, 231; Livingstone v. Temperance &c. Society, 17 Ont. App. 379, 31 Am. & Eng. Corp. Cas. 541.

[94] Perkins v. Union &c. Co., 12 Allen (Mass.) 273. See also 1 Thomp. Corp. (2d ed.), § 767.

[95] To make a valid substitution, the signature of the first subscriber must be erased and that of his substitute inserted. Ryder v. Alton &c. R. Co., 13 Ill. 516. See also 1 Cook Corporations (7th ed.), § 62, and compare Cartwright v. Dickinson, 88 Tenn. 476, 12 S. W. 1030, 17 Am. St. 910; Hawkins v. Mansfield &c. Co., 52 Cal. 513; Coleman v. Spencer, 5 Blackf. (Ind.) 197.

pany, or assignee in bankruptcy, on its becoming insolvent, may recover from him the unpaid instalments already due.[96] But, as a general rule, in most jurisdictions, upon a valid transfer, duly registered, the transferee succeeds to all the rights and liabilities of the transferor, and becomes liable in his place for future calls and indebtedness.[97] If the transfer is not registered, the transferor will usually continue liable, both to the corporation and to its creditors.[98]

§ 204 (179). **When creditors may enforce unpaid subscriptions —Judgment and execution against corporation.**—Subscriptions to the capital stock of railroad corporations are most commonly disputed when an attempt is made to call them in to liquidate claims after corporate insolvency has occurred.[99] Under such

[96] Hood v. McNaughton, 54 N. J. L. 425, 24 Atl. 497; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; American Alkali Co. v. Campbell, 113 Fed. 398. Some cases hold that a stockholder cannot by transferring his stock relieve himself from liability for debts already accrued. Voight v. Dregge, 97 Mich. 322, 56 N. W. 557; Glenn v. Hunt, 120 Mo. 330, 25 S. W. 181; Commercial Nat. Bk. v. Gibson, 37 Nebr. 750, 56 N. W. 616; Nenney v. Waddill, 6 Tex. Civ. App. 244, 25 S. W. 308. Others hold that he is relieved of such liability unless the transfer was fraudulently made to an insolvent purchaser for the purpose of escaping liability. Van Demark v. Barons, 52 Kans. 779, 35 Pac. 798; Close v. Brady, 4 Misc. 474, 24 N. Y. S. 567.

[97] Webster v. Upton, 91 U. S. 65, 70, 23 L. ed. 384; Hartford &c. R. Co. v. Boorman, 12 Conn. 530; Tucker v. Gilman, 121, N. Y. 189, 24 N. E. 302; Roosevelt v. Brown, 11 N. Y. 148; 4 Thomp. Corp. (2d ed.), § 4371. See generally notes in 6 Am. St. 838, 3 Am St. 800, 93 Am. St. 388; 30 L. R. A. (N. S.) 283; and L. R. A. 1918D, 1050.

[98] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864; Kellogg v. Stockwell, 75 Ill. 68; Plumb v. Bank, 48 Kans. 484, 29 Pac. 699; Dane v. Young, 61 Maine 160; Shellington v. Howland, 53 N. Y. 371; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. 532. See also Knickerbocker &c. Co. v. Meyers, 133 Fed. 764; Way v. Mortenson 242 Fed. 903; Russell v. Easterbrook, 71 Conn. 50, 40 Atl. 905; Way v. Mooers, 135 Minn. 339, 160 N. W. 1014; Chilson v. Kavanagh (Okla.), 160 Pac. 601, L. R. A. 1918D, 1044 and note as to continued liability where constitution or statutes so provides; and see American Alkali Co. v. Kurtz, 134 Fed. 663, 665, as to liability where stock is in the name of a dummy.

[99] As to effect of creditor's knowledge that stock is not fully paid, see note in 7 A. L. R. 972.

circumstances, it is the practice of the courts to rigidly enforce the payment of the unpaid subscriptions for the accumulation of a fund with which to pay corporate debts. But these unpaid subscriptions balances are not the primary fund for the payment of corporate liabilities.[1] The corporate property must first be exhausted, or it must be made to appear that such property is so inadequate for the payment of corporate debts as to establish insolvency,[2] before a creditor is permitted to resort to them. The general rule in most jurisdictions is that a creditor's suit to enforce payment of unpaid subscriptions can be maintained only after a judgment at law has been obtained against the corporation and an execution issued thereon has been returned unsatisfied.[3] This remedy, however, need not be pursued where the

[1] 1 Cook Corporations (7th ed.), § 200. A stockholder cannot set off his claim as a creditor against his liability as a stockholder, but must share with the other creditors, as he is not ordinarily liable in excess of his obligation to pay in full for his stock. Boulton Carbon Co. v. Mills, 78 Iowa 460, 43 N. W. 290, 6 R. & Corp. L. J. 417; Tama Water Power Co. v. Hopkins, 79 Iowa 653, 44 N. W. 797. The liability of a stockholder should not be enforced on a judgment against a corporation, where there are other judgment debtors whose property subject to execution could satisfy the judgment. Burch v. Taylor, 1 Wash. 245, 24 Pac. 438. An attachment against a corporation cannot be levied on the individual property of natural persons composing it. State v. Marshall, 69 Miss. 486, 13 So. 668.

[2] Terry v. Tubman, 92 U. S. 156, 23 L. ed. 537; Stiles v. Samainego, 3 Ariz. 48, 20 Pac. 607; First Nat. Bank v. Greene, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; Hedges v. Silver Hill &c. Co., 9 Ore. 200; Cleveland v. Marine Bank, 17 Wis. 545. Corporate bankruptcy has been held sufficient evidence of the inability of the corporation to pay a corporate debt to justify an action by creditors to enforce subscriptions. State Savings Assn. v. Kellogg, 52 Mo. 583; Terry v. Anderson, 95 U. S. 628, 636, 24 L. ed. 365; Shellington v. Howland, 53 N. Y. 371.

[3] Terry v. Anderson, 95 U. S. 628, 636, 24 L. ed. 365; Swan Land &c. Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577; Walser v. Seligman, 21 Blatch. (U. S.) 130, 13 Fed. 415; Cutright v. Stanford, 81 Ill. 240; Bank &c. v. Dallam, 4 Dana (Ky.) 574; Baxter v. Moses, 77 Maine 465, 1 Atl. 350, 52 Am. Rep. 783; Wetherbee v. Baker, 35 N. J. Eq. 501; Freeland v. McCullough, 1 Denio (N. Y.) 414, 43 Am. Dec. 685n; Cleveland v. Burnham, 55 Wis. 598, 13 N. W 677; not

corporation has formally dissolved,[4] and has no funds with which to pay the corporate debts.[5] And the unpaid subscription in such a case may be reached by the general creditors, although the corporate property, rights, privileges and franchises are covered by mortgage to secure another creditor.[6]

§ 205 (180). Effect as against stockholder of judgment against the corporation.—Such a judgment, where the court has jurisdiction, is generally held conclusive against the stockholders as to the validity and amount of the creditor's claim, unless impeached for fraud or collusion.[7] And it was held in a recent case, where

to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 814; and in note in 46 L. R. A. (N. S.) 446. But see Williams v. Chamberlain, 123 Ky. 150, 94 S. W. 29. This should be a personal judgment pronounced by the courts of state in which the corporation exists. Patterson v. Lynde, 112 Ill. 196; Bayliss v. Swift, 40 Iowa 648; Rocky Mt. &c. Bank v. Bliss, 89 N. Y. 338; Murray v. Vanderbilt, 39 Barb. (N. Y.) 140, 147; Barclay v. Talman, 4 Edw. Chan. (N. Y.) 123; Bank &c. v. Adams, 1 Pars. Eq. (Pa.) 534. Some states by statute require the remedy against the corporation to be exhausted before resort is had to the property of the stockholders. Only a judgment and an unsatisfied execution exhausts the legal remedy. Rocky Mountain Nat. Bank v. Bliss, 89 N. Y. 338; Brice v. Munro, 5 Can. L. T. (Ont.) 130. See also Thornton v. Lane, 11 Ga. 459; Priest v. Essex &c. Co., 115 Mass. 380; Shellington v. Howland, 53 N. Y. 371; Wehrman v. Reakirt, 13 Ohio Dec. 517, 1 Cin. Super. Ct. 230; New England &c. Bank v. Newport Steam Factory, 6 R. I. 154, 75 Am. Dec. 688; Dauchy v. Brown, 24 Vt. 197. Contra, in Marion &c. Co. v. Norris, 37 Ind. 424; Shafer v. Morarity, 46 Ind. 9; Bird v. Calvert, 22 S. Car. 292; Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335. See also 4 Thomp. Corp. (2d ed.), § 5075 et seq.

[4] Kincaid v. Dwinelle, 59 N. Y. 548. See Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292, to the effect that a judgment against a corporation, recovered after the corporation has been dissolved, is void. See generally as to jurisdiction of equity to enforce, note in 46 L. R. A. (N. S.) 440.

[5] Creditors will not be required to await the collection of doubtful claims or claims in litigation. The stockholders must pay promptly, and take upon themselves the onus of delay and risk as to all such cases. Moses v. Ocoee Bank, 1 Lea (Tenn.) 398, 413; Stark v. Burke, 9 La. Ann. 341, 343. But see Younglove v. Kelly &c. Co., 49 Ohio St. 663, 33 N. E. 234.

[6] Dean v. Biggs, 25 Hun (N. Y.) 122.

[7] Marsh v. Burroughs, 1 Woods

the plaintiff had recovered a judgment against the corporation in an action for damages for waste, that a judgment against a corporation for the recovery of money is conclusive evidence, in a suit against a stockholder for the collection of said judgment, of the existence of the corporation and its liability to plaintiff therein as thereby determined; and such judgment, whether given in an action ex contractu or ex delicto, is an indebtedness of the corporation, for which a stockholder is liable to the amount due on his stock.[8] But in some jurisdictions the stockholder is permitted to disprove the claim where a judgment is sought to be enforced against him,[9] and the judgment amounts only to

(U. S.) 463, Fed. Cas. No. 9112; Bissit v. Kentucky River Nav. Co., 15 Fed. 353, and note 360; Powell v. Oregonian R. Co., 36 Fed. 726; American Nat. Bank v. Suple, 115 Fed. 657; Hampson v. Weare, 4 Iowa 13, 66 Am. Dec. 116n; Grund v. Tucker, 5 Kans. 70; Milliken v. Whitehouse, 49 Maine 527; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Hinckley v. Kettle River R. Co., 80 Minn. 32, 82 N. W. 1088; Henry v. Vermillion &c. R. Co., 17 Ohio 187; Wilson v. Pittsburgh &c. Coal Co., 43 Pa. St. 424. See also Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. ed. 184; Glenn v. Liggett, 135 U. S. 533, 10 Sup. Ct. 867, 34 L. ed. 262; Scofield v. Excelsior &c. Co., 27 Ohio Cir. Ct. 347; Childs v. Blethen, 40 Wash. 340, 82 Pac. 405; Conklin v. Furman, 8 Abb. Pr. N. S. (N. Y.) 161; Slee v. Bloom, 20 Johns. (N. Y.) 669; Stephens v. Fox, 83 N. Y. 313. The last of the cases hold that it is sufficient evidence of these facts where not disproved. This doctrine has been denied in New York. Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, reversed in Slee v. Bloom, 20 Johns. 669; Moss v. McCullough, 5 Hill (N. Y.) 131, reversed 7 Barb. (N. Y.) 279; Strong v. Wheaton, 38 Barb. (N. Y.) 616; Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155. But this point did not properly arise in the last two cases, and Strong v. Wheaton professes to be based on the authority of Moss v. McCullough, 5 Hill (N. Y.) 131.

[8] Powell v. Oregonian R. Co., 6 R. & Corp. L. J. 28, 38 Fed. 187. A *judgment* on a claim for damages for waste becomes an indebtedness of the corporation, whether the *claim* for damages was an "indebtedness" under the Oregon constitution or not; and the stockholder is liable for such debt to the extent of the amount unpaid on his stock. Powell v. Oregonian R. Co., 36 Fed. 726, 3 L. R. A. 201.

[9] Neilson v. Crawford, 52 Cal. 248; Quick v. Lemon, 105 Ill. 578; Grund v. Tucker, 5 Kans. 70; Hawes v. Anglo-Saxon &c. Co., 101 Mass. 385; Grand Rapids Sav. Bank v. Warren, 52 Mich. 557, 18 N. W

prima facie evidence,[10] of the creditor's right to money due the corporation for subscriptions. It has also been held that a judgment against a corporation is merely a step to fix the liability of stockholders, and does not merge it or stand in the way of any discovery or relief which would otherwise be proper to enforce that liability.[11]

§ 206 (181). **Stockholder's defense.**—It has been held that stockholders may be admitted to defend a suit brought against the corporation for the purpose of charging them on their individual liability, and the court will, in a proper case, relieve the corporation from a default and permit them to carry on the litigation.[12] The judgment does not even tend to prove that the person sued as a subscriber or stockholder is liable as such, and he may offer, with some exceptions, the same defenses that he could offer to suit by the corporation itself.[13] But it is generally held that any

356; Merchants' Bank v. Chandler, 19 Wis. 434. See also Rood v. Whorton, 67 Fed. 434. And see, where judgment is on an ultra vires contract, Ward v. Joslin, 186 U. S. 142, 22 Sup. Ct. 807, 46 L. ed. 1093.

[10] It has been held that the stockholder may set up any defense that was open to the corporation and put the creditor to strict proof of his claim a second time. Moss v. McCullough, 5 Hill (N. Y.) 131, and cases following; Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. ed. 1038; Chestnut v. Pennell, 92 Ill. 55. Cases of this kind may be found depending upon the peculiar language of statutes holding the corporation liable for debts in the first instance, if not promptly paid. Trippe v. Hancheon, 82 Ind. 307; Southmayd v. Russ, 3 Conn. 52; Bailey v. Bancker, 3 Hill (N. Y.) 188, 38 Am. Dec. 625.

[11] Newberry v. Robinson, 41 Fed. 458, 7 R. & Corp. L. J. 396.

[12] Peck v. New York &c. S. S. Co., 3 Bosw. (N. Y.) 622.

[13] 1 Cook Corporations (7th ed.), § 210. But while the judgment against the corporation does not prove that a particular person was a stockholder, such a judgment even on default is generally conclusive against stockholders as to other matters, such as the debt and the liability of the corporation and the like. 4 Thomp. Corp. (2d ed.) §§ 4970-4978. In a suit by the assignee of a judgment against a corporation brought against the stockholders, the assignee must show that he paid a valuable consideration for the judgment assigned. Wilson v. St. Louis &c. R. Co., 120 Mo. 45, 25 S. W. 527, 759.

fraud on the part of the corporation[14] or its officers[15] is not available as a defense to the claims of a corporate creditor who gave credit on the faith of the subscription and who was not a party to such fraud and had no knowledge of it. And secret agreements by which the corporation contracted that the defendant should not be liable for the unpaid balance of his subscription cannot be pleaded as such defense.[16] The statute of limitations may, however, be a good defense in a proper case.[17]

§ 207 (182). Methods of enforcing stockholder's liability.—The subscriber is liable to garnishment, in a proper case, in common with any other corporate debtor, for unpaid calls that have been made by the company.[18] And it has been held that he may

[14] Chubb v. Upton, 95 U. S. 655, 667, 24 L. ed. 523; Turner v. Grangers' &c. Ins. Co., 65 Ga. 649, 38 Am. Rep. 801; Howard v. Glenn, 85 Ga. 238, 11 S. E. 610, 21 Am. St. 156; Saffold v. Barnes, 39 Miss. 399; Ruggles v. Brock, 6 Hun (N. Y.) 164; Tennent v. Glasglow Bank, L. R. 4 App. Cas. 615; Stone v. City &c. Bank, L. R. 3 C. P. Div. 282; Oakes v. Turquand, L. R. 2 H. L. 325. See also note in 93 Am. St. 393. But see Savage v. Bartlett, 78 Md. 561, 28 Atl. 414.

[15] Republic Ins. Co., In re, 3 Biss. (U. S.) 452, Fed. Cas. No. 11704.

[16] Such an agreement is held to be fraud at law upon the corporate creditors. Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Scoville v. Thayer, 105 U. S. 143, 26 L. ed. 968; Flinn v. Bagley, 7 Fed. 785; Northrop v. Bushnell, 38 Conn. 498; Hickling v. Wilson, 104 Ill. 54; Eyerman v. Krieckhaus, 7 Mo. App. 455; Sagory v. Dubois, 3 Sandf. Ch. R. (N. Y.) 466, 499. See also Wilson v. Hundley, 96 Va. 96, 30 S. E. 492, 70 Am. St. 837. An agreement operating among and against stockholders only for an apportionment of their several stock liabilities is good and is contrary neither to law or public policy. Winston v. Dorsett Pipe & P. Co., 27 Ill. App. 546.

[17] As to the statute of limitations as a defense and when it begins to run, see note in 93 Am. St. 390 et seq.; and Boyd v. Mutual L. Assn., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 61 L. R. A. 918, 96 Am. St. 948, and extended note.

[18] Faull v. Alaska &c. Min. Co., 8 Sawyer (U. S.) 420, 14 Fed. 657; Curry v. Woodward, 53 Ala. 371; Brown v. Union Ins. Co., 3 La. Ann. 177; Simpson v. Reynolds, 71 Mo. 594; Rand v. White Mts. R. Co., 40 N. H. 79; Hays v. Lycoming &c. Co., 99 Pa. St. 621; note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 806. But unpaid subscriptions for which no calls have been issued cannot be reached in this way. Bingham v. Rushing, 5 Ala. 403;

be sued at law by a corporate creditor for unpaid calls, and that he is liable to a judgment for the full amount due on such calls.[19] But the remedy most commonly resorted to and the one most favored by the courts, is by bill in equity.[20] And it has been said that no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.[21] Such a bill should be filed by so many

Meints v. East St. Louis &c. Co., 89 Ill. 48; Brown v. Union Ins. Co., 3 La. Ann. 177; McKelvey v. Crockett, 18 Nev. 238, 2 Pac. 386; Hughes v. Oregonian R. Co., 11 Ore. 158, 2 Pac. 94; Bunn's Appeal, 105 Pa. St. 49, 51 Am. Rep. 116.

[19] Faull v. Alaska &c. Min. Co., 8 Sawyer (U. S.) 420, 14 Fed. 657; Allen v. Montgomery R. Co., 11 Ala. 437; McCarthy v. Lavasche, 89 Ill. 270, 31 Am. Rep. 83n; Bank &c. v. Dallam, 4 Dana (Ky.) 574; Freeman v. Winchester, 18 Miss. 577.

[20] Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885; Louisiana Paper Co. v. Waples, 3 Woods (U. S.) 34, Fed. Cas. No. 8540; Faull v. Alaska &c. Min. Co., 8 Sawyer (U. S.) 420, 16 Fed. 657; Holmes v. Sherwood, 16 Fed. 725; Allen v. Montgomery &c. R. Co., 11 Ala. 437; Harmon v. Page, 62 Cal. 448; Ward v. Griswoldville &c. Co., 16 Conn. 593; Dalton &c. R. Co. v. McDaniel, 56 Ga. 191; Hickling v. Wilson, 104 Ill. 54; Crawford v. Rohrer, 59 Md. 599; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Christensen v. Eno, 106 N. Y. 97, 100, 12 N. E. 648; Henry v. Vermillion &c. Tpk. Co., 17 Ohio 187; Germantown &c. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546n; Adler v. Milwaukee &c. Co., 13 Wis. 57. A creditor's bill is a proper remedy for enforcing personal liability of stockholders. Stutz v. Handley, 7 Ry. & Corp. L. J. 407, 41 Fed. 531. Such a bill cannot be maintained to enforce a stale claim. Wilson v. St. Louis &c. R. Co., 120 Mo. 45, 894, 25 S. W. 527, 759.

[21] Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265. It seems to be a settled rule in the United States Courts that unpaid subscriptions can be reached by a corporate creditor in a court of equity only. Brown v. Fisk, 23 Fed. 228. See also Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135. But compare note in 40 L. R. A. (N. S.) 450. Some states provide by statute that the only remedy to enforce the payment of a debt of a corporation against the individual stockholders thereof shall be by bill in chancery. Many of the courts hold a bill in equity to be the creditor's only means of reaching unpaid subscriptions. Smith v. Huckabee, 53 Ala. 191; Jones v. Jarman, 34 Ark. 323; Erickson v. Nesmith, 15 Gray (Mass.) 221; Umsted v. Buskirk, 17 Ohio St. 113; Hodges v. Silver Hill Min. Co., 9 Ore. 200. Even where the general equitable remedy by creditor's bill

creditors as may wish to bring suit,[22] in favor of any or all creditors that may choose to come in and establish their claims,[23] and should be directed against the corporation itself,[24] and all solvent subscribers within the jurisdiction of the court whose subscriptions are not fully paid, excepting such as are unknown.[25]

has been abolished by statute, the right to proceed herein by suit in equity has been held to exist. Adler v. Milwaukee &c. Co., 13 Wis. 57. An action at law cannot be maintained by a creditor of a corporation, under Wash. Code, § 2434, against a stock subscriber, for the unpaid portion of his subscription. Burch v. Taylor, 1 Wash. 245, 24 Pac. 438.

[22] Crease v. Babcock, 10 Metc. (Mass.) 525; Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. ed. 265. Several creditors cannot bring separate suits but the first properly framed bill takes precedence, and another creditor's suit may be enjoined. Pierce v. Milwaukee Construction Co., 38 Wis. 253.

[23] Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Crease v. Babcock, 10 Metc. (Mass.) 525; Wetherbee v. Baker, 35 N. J. Eq. 501; Morgan v. New York &c. R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244n; Umsted v. Buskirk, 17 Ohio St. 113; Coleman v. White, 14 Wis. 700, 80 Am. Dec. 797. Even if the bill was not filed for the benefit of all creditors choosing to come in and share the expense, any creditor has a right to establish his claim under it and share pro rata in the distribution of the assets. Turnbull v. Prentiss Lumber Co., 55 Mich. 387; Walker v. Crain, 17 Barb. (N. Y.) 119. See also Wright v. McCormack, 17 Ohio St. 86; Adler v. Milwaukee &c. Co., 13 Wis. 57; note in 40 L. R. A. (N. S.) 448.

[24] Walser v. Memphis &c. R. Co., 19 Fed. 152; Wetherbee v. Baker, 35 N. J. Eq. 501; Mann v. Pentz, 3 N. Y. 415. Where the corporation is beyond the jurisdiction or is defunct it need not be made a party. Walser v. Seligman, 21 Blatch. (U. S.) 130 Fed. 415; Wellman v. Howland &c. Works, 19 Fed. 51.

[25] Walser v. Memphis &c. R. Co., 19 Fed. 152; Vick v. Lane, 56 Miss. 681; Erickson v. Nesmith, 46 N. H. 371; Ulmsted v. Buskirk, 17 Ohio St. 113; Pierce v. Milwaukee &c. Co., 38 Wis. 253. All need not be originally made parties, according to the authority of some cases, but the stockholders against whom the suit is directed may bring in those not made parties by cross-bill and thus enforce contribution. Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885. See also Ogilvie v. Knox Ins. Co., 22 How. (U. S.) 380, 16 L. ed. 349; Von Schmidt v. Huntington, 1 Cal. 55; Lamar Ins. Co. v. Gulick, 102 Ill. 41; Glenn v. Williams, 60 Md. 93; Griffith v. Mangam, 73 N. Y. 611; Brundage v. Monumental &c. Co., 12 Ore. 322. Some cases hold that judgment cannot be rendered against part of the delinquent subscribers unless it affirmatively ap-

§ 208 (183). **Contribution.**—The creditors are under no obligation to see that the payments made by the subscribers are proportionally equal, and a court of chancery will compel payment of so much of the unpaid subscriptions of the stockholders that are before it as may be necessary to pay the corporate debts.[26] The stockholder may, however, in general, have the other stockholders within the jurisdiction joined as defendants,[27] in which case contribution may be enforced in the original suit.[28] Or, if he is compelled to pay more than his proportion of the debts of the company, he may maintain a suit against his co-stockholders for contribution.[29] The fact that the creditor is himself a stock-

pear that the others are insolvent or beyond the jurisdiction of the court. Wood v. Dummer, 3 Mason (U. S.) 308, Fed. Cas. No. 17944; Marsh v. Burroughs, 1 Woods (U. S.) 463, Fed. Cas. No. 9112; Bonewitz v. Van Wert Co. Bank, 41 Ohio St. 78. See Erickson v. Nesmith, 46 N. H. 371. But this rule may be doubted. See Hatch v. Dana, 101 U. S. 205. 25 L. ed. 885; Cook Corporations (7th ed.), § 206. See also 4 Thomp. Corp. (2d ed.), § 510.

[26] Pentz v. Hawley, 1 Barb. Ch. (N. Y.) 122; Marsh v. Burroughs, 1 Woods (U. S.) 463, Fed. Cas. No. 9112; Evans v. Coventry, 25 L. J. Chan. 489. But actual subscribers are not liable for that part of the capital stock which was never subscribed. Evans v. Coventry, 25 L. J. Chan. 489.

[27] Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885. The fact that creditors of a corporation have released one stockholder from his liability is of no concern to another stock holder unless his liability has been thereby increased, and he is still liable on his subscription to the capital stock. Howard v. Glenn, 85 Ga. 238, 11 S. E. 610. A creditor of a corporation may bring individual action at law against one of the stockholders to recover to the amount of his entire pro rata liability notwithstanding that he has compromised with other stockholders, especially where the offer to compromise was made to all with notice that if not accepted the creditor would claim his full legal rights. Hall v. Klinck, 25 S. Car. 348, 60 Am. Rep. 505. A compromise decree making an offer of the terms of settlement to all alike who are liable on stock of an insolvent corporation does not release those who do not accept it from their liability on the stock. Hambleton v. Glenn, 72 Md. 351, 20 Atl. 115.

[28] Holmes v. Sherwood, 3 McCrary (U. S.) 405, 16 Fed. 725; Umsted v. Buskirk, 17 Ohio St. 113; Hodges v. Silver Hill Min. Co., 9 Ore. 200; Masters v. Rossie &c. Co., 2 Sandf. Ch. 301; N. Y. Code of Civil Procedure, §§ 1791-1794.

[29] Holmes v. Sherwood, 3 McCrary (U. S.) 405, 16 Fed. 725; Marsh v. Burroughs, 1 Woods (U. S.) 463, Fed Cas. No. 9112; Win-

holder and delinquent in making payments on his stock does not necessarily prevent him from recovering against other delinquent subscribers in a suit to enforce payment of a judgment obtained by him against the corporation. But he must contribute ratably with the other stockholders to the payment of the amount due him.[30] It has also been held that a part of the stockholders may, in a proper case, file a bill in equity upon their own account, making the corporation a party, to enforce the payment of unpaid balances of subscriptions, for the payment of corporate indebtedness, and for contribution, even before a creditor's bill has been filed.[31]

§ 209 (184). **Suits by assignees and receivers.**—In case the corporation has passed into the hands of a receiver or an assignee it is the duty of such receiver[32] or assignee[33] to collect the un-

cock v. Turpin, 96 Ill. 135; Stewart v. Lay, 45 Iowa 604; Millaudon v. New Orleans &c. R. Co., 3 Rob. (La.) 488; Matthews v. Albert, 24 Md. 527; Gray v. Coffin, 9 Cush. (Mass.) 192; Hadley v. Russell, 40 N. H. 109; Stover v. Flack, 30 N. Y. 64; Umsted v. Buskirk, 17 Ohio St. 113; Farrow v. Bivings, 13 Rich. Eq. (S. Car.) 25; Suttons' Case, 3 DeG. & Sm. 262. See also Putnam v. Misochi, 189 Mass. 421, 75 N. E. 956; See v. Heppenheimer, 69 N. J. Eq. 36, 61 Atl. 843. As to when the suit by the stockholder to enforce contribution in case of statutory liability must be in equity, and when the action may be at law, see Shurlow v. Lewis, 170 Mich. 493, 136 N. W. 484, 41 L. R. A. (N. S.) 975n, and cases cited in note. Brinham v. Wellersburg Coal Co., 47 Pa. St. 43, where it is said that the right to contribution in Pennsylvania is purely statutory.

[30] Wilson v. Kiesel, 9 Utah 397, 35 Pac. 488. See also Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797.

[31] Fiery v. Emmert, 36 Md. 464.

[32] Andrews v. Bacon, 38 Fed. 777; Chandler v. Brown, 77 Ill. 333; State v. Union Stock Yards State Bank, 103 Iowa 549, 70 N. W. 752, 72 N. W. 1076; Frank v. Morrison, 58 Md. 423; Dayton v. Borst, 31 N. Y. 435; note to Germantown &c. R. Co. v. Fitler, 60 Pa. 124, 100 Am. Dec. 551; Mean's Appeal, 85 Pa. St. 75. And see Dill v. Ebby, 27 Okla. 584, 112 Pac. 973, 46 L. R. A. (N. S.) 440 and note. Under the English Railway Companies Act of 1867, a receiver has no such power. Birmingham &c. R. Co., In re, L. R. 18 Ch. Div. 155. See also Hancock Nat. Bank v. Ellis, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. 232.

[33] Chamberlain v. Bromberg, 83 Ala. 576, 3 So. 434; Stewart v. Lay, 45 Iowa 604; Shockley v. Fisher, 75 Mo. 498; Phoenix &c. Co. v. Badger, 67 N. Y. 294; Clarke v. Thomas, 34

paid subscriptions necessary for the payment of the debts of the corporation, and the creditor's right to proceed directly against the delinquent shareholders is usually suspended during the time it remains in his hands.[34] A receiver represents the creditors as well as the shareholders and corporation, and may, as such representative and as an officer of the court, disaffirm illegal and fraudulent transfers of corporate property and recover its misapplied funds and securities,[35] although he cannot, ordinarily, enforce a subscription which the corporation could not have enforced at the time of his appointment.[36]

§ 210 (185). **Statutory liability of stockholders.**—In several of the states a corporation creditor may, upon the dissolution of a railroad corporation without payment of his debt, sue the stockholders individually and recover the whole debt, leaving the stockholder paying it to his action against the other stockholders for contribution.[37] Other states provide by statute that each

Ohio St. 46; Tobey v. Russell, 9 R. I. 58; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; note to Germantown &c. R. v. Fitler, 100 Am. Dec. 551, 556. An assignee in bankruptcy may sue by bill in equity to recover unpaid subscriptions. Sawyer v. Hoag, 17 Wall. (U. S.) 610, 621, 21 L. ed. 731; Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523; Payson v. Stoever, 2 Dill (U. S.) 427, Fed Cas. No. 10863. See also Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135.

[34] See Franklin v. Menown, 10 Mo. App. 570. But the creditors may compel the receiver to act for them in collecting unpaid subscriptions. Stark v. Burke, 9 La. Ann. 341; Rankine v. Elliott, 16 N. Y. 377; Atwood v. Rhode Island &c. Bank, 1 R. I. 376. A creditor who had knowledge that stock had been taken at an overvaluation may, however, be estopped from participating in the fund, or seeking enforcement of the liability. Davies v. Ball, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B, 750; Dupont v. Ball, (Del). 106 Atl. 39, 7 A. L. R. 955 and notes. But see Sherman v. Harley, 178 Cal. 584, 174 Pac. 901, 7 A. L. R. 950, and note on § 983.

[35] Davis v. Gray, 16 Wall. (U. S.) 203, 218, 21 L. ed. 477; Voorhees v Indianapolis &c. Co., 140 Ind. 220, 39 N. E. 738; Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Attorney-General v. Guardian &c. Co., 77 N. Y. 272; 1 Elliott's Gen. Pr. § 393.

[36] Cutting v. Damerel, 88 N. Y. 410. See also note in 46 L. R. A. (N. S.) 452.

[37] Under the Kansas Law governing private corporations stockholders are severally and not jointly liable to the corporation creditors, and each must be sued separately. Abbey v. W. B. Grimes Dry Goods

stockholder shall be liable for the debts of the corporation to the amount unpaid of the stock held or subscribed for by him until all the stock is paid in,[38] while some of the states add a personal liability on the part of the stockholders for the wages of certain of their employes, regardless of the fact that their stock may or may not be paid in full.[39] And similar provisions are frequently found in special charters.[40] The individual liability of members for the debt of a corporation is a departure from the established rules of law, and is founded solely upon grounds of public policy, depending entirely upon express provisions of the statute law; and such liability is to be construed reasonably but strictly, rather than liberally, and not extended beyond the limits to which it is plainly carried by such provisions of the statute.[41]

Co., 44 Kans. 415, 24 Pac. 426, 8 R. & Corp. L. J. 207. Where the directors of a corporation, acting in good faith, have borrowed money for the purposes of the corporation, the indebtedness against the corporation is created, the stockholders become personally liable to the lender of the money or the sureties who pay it, and it is not necessary to show that all the money was actually appropriated to the legitimate uses of the corporation. Borland v. Haven, 37 Fed. 394.

[38] The liability created by a statute similar to the present one in South Carolina, was held to be enforceable by an action at law against one stockholder individually. Hall v. Klinck, 25 S. Car. 348, 60 Am. Rep. 505.

[39] Holders of preferred stock in an insolvent corporation are subject to the statutory liability for its debts, equally with the common stockholders. Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743.

[40] A provision in an act of incorporation, that stockholders shall be individually liable "to the extent of double the amount of the stock subscribed for or held by them," renders them liable to double the amount of their stock, whether paid up or not. Dreisbach v. Price, 133 Pa. 560, 19 Atl. 569, 26 Wkly. Notes Cas. 61. And is is held that the individual liability of a stockholder under the terms of a charter is not extinguished by the expiration of the charter. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626.

[41] Libby v. Toby, 82 Maine 397, 19 Atl. 904, where the plaintiff sought to enforce against a stockholder, a judgment recovered against the corporation under the Maine statute; Chamberlin v. Huguenot &c. Co., 118 Mass. 532; Salt Lake City Nat. Bank v. Hendrickson, 40 N. J. L. 52; Chase v. Lord, 77 N. Y. 1; O'Reilly v. Bard, 105 Pa. St. 569; Windham &c. Inst. v. Sprague, 43 Vt. 502; note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 834. "The individual liability of stockholders in a corporation for the payment of its debts is always a crea-

Accordingly it is held that such liability for debts cannot be enforced to pay damages recovered against the corporation in an action in tort.[42]

§ 211 (186). Defenses to actions to enforce statutory liability. —In suits to enforce such liability, certain defenses are open to the stockholder that would not be allowed him in an equitable suit to enforce payment of his subscription to the corporation. Thus he may show that the debt for which the suit is brought does not belong to the particular class for which the stockholders are made liable,[43] and it is held, in general, that statutes fixing a personal liability upon the stockholders for debts due to servants or laborers are enacted for the benefit of that "class whose members usually look to the reward of a day's labor or service

tion of statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation and provide for the manner of its enforcement." Pollard v. Bailey, 20 Wallace (U. S.) 520, 22 L. ed. 376; Terry v. Little, 101 U. S. 216, 25 L. ed. 864; Russell v. Pacific Co., 113 Cal. 258, 45 Pac, 323, 34 L. R. A. 747n. It is held that a statute attempting to repeal and take away this statutory liability and right is unconstitutional if retroactive and applied as against creditors who made their contracts and acquired their rights, while the defendant was a stockholder, before the passage of the repealing statute. Harrison v. Remington &c. Co., 140 Fed. 385. And a statute has been held unconstitutional where it atempts to create a double liability as against those who became stockholders before its passage. Yoncalla State Bank v. Gemmill, 134 Minn. 344, 159 N. W. 798, L. R. A. 1917A, 1223.

[42] Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. ed. 1038; Stanton v. Wilkeson, 8 Ben. (U. S.) 357, Fed. Cas. No. 13299; Zimmer v. Schleehauf, 115 Mass. 52; Bohn v. Brown, 33 Mich. 257, 263; Cable v. McCune, 26 Mo. 371, 72 Am. Dec. 214; Heacock v. Sherman, 14 Wend. (N. Y.) 58; note to Prince v. Lynch, 99 Am. Dec. 427, 435. A stockholder of a railroad company is not personally liable for the negligence of the officers, agents, or employes of the company in the operation of its road. Atchison &c. R. Co. v. Cochran, 43 Kans. 225, 23 Pac. 151, 7 L. R. A. 414, 19 Am. St. 129, 41 Am. & Eng. R. Cas. 48.

[43] Wilson v. Stockholders, 43 Pa. St. 424; Larrabee v. Baldwin, 35 Cal. 155; Conant v. Van Schaick, 24 Barb. (N. Y.) 87. One who became a stockholder after the debt was incurred by the corporation is liable under the statute like any other stockholder. Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743.

for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence.[44] Consequently, a civil engineer,[45] or his assistant,[46] or a superintendent,[47] or a general manager,[48] will not be entitled to enforce such liability for his own benefit, where it is confined to debts due "laborers and servants." But a master mechanic and superintendent of works has been held to be a "servant and laborer" under a similar statute applying to manufacturing companies.[49] And a superintendent of construction, who acted as foreman of a gang of one hundred and fifty men engaged in digging trenches and laying gaspipes, and whose duties required him to be with the men while at work and occasionally to do some physical labor because of a scarcity of hands, was held a "laborer" within the meaning of a mechanic's lien law.[50] The stockholder may also show in defense to such a suit that the corporate creditor by express contract made at the time the debt was incurred waived his right to resort to the stockholders for payment in whole or in part, and it is settled in England that he may show that the contract contained a stipulation by the corporation for the exemption of its members from the liability imposed upon them by statute in the event of corporate insolvency.[51] So he may show that he has been separately released

[44] Wakefield v. Fargo, 90 N. Y. 213, 217, overruling several earlier cases; Adams v. Goodrich, 55 Ga. 233. And see Harrod v. Hamer, 32 Wis. 162; note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 842.

[45] Pennsylvania &c. R Co. v. Lueffer, 84 Pa. St. 168, 24 Am. Rep. 189; Ericsson v. Brown, 38 Barb. (N. Y.) 390. Contra, Conant v. Van Schaick, 24 Barb. (N. Y.) 87; Williamson v. Wadsworth, 49 Barb. (N. Y.) 294.

[46] Brockway v. Innes, 39 Mich. 47, 33 Am. Rep. 348.

[47] Kincaid v. Dwinelle, 59 N. Y. 548. And see Gurney v. Atlantic, &c. R. Co., 58 N. Y. 358; Gordon v. Jennings, L. R. 9 Q. B. Div. 45. But compare Sleeper v Goodwin, 67 Wis. 577, 31 N. W. 335.

[48] Wakefield v. Fargo, 90 N. Y. 213; Hill v. Spencer, 61 N. Y. 274.

[49] Sleeper v. Goodwin, 67 Wis. 577, 31 N. W. 335.

[50] Pendergast v. Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849.

[51] Such a contract is valid. Robinson v. Bidwell, 22 Cal. 379; Basshor v. Forbes, 36 Md. 154; Brown v. Eastern State Co., 134 Mass. 590, where the waiver was oral; Hess v. Werts, 4 Serg. & R. (Pa.) 356; State Fire Ins. Co., In re, 1 Hem. & M. 457, 1 DeG., F. & J. 634. But the exemption must be clearly

from the statutory liability,[52] or that he has voluntarily paid corporate debts to the full amount of such liability.[53] He may also, in some jurisdictions, set off a debt or judgment due him from the corporation against a personal action brought by an individual creditor, where the statute provides for such suits,[54] al-

proved. Skinner v. Dayton, 19 John. (N. Y.) 513, 537, 10 Am. Dec. 286; Athenaeum &c. Society, Re, 3 DeG. & J. 660. A stipulation against holding stockholders liable has been held to refer to the statutory liability and not to the subscription liability. Preston v. Cincinnati &c. R. Co., 36 Fed. 54.

[52] Where the stockholders are held to be severally and not jointly liable under the statute, one may be released without releasing the others. Bank &c. v. Ibbotson, 5 Hill (N. Y.) 461. See also Herries v. Platt, 21 Hun (N. Y.) 132; Borland v. Haven, 37 Fed. 394; Prince v. Lynch, 38 Cal. 528, 99 Am. Dec. 427n.

[53] Mathez v. Neidig, 72 N. Y. 100; San Jose Sav. Bank v. Pharis, 58 Cal. 380; Boyd v. Hall, 56 Ga. 563. The payments must be bona fide. Thebus v. Smiley, 110 Ill. 316; Manville v. Karst, 16 Fed. 173. And must be made before the suit in which they are relied upon as a defense was commenced. Jones v. Wiltberger, 42 Ga. 575. But see Richards v. Brice, 15 Daly 144, 3 N. Y. S. 41. And his exemption from liability will be measured by the sum actually paid on corporate debts and judgments, and not by the face of the claims paid off or purchased by him. Kunkelman v. Rentchler, 15 Brad. (Ill.) 271; Holland v. Heyman, 60 Ga. 174; Bulkley v. Whitcomb, 49 Hun 290, 1 N. Y. S. 748. The fact that suits brought by other stockholders are pending is no defense, so long as they have not been brought to judgment. Ingalls v. Cole, 47 Maine 530, 541; Grose v. Hilt, 36 Maine 22, denies the doctrine of the text.

[54] Boyd v. Hall, 56 Ga. 563; Jerman v. Benton, 79 Mo. 148; Wheeler v. Millar, 90 N. Y. 353, 362; Christensen v. Colby, 43 Hun (N. Y.) 362. See also note in 41 L. R. A. (N. S.) 981. The rule in most jurisdictions is different when the suit is on behalf of the corporation to reach unpaid subscriptions. Everett v. Foster, 223 Mass. 553, 112 N. E. 239; Utica Fire Alarm Tel. Co. v. Waggoner &c. Co., 166 Mich. 618, 132 N. W. 502; Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797, and note 826; note in L. R. A. 1918E, 243, et seq. But see Niler v. Olszak, 87 Ohio St. 229, 100 N. E. 820, L. R. A. 1918E, 238. Judgments purchased by him can only be set off to the extent of the amount that was actually paid for them. Bulkley v. Whitcomb, 49 Hun 290, 1 N. Y. S. 748. In action by corporate creditors to enforce the statutory liability of a stockholder, the stockholder must have held his claim against the corporation at the time the execution against the corporation was returned nulla bona, in or-

though, as we have seen, a different rule applies in case of an ordinary suit to reach unpaid subscriptions for the creditors. Of course he may set up in defense any proper matters tending to show that he is not a stockholder and that a stockholder's liabilities do not attach to him.[55] But it is no defense that the creditor purchased his claim against the corporation at a discount after its insolvency.[56]

§ 212 (187). **Who may institute action to enforce statutory liability.**—An action to enforce the statutory liability can only be maintained, as a rule at least, by the creditors themselves for their own benefit.[57] Thus, it has been held that neither the corporation itself,[58] nor its assignee,[59] nor a receiver can enforce it.[60] Herein lies another distinction between the statutory liability of a stockholder and his ordinary liability for unpaid subscriptions.

§ 213 (188). **How statutory liability is enforced—Judgment and execution against the corporation.**—In most of the states,

der to use it as a defense. Coquard v. Prendergast, 35 Mo. App. 237.

[55] 8 Thomp. Corp. §§ 5146, 5176 (what is a stockholder).

[56] Coquard v. Prendergast, 35 Mo. App. 237. An assignee of a judgment against a corporation, in order to maintain an action upon it against the individual stockholders, must show that he paid a valuable consideration for it. Wilson v. St. Louis &c. R. Co., 120 Mo. 45, 25 S. W. 527, 759.

[57] Hicks v. Burns, 38 N. H. 141; Farnsworth v. Wood, 91 N. Y. 308; note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 847.

[58] Umsted v. Buskirk, 17 Ohio St. 113; Liberty &c. Assn. v. Watkins, 70 Mo. 13.

[59] Wright v. McCormack, 17 Ohio St. 86, 95; Dutcher v. Marine Nat. Bank, 12 Blatch. (U. S.) 435, Fed. Cas. No. 4203; Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580, 36 L. R. A. 645.

[60] Billings v. Robinson, 94 N. Y. 415; Jacobson v. Allen, 20 Blatch. (U. S.) 525, 12 Fed. 454; Arenz v. Weir, 89 Ill. 25. See also Steinke v. Loofbourow, 17 Utah 252, 54 Pac. 120; 4 Thomp. Corp. (2d ed.), § 5090. Unless of course, the receiver is vested with that right by statute. Walker v. Crain, 17 Barb. (N. Y.) 119; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788; 30 L. ed. 864; Kirtley v. Holmes, 107 Fed. 1, 52 L. R. A. 738, holding that a receiver might enforce the statutory liability.

special provision is made for enforcing this liability,[61] but it is the rule in many jurisdictions that, even where not expressly required by statute, an action for this cause must be preceded by a judgment and an execution returned unsatisfied.[62] In some other jurisdictions, however, it is held, usually because the particular statute so provides or is so construed, that the statutory liability of stockholders is primary and may be enforced, without first obtaining a judgment against the corporation.[63] Such a judgment is generally held conclusive as to the amount and validity

[61] Note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 854. The statutory remedy must be followed and is generally held exclusive. 4 Thomp. Corp. (2d ed.), §§ 5092, 5093. If no remedy is provided and the statute simply affirms the liability of stockholders for unpaid subscriptions, the usual remedy in equity is the proper one. But if a new liability is imposed upon the stockholders severally, the creditor's remedy may either be at law or in equity, according to the circumstances of the case, and the nature of the relief that should be granted. For authorities upon these propositions, and upon the subject of parties in such cases, see the exhaustive note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 855, 858; also 4 Thomp. Corp. (2d ed.), § 5091; and 8 Thomp. Corp. § 5076.

[62] Lane v. Harris, 16 Ga. 217; Bayliss v. Swift, 40 Iowa 648; Drinkwater v. Portland &c. R. Co., 18 Maine 35; Wright v. McCormack, 17 Ohio St. 86; Mean's Appeal, 85 Pa. St. 75; note to Prince v. Lynch, 99 Am. Dec. 427, 434; 4 Thomp. Corp. (2d ed.), §§ 4952, 5123, 5124. See also Globe Pub. Co. v. State Bank, 41 Nebr. 175, 59 N. W. 683, 27 L. R. A. 854, 10 Lewis Am. R. & Corp. 589; Swan Land &c. Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. ed. 577.

[63] Spence v. Shapard, 57 Ala. 598; Davidson v. Rankin, 34 Cal. 503; Queenan v. Palmer, 117 Ill. 619, 629, 7 N. E. 613; Todhunter v. Randall, 29 Ind. 275; McMahon v. Macy, 51 N. Y. 155, 160; Sleeper v. Goodwin, 67 Wis. 577, 586, 31 N. W. 335. Compare Marshall v. Harris, 55 Iowa 182, 7 N. W. 509, with the Iowa case cited in last note, and Harper v. Union &c. Co., 100 Ill. 225, with Illinois case herein cited. See also 4 Thomp. Corp. (2d ed.), §§ 4957, 4959, and 8 Thomp. Corp. §§ 4957, 4958. See also as to when prior proceedings against the corporation are excused as useless. Fourth Nat. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. ed. 825; Paine v. Stewart, 33 Conn. 516; State Sav. Assn. v. Kellogg, 52 Mo. 583; Shellington v. Howland, 53 N. Y. 371; Hodges v. Silver &c. Co., 9 Ore. 200.

of the creditor's claim in the same manner as when the suit is to enforce payment of balances due on subscriptions.[64]

§ 214 (189). **Priority among creditors—Forum—Contribution.**—A judgment creditor of an insolvent corporation who first moves to charge a stockholder on his liability under the statute, ordinarily acquires the priority of right to recover against such stockholder, with which a creditor subsequently moving cannot rightfully interfere.[65] The courts of another state in which a part of the stockholders may reside, will generally enforce a liability imposed by statute or charter, for contract debts of the company,[66] though they will not enforce penalties prescribed for failures to obey state regulations.[67] This liability may be enforced against the estate of a deceased shareholder,[68] and it has

[64] See also 4 Thomp. Corp. (2d ed.), § 4970, et seq., note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 858. In Ohio, suits against the stockholder directly are permitted, and it is held that he can interpose only such defenses to them as are available to the corporation. Railroad Co. v. Smith, 48 Ohio St. 219, 31 N. E. 743.

[65] Lowry v. Parsons, 52 Ga. 356; Thebus v. Smiley, 110 Ill. 316; Wells v. Robb, 43 Kans. 201, 23 Pac. 148; Cole v. Butler, 43 Maine 401. But see Chicago v. Hall, 103 Ill. 342; State Sav. Assn. v. Kellogg, 63 Mo. 540.

[66] Flash v. Conn, 16 Fla. 428, 26 Am. Rep. 721, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. ed. 966; Queenan v. Palmer, 117 Ill. 619, 7 N. E. 613; Howell v. Manglesdorf, 33 Kans. 194, 199, 5 Pac. 759; Manville v. Edgar, 8 Mo. App. 324; Corning v. McCullough, 1 N. Y. 47; Lowry v. Inman, 46 N. Y. 119, 127; Aldrich v. Anchor Coal &c. Co., 24 Ore. 32, 32 Pac. 756, 41 Am. St. 831; Aultman's Appeal, 98 Pa. St. 505; Sackett's Harbor Bank v. Blake, 3 Rich. Eq. (S. Car.) 225; Woods v. Wicks, 7 Lea (Tenn.) 40. But see where special remedy is provided, Fowler v. Lamson, 146 Ill. 472, 34 N. E. 932, 37 Am. St. 163, and note.

[67] Derrickson v. Smith, 27 N. J. L. 166; Sayles v. Brown, 40 Fed. 8; Lowry v. Inman, 46 N. Y. 119. See generally as to enforcement of statutory liability, conflict of laws and what law governs in such cases, note in 37 Am. St. 168-174; and note in 93 Am. St. 393, 394; also Blair v. Newbegin, 65 Ohio St. 425, 62 N. E. 1040, 58 L. R. A. 644, and note.

[68] Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. ed. 864; Manville v. Edgar, 8 Mo. App. 324; Chase v. Lord, 77 N. Y. 1. See for additional cases to this effect and also as to when it may be enforced against heirs, and procedure for enforcement, note in Ann. Cas. 1913A, 384.

been held that this may be done without a reviver of the judgment against the corporation.[69] Stockholders are usually entitled, in equity, to contribution from other shareholders, as in the case of suits for unpaid subscriptions.[70]

§ 215 (190). **When stockholders are liable as partners.**—Stockholders may generally be held liable as partners for the payment of debts incurred by the company, if it has proceeded to do business without taking the requisite steps to become legally incorporated.[71] And where no such business undertaken is authorized by the act under which incorporated is attempted, a partnership liability will be incurred by all who become members,[72] as it also is, according to some authorities, where a corporation is formed

[69] Douglass v. Loftus, 85 Kans. 720, 119 Pac. 74, Ann. Cas. 1913A, 378. See also Atlantic Trust Co. v. Dana, 128 Fed. 209.

[70] 1 Thomp. Corp. (2d ed.), § 5231, et seq; note to Thompson v. Reno Sav. Bank, 3 Am. St. 797, 870. But see 8 Thomp. Corp. §§ 5232-5328.

[71] Western &c. T. Co. v. Union Pacific R. Co., 3 Fed. 721; Smith v. Colorado &c. Co., 14 Fed. 399; Wechselberg v. Flour City Nat. Bank, 64 Fed. 90; Garnett v. Richardson, 35 Ark. 144; Harris v. McGregor, 29 Cal. 124; Meinhard v. Bedingfield Mercantile Co., 4 Ga. App. 176, 61 S. E. 34; Pettis v. Atkins, 60 Ill. 454; Bigelow v. Gregory, 73 Ill. 197; Coleman v. Coleman, 78 Ind. 344; Kaiser v. Lawrence Sav. Bank, 56 Iowa 104, 8 N. W. 772, 41 Am. Rep. 85; Walton v. Oliver, 49 Kans. 107, 30 Pac. 172, 33 Am. St. 355; Field v. Cooks, 16 La. Ann. 153; Hurt v. Salisbury, 55 Mo. 310; Martin v. Fewell, 79 Mo. 401; Unity Ins. Co. v. Cram, 43 N. H. 636; Fuller v. Rowe, 57 N. Y. 23; Midill v. Collier, 16 Ohio St. 599, 613, 47 Am. Dec. 387; note in L. R. A. 1916C, 197, 198. But see Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Humphrey v. Mooney, 5 Colo. 282; Planters' &c Bank v. Padgett, 69 Ga. 159; Merchants' &c. Bank v. Stone, 38 Mich. 779; Merriman v. Magiveny, 12 Heisk. (Tenn.) 494.

[72] 4 Thomp. Corp. (2d ed.), § 4747 et seq; Vredenburg v. Behan, 33 La. Ann. 627. But see Mandeville v. Courtwright, 126 Fed. 1007. So where the law under which incorporation is attempted is unconstitutional. Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102. See also Heaston v. Cincinnati &c. R. Co., 16 Ind. 275, 278, 79 Am. Dec. 430; Kennedy v. McLellan, 76 Mich. 598, 43 N. W. 638; Williams v. Bank, 7 Wend. (N. Y.) 541; Chenango Bridge Co. v. Paige, 83 N. Y. 178, 190, 38 Am. Rep. 407.

to do business only outside of the state creating it, the formation of such a corporation being held to be a fraud upon the law.[73] But the weight of authority seems to be opposed to this latter rule.[74] What omissions in the articles will render the incorporation so incomplete as to fix a partnership liability upon the members may depend largely upon the language of the statute under which incorporation is attempted; for where there is a valid law authorizing the incorporation a failure to observe immaterial provisions,[75] or to perform acts required after the in-

[73] Land Grant R. &c. Co. v. Coffey Co., 6 Kans. 245, and opinion of Attorney-General of Texas (1887), 2 R. & Corp. L. J. 433, where the companies were only authorized to transact business outside the sovereignty creating them. Hill v. Beach, 12 N. J. Eq. 31; Kruse v. Dusenbury, 19 Wkly. Dig. (N. Y. C. P.) 201; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342, where regularly organized corporations had places of business only outside of the states by which they were created. See also Duke v. Taylor, 37 Fla. 64, 19 So. 172, 31 L. R. A. 484, 53 Am. St. 232; Montgomery v. Forbes, 148 Mass. 249, 19 N. E. 342; State v. Park &c. Co., 58 Minn. 330, 59 N. W. 1048, 49 Am. St. 516; Coler v. Tacoma, 64 N. J. 117, 53 Atl. 680. See also Wonderly v. Booth, 36 N. J. L. 250; note in L. R. A. 1916C, 217.

[74] Canada Southern R. Co., v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. ed. 1020; Oregonian R. Co. v. Oregon R. &c. Co., 23 Fed. 232; New York &c. R. Co., In re, 35 Hun (N. Y.) 220; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Pennsylvania Co. v. Sloan, 1 Bradw. (Ill.) 364; 4 Thomp. Corp. (2d ed.), § 4749. But see Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679; Empire Mills v. Alston Grocery Co., 4 Willson Civ. Cas. Ct. App. (Tex.) 221, 15 S. W. 200, 12 L. R. A. 366, and note; Second Nat. Bank v. Hall, 35 Ohio St. 158, where the stockholders escaped a personal liability by organizing under the laws of an adjoining state. Bateman v. Service, L. R. 6 App. Cases 386. As to tramp corporations, generally, see note in L. R. A. 1917E, 893.

[75] McClinch v. Sturgis, 72 Maine 288, where notice of the meeting to organize was not sent to all the members. Judah v. American &c. Co., 4 Ind. 333, where the subscriptions were taken and notice of the stockholders' meeting given in a different manner from that provided in the act. Stout v. Zulick, 46 N. J. L. 599, 7 Atl. 362, where an immaterial part of the certificate of acknowledgment was omitted. Russell v. McLellan, 14 Pick. (Mass.) 63; Holmes v. Gilliland, 41 Barb. (N. Y.) 568, where no notice was given to the community by publication. Granby &c. Co. v. Richards 95 Mo. 106, 8 S. W. 246, where the

corporation is effected will not, as a rule, vitiate the organization,[76] and different preliminary acts are made essential in different statutes. Nor is it true in every case that the failure to fully comply with the statute will make the stockholders liable as partners. The doctrine of estoppel should not be overlooked. In accordance with that doctrine it is fairly well settled that where there is a valid law providing for incorporation and an attempt has been made in good faith to incorporate under such law for the purposes therein specified, and to carry on the authorized business as a corporation, one who deals with it as such is estopped from questioning the corporate existence and cannot hold the incorporators liable as partners, notwithstanding the fact that the statutory formalities may not have been fully complied with.[78] A stockholder, if held to the liability of a partner, will,

articles were not filed with the county clerk as required by law. For omissions held material, see note 71 supra.

[76] Trowbridge v. Scudder, 11 Cush. (Mass.) 83, where the principal business for which the corporation was organized was never begun. Lagan v. Iowa &c. Construction Co., 49 Iowa 317, where the company had been guilty of ultra vires and fraudulent acts. First Nat. Bank v. Davies, 43 Iowa 424, where the articles were to be filed within ninety days. But in the recent case of Cincinnati Cooperage Co. v. Bate, 96 Ky. 356, 26 S. W. 538, 49 Am. St. 300, 10 Lewis' Am. R. & Corp. 653, it is held that changing the name of a corporation without complying with the statute is to destroy the identity of the corporation and amounts to a virtual abandonment of it, so as to render the stockholder liable as partner. The soundness of this decision, however, seems to us to be doubtful, and such, we understand, is the opinion of Mr. Lewis as indicated in the note in 10 Lewis' Am. R. & Corp. § 665 et seq.

[78] Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050; Gartside Coal Co. v. Maxwell, 22 Fed. 197; Snider's Sons Co. v. Troy, 91 Ala. 224, 8 So. 754, 11 L. R. A. 515, 24 Am. St. 887; Humphreys v. Mooney, 5 Colo. 282; Duke v. Taylor, 37 Fla. 64, 19 So. 172, 175, 31 L. R. A. 484, 53 Am. St. 232, 10 Lewis' Am. R. & Corp. 589; Bushnell v. Consolidated &c. Co., 138 Ill. 67, 27 N. E. 596; Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415; Baker v. Neff, 73 Ind. 68; Williamson v. Kokomo &c. Co., 89 Ind. 389; Crowder v. Sullivan, 128 Ind. 486, 28 N. E. 94; Walton v. Riley, 85 Ky. 413, 3 S. W. 605; Laflin &c. Co. v. Sinsheimer, 46 Md. 315, 24 Am. Rep. 522; First Nat. Bank v. Almy, 117 Mass. 476; Finnegan v. Noerenberg, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. 552; Globe Pub. Co. v. State Bank, 41

ordinarily, be bound only as a partner for the debts contracted while he was a member of the company.[79] A stockholder does not become liable as a partner merely because he falsely represents that the corporation is solvent,[80] and his promise to pay the corporate debts is a promise to answer for the debts of another within the statute of frauds.[81] Where persons purchase a railroad at execution sale, it has been held that they acquire none of the special privileges of individual stockholders in the old corporation, and, in such a case, if they continue to operate it without forming a new corporation, they will incur partnership liabilities on account thereof.[82]

Nebr. 175, 59 N. W. 683, 27 L. R. A. 854; Larned v. Beal, 65 N. H. 184, 23 Atl. 149; Vanneman v. Young, 52 N. J. L. 403, 20 Atl. 53, 3 Lewis' Am. R. & Corp. 660, and note; Second Nat. Bank v. Hall, 35 Ohio St. 158; Swofford Bros. Dry Goods Co. v. Owen, 37 Okla. 616, 133 Pac. 193; Rutherford v. Hill, 22 Ore. 218, 29 Pac. 546, 17 L. R. A. 549n, 29 Am. St. 596n; Allegheny Nat. Bank v. Bailey, 147 Pa. St. 111, 23 Atl. 439; American Salt Co. v. Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. 743.

[79] Fuller v. Rowe, 57 N. Y. 23. But where he becomes a member by transfer of another's interest, he may be held to have assumed his grantor's liability for precedent debts. Taylor v. Ifill, 1 N. R. 566, 8 L. T. R. (N. S.) 148. It has been held, however, that one who becomes a member after the attempted organization, and takes no part in the management of the company is not liable for its debts because of imperfect incorporation. Stafford Nat. Bank v. Palmer, 47 Conn. 443.

[80] Searight v. Payne, 2 Tenn. Ch. 175. But he may render himself liable in damages for false representations.

[81] Trustees &c. v. Flint, 13 Metc. (Mass.) 539.

[82] Chaffe v. Ludeling, 27 La. Ann. 607. As to when a railroad company becomes liable as a partner or the like for contracts or torts of another company in which it owns a majority of stock or otherwise controls, see Stone v. Cleveland &c. R. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770 (holding it not liable in the particular case), and note.

CHAPTER X.

BY-LAWS, RULES AND REGULATIONS.

Sec.
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§ 220 (191). **Power to make by-laws.**—The law implies from the act of creating a corporation a grant of power to make all necessary by-laws, or private statutes for the government of itself and its members, officers and agents.[1] This power is, however, in most cases, specially granted to railroad companies and other corporations either by a provision of the company's charter or by general statute.[2] In many cases the power is granted to make

[1] Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Martin v. Nashville &c. Assn., 2 Cold. (Tenn.) 418; 1 Thomp. Corp. (2d ed.), § 965.

[2] They may make all by-laws and regulations for their own government necessary and consistent with the constitution and laws of the state and with their own charters. 1 Thomp. Corp. (2d ed.), § 965.

by-laws for certain specified purposes, and where this is so, legislation upon other subjects is usually considered as prohibited by implication.[3] The corporation cannot pass any by-law inconsistent with its charter,[4] nor, as a rule, any relating to matters outside the objects for which it was incorporated, unless power to do so is expressly conferred.[5] The usual subjects with reference to which corporations ordinarily have power to make by-laws are such as relate to the time and manner of calling and conducting meetings of the stockholders, or of the directors, the number of each required to form a quorum, the method of voting proxies, the number of shares entitling a member to one or

[3] Child v. Hudson Bay Co., 2 Peere Wms. 207; State v. Ferguson, 33 N. H. 424, 430. See also McCullough v. Annapolis R. Co., 4 Gill (Md.) 58; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33n; State v. Mayor &c., 33 N. J. L. 57; Ireland v. Globe Milling &c. Co., 19 R. I. 180, 61 Am. St. 756; Rex v. Spencer, 3 Burr. 1827. But this, of course, depends upon the charter or particular statute and its proper construction, and the mere fact that power is expressly given to make rules or by-laws on one subject does not necessarily imply a prohibition as to all other subjects, especially in the case of such a corporation as a railroad company with its varied and complex relations, interests and duties. For instance, a statute might expressly authorize it to make rules as a carrier governing its relation with shippers and thus would not prevent its making rules as to its employes or the like not affecting shippers or its duties as a carrier.

[4] Kennebec &c. R. Co. v. Kendall, 31 Maine 470, where it was undertaken to impose a personal liability for calls not imposed by the charter. Carr v. St. Louis, 9 Mo. 191, where the corporation undertook to increase the salaries of the officers beyond what the charter allowed. McCullough v. Annapolis R. Co., 4 Gill (Md.) 58 where the right of an officer to vote was restricted to a casting vote in case of a tie. Clark v. Wild, 85 Vt. 212, 81 Atl. 536, Ann. Cas. 1914C, 661, where many additional authorities are cited both in the opinion and in the note. See also 1 Thomp. Corp. (1st ed.), § 1011; Steiner v. Steiner &c. Co., 120 Ala. 128, 26 So. 494; Durkee v. People, 155 Ill. 354, 46 Am. St. 340, 40 N. E. 626; People v. Chicago &c. Exchange, 170 Ill. 556, 39 L. R. A. 373, 62 Am. St. 404, 48 N. E. 1062; Presbyterian &c. Fund v. Allen, 106 Ind. 593, 7 N. E. 317; American Legion of Honor v. Perry, 140 Mass. 580, 5 N. E. 634; Kearney v. Andrews, 10 N. J. Eq. 70.

[5] 1 Thomp. Corp. (2nd ed.) §§ 997, 998.

more votes, the mode of enforcing forfeitures of stock (where no mode is prescribed by statute), the number of directors and other officers, and the mode of choosing and compensating them, the transfer of stock, and the management and disposition of the corporate property.[6]

§ 221 (192). **Who are affected by corporate by-laws.**—Such by-laws are obligatory only upon the corporate body, its members and agents, and do not, as a rule, affect the general public.[7] Herein, as we shall hereafter show, they differ from rules and regulations such as those promulgated by common carriers to govern their dealings with the public. They are not evidence for the corporation against strangers who deal with it unless such by-laws are brought home to their knowledge and assented to by them.[8] But the members of the company are affected by all binding statutes of the corporation from the time of their enactment, without any formal notice of their existence.[9]

[6] Reasonable rules and regulations may, of course, be made in case of a railroad company within proper limits in regard to the conduct of the business, and relations between the company and its employes and shippers and travelers.

[7] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Wait v. Smith, 92 Ill. 385; Walker v. Wilmington &c. R. Co., 26 S. Car. 80, 1 S. E. 366. They bind only members and officers or agents. Bank of Wilmington v. Wollaston, 3 Harr. (Del.) 90; Worcester v. Essex Bridges Co., 7 Gray (Mass.) 457; Palmyra v. Morton, 25 Mo. 593; Rathburn v. Snow, 123 N. Y. 343, 25 N. E. 379, 10 L. R. A. 355; Mechanics' Bank v. Smith, 19 Johns. (N. Y.) 115; Susquehanna Ins. Co. v. Perrine, 7 Watts & S. (Pa.) 348. But see Bocock v. Alleghany &c. Co., 82 Va. 913, 1 S. E. 325, 3 Am. Rep. 128. See also Moyer v. East Shore &c. Co., 41 S. Car. 300, 19 S. E. 651, 25 L. R. A. 48, 44 Am. St. 709, and note.

[8] Smith v. North Carolina R. Co., 68 N. Car. 107; Moyer v. East Shore &c. Co., 41 S. Car. 300, 19 S. E. 651, 44 Am. St. 709, L. R. A. 48, and note. See also 1 Thomp. Corp. (2d ed.), § 1056.

[9] Arapahoe &c. Co. v. Stevens, 13 Colo. 534, 22 Pac. 823; Bauer v. Samson Lodge, 102 Ind. 262, 1 N. E. 571; Hunter v. Sun Mutual &c. Co., 26 La. Ann. 13; Frank v. Morrison, 58 Md. 423; Buffalo v. Webster, 10 Wend. (N. Y.) 99; Woodfin v. Asheville &c. Ins Co., 6 Jones Law (N. Car.) 558; Susquehanna &c. Co. v. Perrine, 7 Watts & S. (Pa.) 348.

§ 222 (193). **Limits of power to make by-laws—Reasonableness a question for the court.**—The power of the corporation to make by-laws is always limited by the requirement that they must not be inconsistent with the constitution and valid statutes of the United States or of the state in which it is established nor with the general policy and fundamental principles of common law as it is therein accepted.[10] Thus, it was held in a recent case that a by-law permitting bondholders to vote for directors was in conflict with the constitution of Illinois and the general policy of the state and therefore void.[11] The rule is often stated to be that by-laws must be reasonable.[12] and not opposed to common right.[13] The question as to the reasonableness of a by-law is for the court, in most jurisdictions, and it is held that the jury cannot hear evidence as to its effects offered in proof of the claim that it is unreasonable.[14] A by-law can never be valid

[10] Bullard v. Bank, 18 Wall. (U. S.) 589, 21 L. ed. 923; Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447; People v. Chicago &c. Exchange, 170 Ill. 556, 48 N. E. 950, 62 Am. St. 404; Sayre v. Louisville &c. Assn., 1 Duv. (Ky.) 143, 85 Am. Dec. 613n; Kennebec &c. R. Co. v. Kendall, 31 Maine 470; State v. Curtis, 9 Nev. 325; State v. Cincinnati, 23 Ohio St. 445; Price v. Supreme Lodge, 68 Tex. 361, 4 S. W. 633; 1 Thomp. Corp. (2d ed.), § 995.

[11] Durkee v. People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. 340. See also Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237.

[12] Chandler v. Northern Cross R. Co., 18 Ill. 190; American Livestock Co. v. Chicago &c. Exchange, 143 Ill. 210, 32 N. E. 274, 36 Am. St. 385; Kennebec &c. R. Co. v. Kendall, 31 Maine 370; Kent v. Quicksilver Min. Co., 78 N. Y. 159; Williams v. Great Western R. Co., 10 Exch. 15.

[13] Hayden v. Noyes, 5 Conn. 391. But see Goddard v. Merchants' Exchange, 9 Mo. App. 290. By-laws which are vexatious, unequal, oppressive and manifestly detrimental to the interests of the corporation are void. Gosling v. Veley, 12 Q. B. 328; Chicago v. Rumpff, 45 Ill. 90, 92 Am. Dec. 196; People v. Medical Society, 24 Barb. (N. Y.) 570.

[14] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420; Commonwealth v. Worcester, 3 Pick. (Mass.) 462; Merz v. Missouri Pac. R. Co., 14 Mo. App. 459; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; People v. Throop, 12 Wend. (N. Y.) 182; 1 Elliott's Gen. Pr. § 436; 1 Thomp. Corp. (2d ed.), §§ 999, 1001. Its unreasonableness must be demonstrated. Hibernia &c. Co. v. Harrison, 93 Pa. St. 264; Paxon v. Sweet, 13 N. J. L. (1 Green) 196. But see Day v. Owen, 5 Mich. 520, holding that the reasonableness of a by-law should be left to the jury under proper instruc-

where it impairs the obligation of a contract,[15] nor where it amounts to a retrospective or ex post facto rule,[16] nor where it deprives the holder of any of his vested property rights.[17] The right given by statute to vote by proxy is a substantial right and cannot be taken away, or even materially abridged, by any corporate by-laws.[18] Neither will a by-law be sustained if, under the guise of regulating the mode of transfer, it unreasonably restricts the power to transfer shares;[19] or if it forbids the member to

tions from the court. See also as to railroad regulations for jury Chicago &c. R. Co. v. McLellan, 84 Ill. 109; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393, 80 Am. Dec. 215; Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 10 Am. St. 517. Post, § 233. See generally Wuerfler v. Trustees &c., 116 Wis. 19, 92 N. W. 433, 96 Am. St. 94; note in 43 Am. St. 147, 153; Carney v. New York &c. Ins. Co., 162 N. Y. 453, 57 N. E. 78, 49 L. R. A. 471, 76 Am. St. 347.

[15] Such a by-law would be contrary to the constitution of the United States. U. S. Const. art. 1, § 10; Kennebec &c. R. Co. v. Kendall, 31 Maine 470; Northford &c. Assn. v. Perkins, 93 Maine 235, 44 Atl. 893, 74 Am. St. 342. See also Flint v. Pierce, 99 Mass. 68, 96 Am. Dec. 685, 691; Bergman v. St. Paul &c. Assn., 29 Minn. 275, 13 N. W. 120; Stuyesant v. New York, 7 Cow. (N. Y.) 588; note to Freeland v. McCullough, 43 Am. Dec. 694.

[16] U. S. Const., art. 1, § 10; Howard v. Savannah, T. Charlt. (Ga.) 173 (holding a municipal by-law void at common law for this reason); People v. Fire Department, 31 Mich. 458; Great Falls Ins. Co. v. Harvey, 45 N. H. 292.

[17] Kent v. Quicksilver Min. Co., 78 N. Y. 159, where preferred stock had been issued. Taylor v. Griswold, 14 N. J. L. 222, where an attempt was made to give a vote for each share of stock, and so deprive the small stockholders of an equal voice in the management of its affairs. See People v. Crockett, 9 Cal. 112; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Budd v. Multnomah St. R. Co., 15 Ore. 413, 3 Am. St. 169, 15 Pac. 659. Long Island R. Co., In re, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429. The last two cases hold a by-law forfeiting shares invalid. See Ireland v. Globe Mining Co., 21 R. I. 9, 41 Atl. 258, 79 Am. St. 769; People's Home Sav. Bank v. Superior Court, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844n, 43 Am. St. 147, 153, and note.

[18] People's Home Sav. Bank v. Superior Court, 104 Cal. 649, 38 Pac. 452, 29 L. R. A. 844n, 43 Am. St. 147; Matter of Lighthall Mfg. Co., 47 Hun. (N. Y.) 258.

[19] Sargent v. Franklin Ins. Co., 8 Pick. (Mass.) 90; Farmers' &c. Bank v. Wasson, 48 Iowa 336, 30 Am. Rep. 398; Moore v. Bank of Commerce, 52 Mo. 377.

seek legal redress in the courts;[20] for such by-laws would attack rights with which the states themselves are prohibited from interfering,[21] and a corporation cannot, under a grant of power from a state, do what the state itself has no power to do. And so the repeal of a by-law cannot divest rights acquired under it while it continued in force.[22] If the by-law be separable in its character, valid provisions contained in it may stand, although it contains others which are void.[23]

§ 223 (194). **Power to make by-laws resides in stockholders—When directors may make.**—The power to make by-laws resides in the members of the corporation at large, where there is no law or valid usage to the contrary.[24] But it is frequently provided by charter[25] or by general statute that this power shall be exercised by the directors; and where there is no provision on the subject the stockholders may delegate to the directors authority to make all necessary by-laws.[26]

§ 224 (195). **Formalities of enactment—Proof.**—By-laws are not generally required in this country to be enacted or promulgated in any particular form, but only to be enacted at a legal

[20] Amesbury v. Bowditch &c. Co., 6 Gray (Mass.) 596; Bauer v. Sampson Lodge, 102 Ind. 262, 1 N. E. 571, and authorities there cited.

[21] U. S. Const., art. 1, § 10.

[22] Kent v. Quicksilver Min. Co., 78 N. Y. 159, 182. See also Wist v. Grand Lodge, 22 Ore. 271, 29 Pac. 610, 29 Am. St. 603; Supreme Lodge K. P. v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409n; note in 43 Am. St. 157, 158.

[23] Amesbury v. Bowditch &c. Ins. Co., 6 Gray (Mass.) 596; Shelton v. Mayor, 30 Ala. 540, 68 Am. Dec. 143; Rogers v. Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493. But not if the by-law must be taken as an entirety so that the invalid part vitiates the whole. State v. Curtis, 9 Nev. 325.

[24] Morton G. R. Co. v. Wysong, 51 Ind. 4, 12; Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330; Martin v. Nashville &c. Assn., 2 Coldw. (Tenn.) 418; 1 Thomp. Corp. (2d ed.), § 968.

[25] See Union Bank of Maryland v. Ridgely, 1 Harris & G. (Md.) 324; and Fairfield Tpk. Co. v. Thorp, 13 Conn. 173.

[26] Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; State v. Overton, 24 N. J. L. 435; Willcocks, Ex parte, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; 1 Thomp. Corp. (2d ed.) § 970.

meeting of the corporation, and even that much is not always required to be shown in many jurisdictions where they have been acted upon.[27] And it has been held that the jury may find a by-law, its terms and adoption, from the usage of the corporation, in the absence of other evidence, no particular form of adoption being prescribed,[28] and it being shown that no record evidence of the adoption of such by-laws is in existence. But, in general, it is necessary, in order to prove what they are, that the by-laws themselves shall be produced, and where such is the case parol proof of their contents by an officer of the corporation is insufficient.[29] Where the charter or a general statute prescribes, the mode in which by-laws shall be made and adopted in order that they may be valid, that mode must be pursued.[30] Thus, in England, by-laws are generally required to be made under corporate seal,[31] and in California and other states which follow its code, all by-laws adopted must be certified by a majority of the directors and by the secretary of the corporation, and copied in a legible hand in the "book of by-laws" to be kept in the corporate office for public inspection; and no by-law shall take effect until so copied.[32] When the books of the corporation, in which it is proved that the by-laws of the corporation are registered, are produced, they are held to be evidence of the existence and terms of such by-laws in all courts of justice.[33]

[27] 1 Thomp. Corp. (2d ed.), § 987, et seq. But the written assent of the holders of two-thirds of the capital stock is effectual to adopt a code of by-laws without a meeting for that purpose in several of the states.

[28] Union Bank v. Ridgely, 1 Harris & G. (Md.) 324. See also Smith v. Sherman, 113 Iowa 601, 85 N. W. 747; Graebner v. Post, 119 Wis. 392, 96 N. W. 783, 100 Am. St. 890. So they may find any act of the directors to have been duly performed if the statute does not prescribe the manner of its performance and that record evidence of such performance shall be preserved. Langsdale v. Bonton, 12 Ind. 467; McCabe v. Board &c., 46 Ind. 380. See Fairfield T. Co. v. Thorp, 13 Conn. 173.

[29] Lumbard v. Aldrich, 8 N. H. 31. See also 3 Elliott Evidence, § 1941, and cases cited in note 93.

[30] 1 Thomp. Corp. (2d ed.), § 986; Dunston v. Imperial Gas Light Co., 3 Barn. & Adol. 125.

[31] Dunston v. Imperial Gas &c. Co., 3 B. & Ad. 125, 23 E. C. L. 63.

[32] See Vercoutere v. Golden State Land Co., 116 Cal. 410, 48 Pac. 375.

[33] Case of Thetford, 1 Salk 192, 12 Vin. Abr. 90.

§ 225 (196). **Amendment and repeal.**—Of course, the same body (whether stockholders or directors) that may enact by-laws may repeal them or enact others in their stead.[34] And it seems that the repeal of a by-law may be proved by showing a course of conduct inconsistent therewith in a manner similar to that by which its adoption is shown by usage.[35] So, of course, amendments may be made in the by-laws.[36] But by-laws upon the faith of which and under which vested rights have been acquired by a member cannot be so amended or repealed as to impair such rights.[37]

§ 226 (197). **Enforcement of by-laws.**—The power to make by-laws necessarily implies the power to enforce them by pecuniary penalties, competent and proportionable to the offense.[38] But such power is often specially conferred by charter or by statute. The penalty must, however, be reasonable and certain,[39] and cannot be enforced by a forfeiture of shares[40] without statutory authority.

§ 227 (198). **Rules and regulations in England.**—In England rules for the government of the railroad employes, in their dealings with the public, and of the passengers and others transact-

[34] The power to make by-laws generally implies the power to repeal them. King v. Ashwell, 12 East 22; Kent v. Quicksilver &c. Co., 78 N. Y. 159. But see Stevens v. Davidson, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[35] Attorney-General v. Middleton, 2 Ves. Sen. 327. See also Henry v. Jackson, 37 Vt. 431.

[36] Schrick v. St. Louis &c. Co., 34 Mo. 423. See generally as to amendment and repeal, note in 43 Am. St. 157, 158.

[37] Kent v. Quicksilver &c. Co., 78 N. Y. 159. Compare East Tenn. &c. R. Co. v. Gammon, 5 Sneed (Tenn.) 567. Ordinarily, however, minority stockholders have no right, vested or otherwise, which is infringed by the majority amending the by-laws in the manner provided. Renn v. United States Cement Co., 36 Ind. App. 149, 73 N. E. 269.

[38] 1 Thomp. Corp. (2nd ed.), § 1040, et seq.

[39] Cahill v. Kalamazoo &c. Co., 2 Doug. (Mich.) 124, 43 Am. Dec. 457; Mobile v. Yuille 3 Ala. 137, 36 Am. Dec. 441; Grant Corp. 84; 1 Thomp. Corp. (2d ed.), § 1040.

[40] Long Island R. Co., Re, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; Budd v. Multnomah St. R. Co., 15 Ore. 413, 15 Pac. 659, 3 Am. St. 169; Kirk v. Nowell, 1 Term R. 118.

ing business with the company, are called by-laws,[41] and under many of the special charters granted in that country, as well as under the Companies' Clauses Consolidation Act of 1845, the railroad companies are authorized to enact regulations which resemble the by-laws or ordinances of municipal corporations. Their control over persons coming under their property and their right to regulate such matters extend to the imposition of penalties for failure to observe such regulations, which may even be enforced by imprisonment.[42] Such rules or by-laws must be made under the common seal of the corporation, and so far as they affect those who are not officers or servants of the company, should be approved by the board of trade or railway commissioners.[43] A copy of these by-laws must be furnished to every officer and servant of the company liable to be affected thereby. And in many instances, power to bind parties dealing with the company is granted on condition that the by-laws or regulations adopted shall be written or printed, and copies of them prominently displayed at all stations.[44] While the rules are required to be so adopted and promulgated there is a tendency to hold the corporation not liable for acts of its servants done in contravention of such rules. Thus it was held that the company was not liable in a case where the station clerk informed the plaintiff that he could use his excursion ticket for return passage by a certain train, which, however, did not run clear through, and the plain-

41 Chilton v. The London &c. R. Co., 16 M. & W. 212, 5 Eng. Ry. & Can. Cas. 4.

42 Chilton v. London &c R. Co., 16 M. & W. 212. See Hodges Law of Rail. 453, for the by-laws most generally adopted in England.

43 Hodges Law of Rail. 552, 553. In the code of by-laws framed by the board of trade and generally adopted in England, it is provided that every person attempting to evade the payment of all or a part of his fare, and every person smoking, being intoxicated, committing a nuisance, or interfering with the comfort of other passengers, or obstructing the company's servants in the discharge of their duty, shall be liable to a penalty of forty shillings, and (in all but the first instance) forfeiture of the fare paid and eviction from the company's premises. And any person wilfully injuring the company's carriages shall be liable to a penalty of not more than £5, in addition to the damage done. Hodges Law of Rail. 453.

44 Great Western R. Co. v. Goodman, 11 Eng. L. & Eq. 546.

tiff was arrested by the superintendent for refusing to pay the extra fare demanded for his passage on such train.[45] And the company was also held not liable for the arrest by its inspector of an innocent man upon a charge of having no ticket, refusing to pay fare, being intoxicated, and assaulting the inspector, in violation of the company's regulations, even though the solicitor of the company attended to conduct the proceedings at the hearing before the magistrate, but without knowledge of the facts.[46] But these cases would seem to be opposed to the rule which obtains generally throughout this country, that it makes no difference, as to binding the company, that the agent disobeyed his superior, even though it was wilfully done,[47] so long as he was acting within the scope of his employment.[48]

§ 228 (199). **Distinction between by-laws and rules and regulations—Right of railroad company to make rules and regulations.**—In this country there is a clearly recognized distinction between, on the one hand, by-laws for the government of the members and officers in their dealings with the corporation, which must be adopted by the body of stockholders, or by the directors; and, on the other hand, regulations for the government of the company's employes and servants engaged in operating the road and of passengers and others of the public transacting business with the company or dealing in any manner with the company's property,[49] which may usually be made by any officer or agent of the corporation duly authorized to control the business or property to which they relate.[50] A railroad company has an implied

[45] Roe v. Birkenheard &c. R. Co., 7 Eng. L. & Eq. 546, 6 Eng. Ry. & Can. Cas. 795.

[46] Eastern Counties R. v. Broom, 2 Eng. L. & Eq. 406; Roe v. Birkenhead R. Co., 7 Exch. 36.

[47] Weed v. Panama R. Co., 5 Duer (N. Y.) 193. Post, § 286.

[48] Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 483, 14 L. ed. 502; Higgins v. Watervliet &c. R. Co., 46 N. Y. 23, 7 Am. Rep. 293. Whether the agent was acting within the scope of his authority is generally for the jury to determine from the evidence. McKernan v. Manhattan R. Co., 22 Jones & S. Sp. (N. Y. Super. Ct.) 354.

[49] State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393; Commonwealth v. Power, 7 Metc. (Mass.) 596, 601, 41 Am. Dec. 465.

[50] Smith v. Chamberlain, 38 S.

authority (which is necessarily almost absolute)[51] to make and enforce all reasonable rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employes, and to protect itself from imposition and wrong.[52]

§ 229 (200). **Examples of rules and regulations which railroad companies may make—Rules affecting passengers.**—To this end they may regulate the purchase of tickets, the time and manner of procuring and paying for the same, and the time and manner of surrendering them; the manner and time of entering and leaving the cars; and the conduct of the passengers while upon the cars or at stations waiting for trains, as that they shall not be boisterous or disorderly, shall do nothing to obstruct the conductors or other employes in the discharge of their duties, and

Car. 529, 17 S. E. 371, 19 L. R. A. 710, 32 Am. L. Reg. (N. S.) 747; Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, holding that a superintendent of a railway station may make reasonable rules for the control of the buildings and grounds, and for the regulation of conduct of persons coming upon such grounds. Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209, to the same effect. Veeders v. Fellows, 20 N. Y. 126, per Strong, J.: "The conductors, in the absence of any directions from their superior officers, have a right, and, indeed, it is obligatory upon them to adopt some rule relative to the surrender of the tickets of the passenger."

[51] Hibbard v. New York &c. R. Co., 15 N. Y. 455.

[52] Crocker v. New London &c. R. Co., 24 Conn. 249; Dickerman v. St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907, 3 Lewis' Am. R. & Corp. Cas. 374, and note, 46 N. W. 907; Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Cleveland &c. R. Co. v. Bartram, 11 Ohio St. 457; Pittsburgh &c. R. Co. v. McClurg, 56 Pa. St. 294; Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 6 L. R. A. 529, 1 Lewis Am. R. & Corp. Cas. 147; Taylor v. Spartanburg &c. R. Co., 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908, 909 (citing text and next two following sections); Stephen v. Smith, 29 Vt. 160. See also Donovan v. Pennsylvania Co., 199 U. S. 279, 26 Sup. Ct. 91, 50 L. ed. 192; Garricott v. New York State Rys., 223 N. Y. 9, 119 N. E. 94, L. R. A. 1918D, 929, 931; Chicago &c. R. Co. v. Armstrong, 30 Okla. 134, 120 Pac. 952, Ann. Cas. 1913B, 1343.

shall be seated in the cars while the train is in motion.[53] Thus, where a reasonable opportunity is afforded for the purchase of tickets, they may enact and enforce a rule requiring the payment of an additional sum by those who do not purchase tickets before entering the car, and a regulation providing that ten cents extra shall be paid in such a case over and above the regular ticket fare, is reasonable and valid.[54] It has also been held that a street railway company may adopt a rule that no bank bill or government note larger than two dollars need be accepted and changed on the car.[55] So, a railroad company may require the production of a ticket and its exhibition to the conductor at proper times as evidence of the right to passage.[56] And a rule requiring pas-

[53] Hibbard v. New York &c. R. Co., 15 N. Y. 455, and cases in last note supra; Coombs v. Southern Wis. Ry. Co., 162 Wis. 111, 155 N. W. 922, L. R. A. 1916D, 539, and note.

[54] Crocker v. New London &c. R. Co., 24 Conn. 249; Pullman Co. v. Reed, 75 Ill. 125; Sage v. Evansville &c. R. Co., 134 Ind. 100, 33 N. E. 771; Snellbaker v. Paducah &c. R. Co., 94 Ky. 597, 23 S. W. 509; State v. Goold, 53 Maine 279; Swan v. Manchester &c. R. Co., 132 Mass. 116, 42 Am. Rep. 432; State v. Hungerford, 39 Minn. 6, 38 N. W. 628; Forsee v. Alabama &c. R. Co., 63 Miss. 67; Hilliard v. Goold, 34 N. H. 230, 66 Am. Dec. 765; Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 17 Am. St. 818, 1 Lewis Am. R. & Corp. R. 147; Stephen v. Smith, 29 Vt. 160. See also Manning v. Louisville &c. R. Co., 95 Ala. 92, 11 So. 8, 36 Am. St. 225; Ammons v. Southern R. Co., 138 N. Car. 555, 51 S. E. 127.

[55] Barker v. Central Park &c. R. Co., 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. 626.

[56] Nye v. Marysville &c. St. R. Co., 97 Cal. 461, 32 Pac. 530; Downs v. New York &c. R. Co., 36 Conn. 287, 4 Am. Rep. 77; Chicago &c. R. Co. v. Boger, 1 Bradw. (Ill.) 472; Baltimore &c. R. Co. v. Blocher, 27 Md. 277; Northern Cent. R. Co. v. O'Conner, 76 Md. 207, 24 Atl. 449, 35 Am. St. 422; Standish v. Narragansett &c. Co., 111 Mass. 512, 15 Am. Rep. 66; Frederick v. Marquette &c. R. Co., 37 Mich. 342, 26 Am. Rep. 531; Van Dusan v. Grand Trunk R. Co., 97 Mich. 439, 56 N. W. 848; Ripley v. New Jersey &c. Co., 31 N. J. L. 388; Townsend v. New York &c. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Crawford v. Cincinnati &c. R. Co., 26 Ohio St. 580; Poole v. Northern Pac. R. Co., 16 Ore. 261, 19 Pac. 107, 8 Am. St. 289; Cresson v. Philadelphia &c. R. Co., 11 Phila. (Pa.) 597; Jerome v. Smith, 48 Vt. 230, 21 Am. Rep. 125; Duke v. Great Western R. Co., 14 Upper Can. Q. B. 369, 377. See Watkins v. Pennsylvania R. Co., 21 Dist. of C. 1, 52 Am. & Eng. R. Cas. 159, and note.

sengers to make a continuous trip, unless they procure a "stop-over" ticket or check, is reasonable and valid.[57] A railroad company may also make and enforce a rule forbidding passengers to be carried on freight trains,[58] where it sufficiently provides for their accommodation on passenger trains, and, if it permits passengers on freight trains, it may, after due notice of the rule, require such passengers to provide themselves with a particular kind of ticket which it has given them a reasonable opportunity to obtain.[59] It is likewise held, in the absence of any statutory provision to the contrary, that the railroad company may adopt rules providing that particular trains shall stop only at certain stations, where it furnishes reasonable means of reaching all stations on its road by other trains, and that passengers are bound to take notice of such a rule as shown in the time-card published by the company.[60] Rules and regulations in regard to separate

[57] Cheney v. Boston &c. R. Co., 11 Metc. (Mass.) 121, 45 Am. Dec. 190, and note; Johnson v. Concord R. Co., 46 N. H. 213, 88 Am. Dec. 199; Beebe v. Ayres, 28 Barb. (N. Y.) 275; Yorton v. Milwaukee &c. R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23. And street railway companies may make and enforce reasonable rules as to transfer at specified places and within a certain time. Shortsleeves v. Capital Tract. Co., 28 App. (D. C.) 365, 8 L. R. A. (N. S.) 287, and other cases cited in note; Taylor v. Spartanburg Ry. &c. Co., 98 S. Car. 206, 82 S. E. 404, 52 L. R. A. (N. S.) 908, and other recent cases cited in note.

[58] Chicago &c. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Eaton v. Delaware &c. R. Co., 57 N. Y. 382, 15 Am. Rep. 513; Houston &c. R. Co. v. Moore, 49 Tex. 31, 30 Am. Rep. 98.

[59] Evans v. Memphis &c. R. Co., 56 Ala. 246, 28 Am. Rep. 771; Arnold v. Illinois &c. R. Co., 83 Ill. 273, 25 Am. Rep. 383; St. Louis &c. R. Co. v. Myrtle, 51 Ind. 566; Law v. Illinois &c. R. Co., 32 Iowa 534; Kansas &c. R. Co. v. Kessler, 18 Kans. 523; Burlington &c. R. Co. v. Rose, 11 Nebr. 177, 1 Am. & Eng. R. Cas. 253, 8 N. W. 433.

[60] Texas &c. R. Co. v. Ludlam (Tex. Civ. App.), 26 S. W. 430; Dietrich v. Pennsylvania &c. R. Co., 71 Pa. St. 432, 10 Am. Rep. 711. "It is the duty of a party going upon a railroad train to inform himself when, where and how he can go or stop according to the regulations of the railroad company." Ohio &c. Co. v. Applewhite, 52 Ind. 540, 546; Chicago &c. R. Co. v. Randolph, 53 Ill. 510, 5 Am. Rep. 60; Pittsburgh &c. Co. v. Lightcap, 7 Ind. App. 249, 253, 34 N. E. 243; Jackson v. Grand Ave. R. Co., 1[illegible] Mo. 199, 2[illegible] S. W. 192; Beauchamp v. International &c. R. Co., 56 Tex. 239; Gulf &c. R. Co. v. Henry, 84

cars for ladies and their escorts,[61] or providing for the separation of white from colored passengers,[62] have also been upheld as reasonable where equal accommodations were offered to all. So has a rule that none but holders of first-class tickets shall ride on sleeping cars.[63] Railroad companies may also adopt and enforce rules prohibiting passengers from riding in the baggage or express cars or on the engines, platforms, or other improper places of danger,[64] and prohibiting disorderly conduct on the cars.[65] And they may exclude from their carriages and premises such persons as refuse to comply with their reasonable regulations.[66]

Tex. 678, 19 S. W. 870, 16 L. R. A. 318, 52 Am. & Eng. R. Cas. 233. See also Southern Ry. Co. v. Bailey (Ga.), 85 So. 847, L. R. A. 1915E, 1043, 1045 (citing text).

[61] Marquette v. Chicago &c. R. Co., 33 Iowa 562; Peck v. New York &c. R. Co., 70 N. Y. 587; Memphis &c. R. Co. v. Benson, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. 776; Bass v. Chicago &c. R. Co., 36 Wis. 450, 17 Am. Rep. 495. And a rule of an electric railway company that women shall be allowed to go first where a crowd is waiting to board a car has been held authorized by common law and reasonable. Garricott v. New York State Rys., 223 N. Y. 9, 119 N. E. 94, L. R. A. 1918D, 929. So has a rule prohibiting turning of seats. Chesapeake &c. R. Co. v. Speller, 157 Ky. 222, 162 S. W. 815, 50 L. R. A. (N. S.) 394.

[62] West Chester &c. R. Co. v. Miles, 55 Pa. St. 209, 93 Am. Dec. 744; Green v. Bridgeton, 9 Cent. L. J. 206; Plessey, Ex parte, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639, and note. See also post, § 2540. But a statute permitting sleeping and dining cars exclusively for white persons without providing any similar accommodation for negroes is invalid under the fourteenth amendment. McCabe v. Atchison &c. R. Co., 235 U. S. 151, 35 Sup. Ct. 69.

[63] Pullman Palace Car Co. v. Lee, 49 Ill. App. 75, and the company may charge extra compensation for a seat in a chair car, even to the holder of a first class ticket. St. Louis &c. R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224.

[64] Florida Southern R. Co. v. Hirst, 30 Fla. 1, 52 Am. & Eng. R. Cas. 409, 11 So. 506, 16 L. R. A. 631, and note, 32 Am. St. 17n; Augusta R. &c. Co. v. Smith, 121 Ga. 29, 48 S. E. 681; O'Neill v. Lynn &c. R. Co., 155 Mass. 371, 29 N. E. 630; Robertson v. New York &c. R. Co., 22 Barb. (N. Y.) 91; Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21, 37 Am. Rep. 651.

[65] See Pittsburgh &c. R. Co. v. Pillow, 76 Pa. St. 510, 18 Am. Rep. 424; Jencks v. Coleman, 2 Sumn. (U. S.) 221, Fed. Cas. No. 7258; New Orleans &c. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689.

[66] Louisville &c. R. Co. v. Johnson, 92 Ala. 204, 9 So. 269; Louis-

§ 230 (200a). **Rules affecting shippers and freight.**—Like reasonable rules may be made to govern the receipt, carriage, and delivery of freight and baggage, and the shipper may be compelled to conform to them in transacting business with the company.[67] Thus, it has been held that a railroad company may require persons hauling freight from its depot to take it from the platform, where it is delivered to them by the company's agents, and to transact business over the counter, without entering the warehouse to check off the freight.[68] So, it is now established in most jurisdictions by the weight of authority, in accordance with

ville &c. R. Co. v. Logan, 88 Ky. 232, 10 S. W. 655, 3 L. R. A. 80, 21 Am. St. 332; Commonwealth v. Power, 7 Metc. (Mass.) 596; Murphy v. Union R. Co., 118 Mass. 228; Putnam v. Broadway &c. R. Co., 55 N. Y. 108, 14 Am. Rep. 190; Townsend v. New York &c. R. Co., 56 N. Y. 295, 15 Am. Rep. 419; Monnier v. New York &c. R. Co., 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. 619; McKernan v. Manhattan R. Co., 54 N. Y. Super. Ct. 354; Pittsburgh &c. R. Co. v. Pillow, 76 Pa. St. 510, 18 Am Rep. 424. A railroad company may, at its option, exclude all persons coming upon its premises for purposes other than transacting business with the company. Hotel runners, Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, and note; D. R. Martin, The, 11 Blatch. (U. S.) 233, Fed. Cas. No. 1030; Landrigan v. State, 31 Ark. 50, 25 Am. Rep. 547; porters, Barney v. Oyster Bay &c. Co., 67 N. Y. 301, 23 Am. Rep. 115; Summitt v. State, 8 Lea (Tenn.) 413; Harris v. Stevens, 31 Vt. 79; omnibus driver, Barker v. Midland R. Co., 18 C. B. 46. See post, § 2560. But passengers are not always bound to know rules for employes and the like. New York &c. R. Co. v. Winter, 143 U. S. 60, 70, 12 Sup. Ct. 356, 36 L. ed. 71. Posting a rule in the car is evidence of notice. Baltimore &c. Road v. Cason, 72 Md. 377, 20 Atl. 113. But see Coupland v. Housatonic R. Co., 61 Conn. 334, 541, 23 Atl. 870, 15 L. R. A. 534.

[67] Southern R. Co. v. Kendrick, 40 Miss. 374, 90 Am. Dec. 332; Chicago &c. R. Co. v. Colby, 69 Nebr. 572, 96 N. W. 145; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393; Randall v. Richmond &c. R. Co., 108 N. Car. 612, 13 S. E. 137; Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517. As to when the customer is not bound to take notice of rules see Central R. &c. Co. v. Skellie, 90 Ga. 694, 16 S. E. 657; Southern Exp. Co. v. Crook, 44 Ala. 468, 4 Am. Rep. 140; Atchinson &c. R. Co. v. Miller, 16 Nebr. 661, 21 N. W. 451. And may exclude intoxicated and turbulent persons from its depots and warehouses. Chicago &c. R. Co. v. Armstrong, 30 Okla. 134, 120 Pac. 952, Ann. Cas. 1913B, 1343.

[68] Such a regulation is reasonable

the better reason, that it is competent for a railroad company to adopt and enforce a reasonable regulation, fixing the time within which a consignee shall unload his freight after notice of its arrival and providing a reasonable charge per day thereafter for car service or by way of demurrage.[69] As will hereafter appear, however, a common carrier can make no unreasonable and unjust discrimination between its customers,[70] and some regulations that it might otherwise make are prohibited by the interstate commerce law, or determined by the state law relating to railroad or public utilities commissions.

§ 231 (200b). **Rules affecting employes.**—Rules affecting passengers and shippers are not the only rules which a railroad company has the power to make. It is not only the right, but it is also the duty of railroad companies to promulgate and enforce reasonable and necessary rules for the safety of its employes, in the management and operation of its road.[71] It has also been

Donovan v. Texas &c. R. Co., 64 Tex. 519, 29 Am. & Eng. R. Cas. 320.

[69] Norfolk & Western R. Co. v. Adams, 90 Va. 393, 18 S. E. 673, 56 Am. & Eng. R. Cas. 330; Miller v. Georgia &c. R. Co., 88 Ga. 563, 15 S. E. 316, 18 L. R. A. 323, 30 Am. St. 170; Miller v. Mansfield, 112 Mass. 260; Pennsylvania R. Co. v. Midvale Steel Co., 201 Pa. St. 624, 51 Atl. 313, 88 Am. St. 836; Kentucky Wagon &c. Co. v Louisville &c. Co., 11 Ry. & Corp. L. J. 49; post, § 2369. One dollar per day for each car was held reasonable in the first two cases above cited. But see Chicago &c. R. Co. v. Jenkins, 103 Ill. 588; Burlington &c. R. Co. v. Chicago Lumber Co., 15 Nebr. 390, 19 N. W. 451.

[70] Hays v. Pennsylvania &c. Co., 12 Fed. 309; Logan v. Central R. Co., 74 Ga. 684. See Chicago &c. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Cleveland R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754n, 22 Am. St. 593, and authorities there cited; Root v. Long Island R. Co., 114 N. Y. 300, 21 N. E. 403, 4 L. R. A. 331n, 11 Am. St. 643, and exhaustive note; Rice v. Railroad Co., 3 Inters. Com. Com. Rep. 186. Article in 16 Am. L. Rev. 818; note to Commonwealth v. Power, 41 Am. Dec. 465, 484.

[71] Hough v. Railway Co., 100 U. S. 213, 25 L. ed. 612; Chicago &c. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Ohio &c. R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134; Ford v. Fitchburg R. Co., 110 Mass. 240, 14 Am. Rep. 598; Corcoran v. Delaware &c. R. Co., 126 N. Y. 673, 27 N. E. 1022; Morgan v. Hudson River &c. Co., 133 N. Y. 666, 31 N. E. 234; Pittsburgh &c. R. Co. v. Henderson, 37 Ohio St. 549;

held that the adoption of mere general rules may not relieve a company where emergencies demanded special rules.[72] This subject, however, will be fully considered hereafter.

§ 232 (201). **Enforcement of rules—Penalties.**—Beyond exclusion from their premises and from the privileges of transacting business with them, railroad corporations have in this country very little authority to inflict penalties for disobedience of their rules, except so far as such penalties are prescribed by the statutes of the various states. But they are generally permitted, as we have seen, to exact a higher fare from passengers failing to procure tickets and seeking to pay their fare after getting upon the train,[73] provided such increased fare be reasonable. And the English courts have adjudged a by-law valid which required a passenger, not procuring or delivering up his ticket, to pay fare from the place where the train originally started.[74] Such rules must be in accordance with the charter and not, it seems, in con-

Lewis v. Seifert, 116 Pa. St. 628, 11 Atl. 514, 2 Am. St. 631; post § 1840.

[72] Sprague v. New York &c. R. Co., 68 Conn. 345, 36 Atl. 791, 37 L. R. A. 638. But see where an employe acquiesces in the rules and their sufficiency. Berrigan v. New York &c. R. Co., 131 N. Y. 582, 30 N. E. 57; and see post, § 2891. See also Wolsey v. Lake Shore &c. R. Co., 33 Ohio St. 227. As to notice to the employe and evidence thereof, see Sprong v. Boston &c. R. Co., 58 N. Y. 56, and compare Shenandoah Valley R. Co. v. Lucado, 86 Va. 390, 10 S. E. 422; Galveston &c. R. Co. v. Gormley, 91 Tex. 393, 43 S. W. 877, 66 Am. St. 894.

[73] McGowen v. Morgan's Louisiana &c. R. Co., 41 La. Ann. 732, 6 So. 606, 5 L. R. A. 817, 17 Am. St. 415; State v. Hungerford, 39 Minn. 6, 38 N. W. 561; Reese v. Pennsylvania R. Co., 131 Pa. St. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. 818; 1 Lewis Am. R. & Corp. Cas. 147, citing numerous authorities and holding that an additional charge of ten cents is not a "charge for transportation" within the meaning of a statute limiting the rate three and one-half cents per mile. Ante, § 229. Expulsion or ejection in a proper manner and in a proper place is an ordinary and proper method of enforcing reasonable rules or regulations as to the conduct of passengers. Chesapeake &c. R. Co. v. Spiller, 157 Ky. 222, 162 S. W. 815, 50 L. R. A. (N. S.) 394; Coombs v. Southern Wis. R. Co., 162 Wis. 111, 155 N. W. 922, L. R. A. 1916D, 539, and note.

[74] Chilton v. London &c. R. Co., 16 M. & W. 212, 5 Eng. Ry. & Can. Cas. 4. See also Manning v. Louisville &c. R. Co., 95 Ala. 392, 11 So. 8, 16 L. R. A. 55n, 36 Am. St. 225, 52 Am. & Eng. R. Cas. 213.

flict with any of the numerous regulations prescribed by statute in the states through which the road runs or in which it does business,[75] and must, moreover, be reasonable.[76]

§ 233 (202). Reasonableness of rules—When a question of fact and when a question of law.—The reasonableness of such regulations and of the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury.[77] But it would seem that this must be a question of law for the court to decide, if any fixed and permanent regulations are to be established, and the better authority holds it to be such; since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable.[78] Yet, as any given case is apt to depend in part upon the facts and circumstances which are themselves in dispute, some authorities hold that the question of the reasonableness of a rule as applied to the case in hand should be

[75] See ante, § 220. We do not mean, however, that a state law will control the authority of the United States over the road as an instrument of interstate commerce.

[76] Chicago &c. R. Co. v. Williams, 55 Ill. 185, 8 Am. Rep. 641. Ante, § 222.

[77] Prather v. Railway Co., 80 Ga. 427, 9 S. E. 530, 12 Am. St. 263; State v. Chovin, 7 Iowa 204; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; Morris &c. R. Co. v. Ayres, 29 N. J. L. 393; Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56.

[78] Illinois Central R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Chicago &c. R. Co. v. McLallen, 84 Ill. 109 (holding, however, that its adequacy or sufficiency is for the jury); Nolan v. New York &c. R. Co., 7 Conn. 159, 180, 39 Atl. 115, 43 L. R. A. 305; South Florida R. Co. v. Rhoads, 25 Fla. 40, 6 So. 60, 3 L. R. A. 733n, 23 Am. St. 506; Pittsburgh &c. R. Co. v. Nuzum, 50 Ind. 141, 19 Am. Rep. 703; Fertich v. Michener, 111 Ind. 472, 481, 11 N. E. 605; 60 Am. Rep. 709; Hoffbauer v. Delhi &c. R. Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; Maroney v. Old Colony &c. R. Co., 106 Mass. 153, 8 Am. Rep. 305; Vedder v. Fellows, 20 N. Y. 126; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.) 128; Pierce v. Randolph, 12 Tex. 290; Yorton v. Milwaukee &c. R. Co., 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23; 1 Elliott's Gen. Pr., § 436. See also Little Rock &c. R. Co. v. Barry, 84 Fed. 944, 43 L. R. A. 349; Cincinnati &c. R. Co. v. Lowell, 141 Ky. 249, 132 S. W. 569 (citing text); Garricott v. New York State Rys., 223 N. Y. 9, 119 N. E. 94, L. R. A. 1918D, 929, 931.

submitted to the jury, under proper instructions from the court, as a mixed question of law and fact,[79] and that it is for the court only where the facts are undisputed.[80] There are, doubtless, many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts or circumstances, and, where this is true, it may, perhaps, be called a mixed question of law and fact; but, when the facts are undisputed we think it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court.[81]

§ 234 (202a). Failure to enforce rules—Waiver or abrogation. —By-laws may often be waived, and so, too, in some instances, at least, may a rule of a railroad company. By failing to enforce a rule the company may allow it to become a dead letter and, in effect, waive, abandon, or abrogate it.[82] As will hereafter be shown, it is not every failure to enforce or carry out a rule by every employe, or in a few exceptional instances, that will ordinarily have this effect, but there are instances in which both employes and others have been relieved from the operation of a rule

[79] Brown v. Memphis &c. R. Co., 4 Fed. 37; Day v. Owen, 5 Mich. 520, 72 Am. Dec. 62; Bass v. Chicago &c. R. Co., 36 Wis. 450. See also Christian v. First Div. St. Paul &c. R. Co., 20 Minn. 21; Clason v. Milwaukee, 30 Wis. 316. It is for the jury to ascertain the facts in such a case, but it is a question of law whether upon such facts the rule is reasonable. But see Devoe v. New York &c. R. Co., 174 N. Y. 1, 66 N. E. 568.

[80] Commonwealth v. Power, 7 Metc. (Mass.) 596; Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517.

[81] St. Louis &c. R. Co. v. Hardy, 55 Ark. 134, 17 S. W. 711, 52 Am. & Eng. R. Cas. 224; Hoffbauer v. Railway Co., 52 Iowa 342, 3 N. W. 121, 35 Am. Rep. 278; Old Colony R. Co. v. Tripp, 147 Mass. 35, 17 N. E. 89, 9 Am. St. 661; Garricott v. New York State Rys., 223 N. Y. 9, 119 N. E. 94, L. R. A. 1918D, 929; Wosley v. Railroad Co., 33 Ohio St. 227; Louisville &c. R. Co. v. Fleming, 14 Lea (Tenn.) 128; and authorities cited in note 82, supra. See also Missouri &c. Ry. Co. v. Collier, 157 Fed. 347, 354. The construction of a written rule is for the court. Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, 43 N. E. 1.

[82] This section is quoted in Florida East Coast R. Co. v. Carter, 67 Fla. 335, 65 So. 254, Ann. Cas. 1916E, 1299, 1302, where it is said; "We think this is a sound principle of law." See also Merkouras v. Chicago &c. R. Co., 101 Nebr. 717, 164 N. W. 719, 720 (citing text).

at one time promulgated by the company because it was no longer considered in force, and such, in general, is the effect or result where the company itself does not enforce it but knowingly permits it to become a dead letter.[83]

[83] Chicago &c. R. Co. v. Lowell, 151 U. S. 209, 219, 14 Sup. Ct. 281, 38 L. ed. 131; Montgomery &c. Ry. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54. See Sweetland v. Lynn &c. R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; Greenfield v. Detroit &c. R. Co., 133 Mich. 557, 95 N. W. 546. This subject, especially with reference to employes, is hereafter considered. See also Northern Pac. R. Co. v. Nickels, 50 Fed. 718. And see generally as to waiver of by-laws proper and estoppel in such cases. 1 Thomp. Corp. (2d ed.), §§ 1058, 1059.

CHAPTER XI.

CORPORATE REPRESENTATIVES.

Sec.
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268. Compensation of officers.
269. Individual liability of agents for their torts.
270. Bonds of officers and agents.
271. Sureties — Bonds of officers and agents.

§ 240 (203). **Railroad corporations act through officers, agents or other representatives.**—It is elementary learning that corporations act through agents, officers, attorneys or servants. The nature of a corporation aggregate, as is well known, is such that it can only perform its corporate functions, duties and acts through

the medium of natural persons.[1] The creation of a railroad corporation invests it with power, without express words, to choose officers, agents, attorneys and servants.[2] In other words, the creation of a railroad company invests it, as an incidental power, with the authority to appoint officers and agents.

§ 241 (204). **Appointment of officers and agents—General doctrine.**—As a general rule agents or servants may be appointed by railroad corporations in the same manner as agents and servants may be appointed by natural persons.[3] It is however, to be understood that where the charter or act of incorporation provides the mode in which officers or agents shall be appointed that mode must be pursued. There may be cases where a departure from the mode prescribed by the charter or act of incorporation would not prejudice the rights of third persons, but the general rule is that where the mode is expressly prescribed by the charter or the act of incorporation the appointment will not be valid if there is a substantial or material departure from the prescribed mode.[4]

[1] New York &c. Co. v. Schuyler, 34 N. Y. 30; Lyman River &c. Co., 2 Aik. (Vt.) 255, 16 Am. Dec. 705; 2 Thomp. Corp. (2d ed.), § 1386.

[2] Alabama &c. Co. v. Kidd, 29 Ala. 221; Protection Life Ins. Co. v. Foote, 79 Ill. 361, 368; Kitchen v. Cape Girardeau &c. Co., 59 Mo. 514; Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852; Wood v. Ontario &c. Co., 24 U. C. C. P. 334.

[3] Bank of Columbia v. Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; Alabama &c. Co. v. Kidd, 29 Ala. 221; Reynolds v. Collins, 78 Ala. 94; Crowley v. Genessee &c. Co., 55 Cal. 273; Bancroft v. Wilmington &c. Academy, 5 Houst. (Del.) 577; Hamilton v. Newcastle &c. Co., 9 Ind. 359; White v. State, 69 Ind. 273; Fitch v. Lewiston Steam Mill Co., 80 Maine 34, 12 Atl. 732; Santa Clara &c. Co. v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Cook v. Kuhn, 1 Nebr. 472; Despatch Line &c. v. Bellamy &c. Co., 12 N. H. 205, 37 Am. Dec. 203; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Giles v. Taff Vale. R. Co., 2 El. & Bl. 822; Goff v. Great Northern &c. Co., 3 El. & El. 672, 30 L. J. Q. B. 148.

[4] Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Badger v. American &c. Co., 103 Mass. 244, 4 Am. Rep. 547; Henning v. United States Ins. Co., 47 Mo. 425, 4 Am. Rep. 332. Beatty v. Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Gordon v. Preston, 1 Watts (Pa.) 385; Chicago &c. Co. v. James, 22 Wis. 194; Card v. Carr, 1 C. B. N. S. 197; Kirk v. Bell, 16 Q. B. 290. See Bridgeport Bank v. New York &c. Co., 30 Conn. 231.

To prevent misunderstanding we say that we are here outlining general doctrines and are not stating specific rules.

§ 242 (205). **Statutory privileges bestowed on agents.**—Because of the entire reliance of a railroad corporation upon its servants for the discharge of its duties to the public, some of the older charters granted to them special privileges and exemptions. Privileges and exemptions granted corporate agents are generally regarded as bestowed upon the corporation and not upon persons who chance to be the corporate agents. Thus, it is held that an exemption of the servants of a corporation from military duty, serving on juries, and working on public roads, is not a mere personal privilege to the officers, agents and servants of the company, but is a right or privilege of the corporation, on which it may insist in favor of any servant whom it may employ.[5]

§ 243 (205). **Officers generally.**—The most important of corporate agents are, of course, the officers,[6] without whom no business can be transacted by the corporation.[7] Indeed, in most acts for the incorporation of railroad companies, a choice of directors is one of the essential steps toward incorporation.[8] The power to

[5] Johnson v. State, 88 Ala. 176, 7 So. 253, 41 Am. & Eng. R. Cas. 275; Zimmer v. State, 30 Ark. 677. The grant of such a privilege was held unconstitutional in Tennessee. Neely v. State, 4 Lea (Tenn.) 316.

[6] Officers are but ministerial agents of the corporation. Dispatch Line &c. v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Burr v. McDonald, 3 Grat. (Va.) 215. Officers may be invested with very comprehensive powers, but they are not the corporation. A corporation may entrust the conduct of its business to its officers, and may be bound by their acts, but no matter how extensive the powers conferred upon corporate officers, they are merely the representatives of the corporation, for that legal entity is the principal, and its officers are its agents or representatives.

[7] Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Willey v. Crocker-Woolworth Nat. Bank, 141 Cal. 508, 75 Pac. 106; Atlantic Coast Line R. Co. v. Waycross Electric Light &c. Co., 123 Ga. 613, 51 S. E. 621; Conro v. Port Henry &c. Co., 12 Barb. (N. Y.) 27; Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156. See also Home Fire Ins. Co. v. Barber, 67 Nebr. 664, 93 N. W. 1024, 60 L. R. A. 927, 108 Am. St. 716.

[8] See 2 Parks' Ann. Code of Ga., 1914, § 2581, et seq.; Hurd's Rev. Stat. of Ill. 1917, pp. 2335, 2336, §§ 2, 8; 2 Burns' Rev. Stat. Ind. 1914, § 5176, et seq.; 1 Mo. Ann. Stat. 1906, § 1034;

choose officers is inherent in a corporation and implied from the fact of incorporation without being specially granted.[9] This implied power is limited by the rule that the officers must be such as are reasonably necessary to the discharge of corporate functions and to enable the corporation to accomplish the object for which it was created.

§ 244 (207). Qualifications of officers.—It is, of course, competent for the legislature to prescribe by charter the qualifications of corporate officers and to provide what persons shall or shall not be eligible to hold a corporate office. The legislative decision as to who shall be eligible is necessarily conclusive and not subject to review by the courts. The laws of several of the states prohibit any officer of a railroad corporation from becoming an officer of a parallel or competing line,[10] and some of the states make stockholders and owners of express and transportation companies ineligible to hold office or act as agents in any railroad company.[11] Ordinarily, any one may be an officer of a corporation who is competent to transact business for another, unless special qualifications are required by the charter or by-laws.[12]

§ 245 (208). Election of officers—Generally.—Where the mode of choosing officers is not prescribed by the charter, they must, as a general rule, be chosen by the body of the corporators, or in such a mode as the corporators acting in accordance with the charter may prescribe.[13] Officers can exercise only the powers granted to them either expressly by the charter or by the by-laws, enacted pursuant to the charter, or implied by a declara-

Wisconsin Stat. 1915, § 1820; Charter of St. Ladislaus &c. Assn., 19 Pa. Co. Ct. Rep. 25.

9 Terwilliger v. Great Western Tel. Co., 59 Ill. 249; Hughes v. Parker, 19 N. H. 181; Wheeler, Ex parte, 2 Abb. Pr. N. S. (N. Y.) 361. Hurlbut v. Marshall, 62 Wis. 590, 22 N. W. 852.

10 See 1 Mo. Ann. Stat. 1906, § 1063; Wisconsin Stat. 1915, § 1804.

11 Pennsylvania and Missouri make it a misdemeanor for an officer or employe of a railroad to be interested in the business of transportation as a common carried over such road.

12 People v. Webster, 10 Wend. (N. Y.) 554. See also Mobile &c. R. Co. v. Owen, 121 Ala. 505, 25 So. 612.

13 State v. Ancker, 2 Rich. L. (S. Car.) 245.

tion of the purposes of their appointment, or such as by necessary implication are conferred upon them. It was held at common law that the power to appoint agents rests with the stockholders at large, but this doctrine is almost entirely swept away as to mere agents. It was also held that the courts cannot judicially know that a particular board or body of a corporation not created by a public statute is authorized by the charter and by-laws to appoint agents, where no proof of the fact is introduced,[14] but this doctrine requires limitation and qualification. Principal governing officers, such as the members of the board of directors, must be chosen by the members of the corporation unless otherwise provided by the charter. All of the states make provision by their statutes for the incorporation of railroads for the choice of a board of directors, who are charged with the immediate government and direction of the affairs of the corporation,[15] and of a president usually chosen by them.[16] Many of the states provide that the directors shall also choose certain other officers, as vice-president,[17] secretary,[18] and treasurer;[19] while other states leave all officers and agents, as these states leave all but

[14] It has been held that the court cannot judicially know the authority and duties of officers of a railroad corporation where they are not defined by law. Brown v. Missouri &c. R. Co., 67 Mo. 122. Nor of agents. Wood v. Chicago &c. R. Co., 59 Iowa 196, 13 N. W. 99; Southern R. Co. v. Hogan, 103 Ga. 564, 29 S. E. 760; McGowan v. St. Louis &c. R. Co., 61 Mo. 528. But see Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770, where the court noticed the duties and powers of a "general manager" without proof. And Sacalaris v. Eureka &c. R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep 737, where the court did the same as to a "superintendent." We think that the courts may take judicial notice of the powers and duties of many classes of officers and agents of railroad companies. It may be true that courts will not take judicial notice of the particular powers and duties of officers, but that they will take notice of the general scope and nature of the powers and duties of many classes of officers and agents is also true. See 1 Elliott Ev. § 72.

[15] See statutes referred to in note 8, supra.

[16] See Hurd's Rev. Stat. Ill. 1917, ch. 114, p. 2337, § 12; 1 Mo. Ann. Stat. 1906, § 1038; and other statutes cited in note 8.

[17] See statutes referred to in note 16.

[18] See note 16.

[19] See note 16.

those enumerated, to be selected by the directors in accordance with the by-laws that may be adopted, or in response to the apparent needs of the corporation.[20]

§ 246 (209). **Agents generally.**—Agents are sometimes appointed for a term certain, though they are more often appointed to serve at the pleasure of the directors or principal officers. Except where some other provision is contained in the charter or by-laws, the directors have implied power to remove at any time agents appointed by them, subject to the rules which govern similar contracts between agents of individuals and their principals.[21] But the authority of a duly appointed agent does not, necessarily, cease with the termination of the office of the board of directors by which he was appointed;[22] such authority, as a general rule, continues until revoked, unless a limit was placed upon its duration when granted.

§ 247 (210). **Proof of the existence of the relation of principal and agent.**—The general rule is that the existence of the relation of principal and agent may be established by direct evidence or by facts and circumstances. Whether the relation exists is ordinarily, but not always, a question of fact.[23] As is well known, the relation of principal and agent cannot be established by evidence of the declarations of the person claiming to act as agent,[24] nor

[20] Without express power granted to them, it is the right of the directors to appoint necessary officers and agents of the company, and to provide for the payment of compensation. Falkiner v. Grand Junction R. Co., 4 Ont. Rep. 350.

[21] In re Griffing Iron Co., 63 N. J. L. 357, 46 Atl. 1097.

[22] Anderson v. Longden, 1 Wheat. (U. S.) 85, 4 L. ed. 42; Northhampton Bank v. Pepoon, 11 Mass. 288; Exeter Bank v. Rogers, 7 N. H. 21.

[23] Waterbury v. New York &c. Co., 21 Blatchf. (U. S.) 314, 17 Fed. 671; St. Louis &c. Co. v. Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. 220; Missouri &c. Co. v. Carpenter, 44 Kans. 257, 24 Pac. 462; Barrett v. Indianapolis &c. Co., 9 Mo. App. 226; McDougall v. Covert, 18 U. C. C. P. 119. See 1 Elliott Gen. Pr. § 426. Where the facts are in controversy the question is for the jury. Franklin &c. Co. v. Mackey, 83 Hun 511, 31 N. Y. S. 1057; Baker v. Tibbetts, 162 Mass. 468, 49 N. E. 350 See generally on this subject, 3 Elliott Ev. §§ 1626-1635.

[24] Lindsay v. Central &c. Co., 46 Ga. 477; Columbus &c. Co. v. Powell, 40 Ind. 37; Hirschmann v. Iron

can it be established by evidence of merely a general understanding among business men.[25] The agents of the corporation not expressly named in the charter are usually appointed by the directors under their general authority to direct the affairs of the corporation.[26] Such an appointment should, when practicable, be proved by the records of the corporation, and can not be established by the mere acts of the assumed agent as to the particular matter in question without proof that they were adopted or ratified by the corporation.[27] But, as a general rule, no formal resolution of the board of directors is required to appoint an agent or define his powers.[28] It is not, ordinarily, necessary that the agent's authority be conferred by writing.[29] The fact of his agency may also be proved by showing what he has been accustomed to do for his principal with the latter's acquiescence.[30]

§ 248 (211). **Proof of authority.**—It is not enough, as a general rule, to prove the existence of the relation of principal and

Range &c. R. Co., 97 Mich. 384, 56 N. W. 842; Burke v. Frye, 44 Nebr. 223, 62 N. W. 476; Taylor v. Second Ave. &c. Co., 17 J. & S. (N. Y.) 513; Marvin v. Wilber, 52 N. Y. 270; New England &c. Co. v. Baxley, 44 S. Car. 81, 21 S. E. 444, 885; Brady v. Nagle (Tex. App.), 29 S. W. 943; 3 Elliott Ev. § 1636.

[25] McGregor v. Hudson (Tex. App.), 30 S. W. 489. See also 3 Elliott Ev. § 1638.

[26] But subordinate agents and employes are usually appointed by other officers or higher agents given authority to make such appointments.

[27] Huntsville &c. R. Co. v. Corpenning, 97 Ala. 681, 12 So. 295; City Electric St. R. Co. v. First Nat. &c. Bank, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. 282; International &c. R. Co. v. Prince, 77 Tex. 560, 14 S. W 171, 19 Am. St. 795; Waterman Corp. 323.

[28] Bank of Lyons v. Demmon, Hill & D. Supp. (N. Y.) 398; Goodwin v. Union Screw Co., 34 N. H. 378; 2 Thomp. Corp. (2d ed.) § 1596. It may be made "by the usual course of business." Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159.

[29] Bank of Middlebury v. Rutland, &c. R. Co., 30 Vt. 159; Nicholas v. Oliver, 36 N. H. 218; 3 Elliott Ev. § 1628; 2 Thomp. Corp. (2d ed.) § 1596.

[30] Hamilton v. Newcastle &c. R. Co., 9 Ind. 359; Whitney v. South Paris Mfg. Co., 39 Maine 316. His authority may be implied from his course of action and its ratification by the corporation. Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645; Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch. 392. See also 3 Elliott Ev. §§ 1633, 1634; York v. Mathis, 103 Maine 67, 68 Atl. 746.

agent, but, ordinarily, there must be some evidence of the authority and its scope. In the case of general superior officers, as president, general manager, and the like, the court may infer, in a general way, the existence of authority. In the case of mere agents, where nothing has been done toward executing a contract made by one who assumes to act for the corporation and damages for non-performance are sought to be recovered, the plaintiff must affirmatively show that the agent had authority to bind the corporation.[31] Evidence that a person is an agent of the company is, ordinarily, not sufficient to establish his authority to bind the company by his particular acts, but, as a general rule, evidence that the relation of principal and agent exists must be supplemented by evidence showing the nature and extent of the agent's authority.[32]

§ 249 (212). **Agency inferred.**—The law will often infer an agency from the general character of the acts which one assuming to act for the corporation has been permitted to do,[33] although they do not come strictly within the terms of his employment, and the agent will be held to possess the power to bind his principal within the limits of the authority with which he has apparently been clothed by the principal in respect to the subject-matter.[34] The corporation will, as a general rule, be bound by the

31 Frister v. LaRue, 15 Barb. (N. Y.) 323; Atlantic Co. v. Vigilancia, 73 Fed. 452. See also Elliott Ev. §§ 1625, 1632.

32 Highland Av. &c. Co. v. Walters, 91 Ala. 435, 8 So. 57; Chattanooga &c. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. 169; Bonnell v. State, 64 Ind. 498; Nall v. Louisville &c. Co., 129 Ind. 260, 264, 28 N. E. 183, 611; McGowan v. St. Louis &c. Co., 61 Mo. 528; Brown v. Missouri &c. Co., 67 Mo. 122.

33 Alabama &c. R. Co. v. Kidd, 29 Ala. 221; Isbell v. Brinkman, 70 Ind. 118; Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Hotchin v. Kent, 8 Mich. 526; Washburn v. Nashville &c. R. Co., 40 Tenn. 638, 75 Am. Dec. 784; Tanner v. Oil Creek R. Co., 53 Pa. St. 411. See also 2 Thomp. Corp. (2d ed.), §§ 1597, 1598; Murphy v. Cane, 82 N. J. L. 557, 82 Atl. 854, Ann. Cas. 1913D, 642, and other cases cited in note.

34 Alabama &c. R. Co. v. Kidd, 29 Ala. 221; Columbus &c. R. Co. v. Powell, 40 Ind. 37; Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Covington v. Coving-

acts of an agent whom it has permitted to pursue a particular line of conduct for a considerable period without objection.[35] Thus, where the board of managers of a railroad company permitted the president to assume entire control of the business of the company for three years, and to make such purchases for the company as he deemed necessary, giving notes and corporate securities in payment, and at the end of the three years assumed control of the road, together with all the property so acquired, and continued to use it without questioning the manner in which it was obtained, the company was held bound by all the acts of the president during the time he held control of its road.[36] But, unless his authority is shown to have been enlarged by the course of business which the corporation has permitted him to pursue, or by ratifying acts not embraced in his original authority,[37] an agent under a general appointment to do specified things has only limited special powers.[38]

§ 250 (213). **Powers, duties and authority of officers and agents generally.**—An attempt is made in some of the states to outline the duties of certain officers of railroad companies, but most of the states leave this matter to be controlled by the by-laws. As between themselves and the corporation, the officers and agents have only such powers as are directly or impliedly con-

ton Bridge Co., 10 Bush. (Ky.) 69; Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599; Pickering v. Busk, 15 East 38. And authority to act in a certain matter will carry with it authority to bind the corporation in all things incident thereto. Bodine v. Exchange Fire Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Newell v. Smith, 49 Vt. 255. See also Dore v. Southern Pac. Co., 163 Cal. 182, 124 Pac. 817.

[35] Caldwell v. National Mohawk Valley Bank, 64 Barb. (N. Y.) 333. See generally 3 Elliott Ev. §§ 1631, 1633, 1634, 1635; 2 Thomp. Corp. (2d ed.) § 1603. A single recognition of a single act of an assumed agent, if sufficiently unequivocal, positive and comprehensive in its character, may be sufficient to establish an agency to do other similar acts. Wilcox v. Chicago &c. R. Co., 24 Minn. 269.

[36] Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298. And see Kelley v. Newburyport &c. Horse R. Co., 141 Mass. 496, 6 N. E. 745.

[37] Commonwealth v. Ohio &c. R. Co., 1 Grants' Cas. (Pa.) 329, and cases cited in preceding notes.

[38] Wilson v. Genesee Mut. Ins. Co., 14 N. Y. 418.

ferred upon them by the charter, or by the terms of their appointment.[39] Where the charter provides that certain powers of the corporation shall be exercised by particular officers or agents, only such officers or agents may exercise them, and any attempt by other persons to bind the corporation by the exercise of such powers will ordinarily be voidable,[40] but there may be circumstances which will prevent the corporation from avoiding the acts of such officers or agents. The general rule is that where the duties of an officer or agent are defined by law, or prescribed in the charter or articles of association, or established by usage, a person dealing with the corporation is bound to know the limitations upon his authority thus determined.[41] It has been held by some of the courts that he must, in doubtful cases, acquaint himself with the extent of such authority, or submit to the consequences of an omission to do so.[42] As between the corporation and third persons, where the agent's power is not limited by the charter or by positive law, the corporation will generally be held

[39] See 2 Thomp. Corp. (2d ed.), § 1408.

[40] Union Mut. Fire Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375.

[41] Adriance v. Roome, 52 Barb. (N. Y.) 399; State v. Commercial Bank, 14 Miss. 218, 45 Am. Dec. 280; Ernest v. Nicholls, 6 H. L. Cas. 401. Persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers and with the authority, actual or apparent, of its officers or agents with whom they deal. Wilson v. Kings County Elev. R. Co., 114 N. Y. 487, 21 N. E. 1015, 24 N. Y. S. 81; Memphis &c. Elevator Co. v. Memphis &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am St. 798; Bocock v. Alleghany Coal & Iron Co., 82 Va. 913, 1 S. E. 325, 3 Am. St. 128; Whitehurst v. Whitehurst, 83 Va. 153, 1 S. E. 801.

[42] Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202, in which there is a dictum to the effect that one contracting with an officer of the corporation must be informed as to his powers set forth in the by-laws. But the principal upon which the case is based is that one dealing with a corporation must ascertain with certainty the authority of a person professing to act for the corportion, unless he has been held out by the corporation as possessing the powers in question or has before acted for it in the same capacity; and failing to do this he must abide the consequences of his neglect. Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Adriance v. Roome, 52 Barb. (N. Y.) 399.

bound by his acts performed within the scope of his apparent authority; and this is true not only of his contracts, but of all his other acts and omissions.[43] Thus it is held liable for the frauds, the misrepresentations,[44] and even the torts,[45] of its authorized

[43] Cedar Rapids &c. Co. v. Stewart, 25 Iowa 115; New York &c. Co. v. Bates, 68 Md. 184, 11 Atl. 705; Reed v. Home Savings Bank, 130 Mass. 443, 39 Am. Rep. 468; Hirschmann v. Iron Range &c. Co., 97 Mich. 384, 56 N. W. 842; Ecker v. Chicago &c. R. Co., 8 Mo. App. 223; Olcott v. Tioga &c. Co., 27 N. Y. 546, 84 Am. Dec. 298; Chestnut Hill &c. Co. v. Rutter, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675; Washburn v. Nashville &c. Co., 3 Head. (Tenn.) 638; Nashville &c. Co. v. Carroll, 6 Heisk. (Tenn.) 347; Clouse v. Canada Southern &c. Co., 4 Ont. 28, 14 Am. & Eng. R. Cases 456; Langan v. Great Western &c. Co., 30 L. T. (N. S.) 173; Ranger v. Great Western R. Co., 5 H. L. Cas. 72. See also 2 Thomp Corp. (2d ed.), § 1597, 1609. If an agent is invested with the indicia of authority, the company will be liable to innocent third persons for the acts of the agent within the scope of the authority with which he appears to be clothed, although he may transcend his actual authority or violate instructions, but this rule does not prevail where the authority of the agent is prescribed by the corporate charter. Illinois &c. Co. v. Jonte, 13 Ill. App. 424; Goff v. Toledo &c. Co., 28 Ill. App. 529; Madison &c. R. Co. v. Norwich &c. Soc., 24 Ind. 457, Lake Shore &c. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; American &c. Co. v. Minneapolis, St. Paul &c. Co., 44 Minn. 93, 46 N. W. 143; Harrison v. Kansas City &c. Co., 50 Mo. App. 332; Meyer v. Harnden &c. Co., 24 How. Prac. (N. Y.) 290; Brooke v. New York &c. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Hull v. East Line &c. Co., 66 Texas 619, 2 S. W. 831; Winchell v. National &c. Co., 64 Vt. 15, 23 Atl. 728.

[44] Bank of U. S. v. Davis, 2 Hill (N. Y.) 451; New York &c. R. Co. v. Schuyler, 34 N. Y. 30.

[45] Drake v. Kiely, 93 Pa. St. 492; Whiteman v. Wilmington &c. R. Co., 2 Harr. (Del.) 514, 33 Am. Dec. 411; Moore v. Fitchburg R. Corp., 70 Mass. 465, 64 Am. Dec. 83; Evansville &c. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102; where the company's detective caused the arrest of an innocent person, and the company was held liable in damages. See also Northwestern &c. Co. v. Hack, 66 Ill. 238; Gillemater v. Madison &c. Co., 5 Ind. 339; Pittsburgh &c. Co. v. Kirk, 102 Ind. 399, 52 Am. Rep. 675; Ramsden v. Boston &c. Co., 104 Mass. 117, 6 Am. Rep. 200; Miller v. Burlington, 8 Nebr. 219; State v. Morris &c. Co., 23 N. J. L. 360; Brokaw v. New Jersey &c. Co., 32 N. J. L. 328; Nolton v. Western R. Co., 15 N. Y. 444, 69 Am. Dec. 623; Cohen v. Dry Dock &c. Co., 69 N. Y. 170; Stewart v. Brooklyn &c. Co., 90 N. Y. 588, 43 Am. Rep. 185; Smith v. Manhattan &c. Co., 45 N. Y. S. 865;

agents, committed in the course of their employment.[46] In an action of trespass against a railroad company and its president, who was also the manager of a construction company, which had contracted with the railroad company to construct its road, it appeared that as such manager of the construction company, he made a contract with contractors to build a certain portion on a line, "as shown by a map designating the surveys, both on file in the office of the chief engineer" of the railroad, with such variations as should be determined on by the construction company; that as such he notified the contractors to commence the work "as per contract," and that they underlet four sections to a contractor, who committed the trespass; the president also wrote the body of a letter purporting to be signed by the construction company to the contractors, stating that it was deemed advisable by the executive committee of the railroad (of which committee he was a member) to change the line of survey at that place, and requesting them to await instructions, and suspend operations; the contractors stopped work, but were paid for the work on plaintiff's land, on estimates approved by the chief engineer in drafts approved by the executive committee, and it was held that the testimony of a director of the railroad company that there was a contract with the construction company, together with the fact that the latter company was working under the

Hussey v. Norfolk &c. Co., 98 N. Car. 34, 3 S. E. 923, 2 Am. St. 312; Sawyer v. Norfolk &c. R. Co., 142 N. Car. 1, 54 S. E. 793; Quinn v. South Carolina &c. Co., 29 S. Car. 381, 7 S. E. 614, 1 L. R. A. 682; Payne v. Western &c. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666; Craker v. Chicago &c. Co., 36 Wis. 657, 17 Am. Rep. 504; Ranger v. Great Western &c. Co., 5 H. L. Cas. 72.

[46] The old common law doctrine that a master is not liable for the wilful act of the servant, although performed within the line of duty, has been overthrown. Heenrich v. Pullman &c. Co., 20 Fed. 100; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, and notes, 38 Am. St. 361; Toledo &c. R. Co. v. Harmon, 47 Ill. 298, 95 Am. Dec. 489; Indianapolis &c. Co. v. Anthony, 43 Ind. 183; Terre Haute &c. Co. v. Jackson, 81 Ind. 19, 6 Am. & Eng. R. Cases 178; Pennsylvania Co. v. Weddle, 100 Ind. 138, and cases cited; De Camp v. Mississippi &c. R. Co., 12 Iowa 348; Perkins v. Missouri &c. Co., 55 Mo. 201; Quigley v. Central &c. Co., 11 Nev. 350, 21 Am. Rep. 757, Craker v. Chicago &c. R. Co., 36 Wis. 657, 17 Am. Rep. 504.

railroad company's franchise, and with its consent, was enough to show a liability on the part of the railroad company for whatever the sub-contractors did bona fide and in the line of their employment.[47] The corporation is also liable for the negligence of its agents or servants resulting in the failure to perform duties imposed upon it for consequent injury to one to whom such duties are owing,[48] even though the servants were carefully selected with reference to their competency.[49] The employer's duty is not fully discharged in such a case when he exercises care in the selection of employes, although it is his duty to exercise such care,[50] but he is liable for not seeing to it that his employes

[47] St. Louis &c. R. Co. v. Drennan, 26 Ill. App. 263. A corporation cannot, by its by-laws, or any constating instrument, avoid liability for the wrongful act of its officers or servants performed within the scope of their authority. Sherman v. Commercial Printing Co., 29 Mo. App. 31.

[48] Brown v. Chicago &c. R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Pennsylvania Co. v. Hoagland, 78 Ind. 203; Byrne v. Wilson, 15 Irish C. L. 332. This has been held, although the passenger traveled free, under a contract whereby he assumed all risks of accidents. Ohio &c. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719; Johnson v. Missouri Pacific &c. Co., 96 Mo. 340, 9 S. W. 790, 9 Am. St. 351.

[49] Gillenwater v. Madison &c. R. Co., 5 Ind. 339, 61 Am. Dec. 101. See generally Georgia &c. R. Co. v. Dougherty, 86 Ga. 744, 12 S. E. 747, 22 Am. St. 499; Baird v. Shipman, 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. 514; Golden v. Newbrand, 52 Iowa 59, 2 N. W. 537, 35 Am. Rep. 257; New Orleans &c. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Blake v. Ferris, 5 N. Y. (1 Selden) 48, 55 Am. Dec. 304; McClung v. Dearborne, 134 Pa. St. 396, 19 Atl. 698, 8 L. R. A. 204, 19 Am. St. 708.

[50] Wabash &c. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. ed. 605; Chicago &c. Co. v. Shannon, 43 Ill. 338; Toledo &c. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Western Stone Co. v. Whalen, 151 Ill. 472, 38 N. E. 241, 42 Am. St. 244; Lake Shore &c. Co. v. Stupak, 123 Ind. 210, 23 N. E. 246; Union &c. Co. v. Young, 19 Kans. 488; Gilman v. Eastern &c. Co., 92 Mass. 233, 87 Am. Dec. 635; Gilman v. Eastern &c. Co., 95 Mass. 433, 90 Am. Dec. 210; Hatt v. Nay, 144 Mass. 186, 10 N. E. 807; Monahan v. Worcester, 150 Mass. 439, 23 N. E. 228, 15 Am. St. 226; Davis v. Detroit &c. Co., 20 Mich. 105, 4 Am. Rep. 364; Hilts v. Chicago &c. Co., 55 Mich. 437, 21 N. W. 878; Lee v. Michigan Central &c. Co., 87 Mich. 574, 49 N. W. 909; Grube v. Missouri &c. Co., 98 Mo. 330, 11 S. W. 736, 4 L. R. A. 776, 14 Am. St. 645; Wright v. New York &c. Co., 25 N. Y. 562.

perform their duties with reasonable care, skill and diligence. As already suggested, the employer is not exonerated, although the negligence consisted in disobeying orders.[51]

§ 251 (214). Authority of agent—Line of duty.—The principal is liable only for acts done within the scope of the agent's authority, express or implied.[52] Beyond the scope of authority and

[51] Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 468, 14 L. ed. 502. See also Louisville &c. R. Co. v. Steele, 179 Ky. 605, 201 S. W. 43, L. R. A. 1918D, 317. A person seeking to charge a corporation with the act of its officers or authorized agents is not affected by secret instructions limiting the apparent powers of such officers or agents. Benesch v. John Hancock Mut. L. Ins. Co., 32 N. Y. St. 73, 11 N. Y. S. 348.

[52] The general subject was well considered in the case of Chicago &c. Co. v. Bryant, 65 Fed. 969, 974. The reporter in his head notes makes this statement of the case: "A yardmaster, after 6 p. m., on being relieved from duty, took a passenger car and engine to give himself and fellow servants a free ride to and from a meeting of theirs, without notice or permission from any officer who had authority to permit the passage of such a train. Held that such act, not having been done in the course of his employment, but for his own ends exclusively, and without authority to carry passengers for the company, and having no apparent authority, except possession of the train, the company was not liable as to a passenger for injury to one on the train." In the course of the opinion the court used this language: "Moreover it is a fatal objection to the liability of this company for the acts of this yardmaster in operating this train that they were not in the course of his employment for the company, but for his own ends exclusively, while he was at liberty from his master's service. The master is not liable for an act done by a servant when he is free from his service and is not attempting to discharge any duty to his master imposed upon him by his employment, but is pursuing his own ends exclusively, even though the act could not have been done without the facilities afforded by his relation to his master." In Mitchell v. Crassweller, 13 C. B. 237, a carman, whose duty it was to put the horse and cart of his master in his stable after the day's work was completed, obtained the keys of the stable for that purpose, and then drove in another directions on his own business without the consent of his master. On his return he drove his master's horse and cart against and injured a third person, but the master was held to be exempt from liability for this injury. In Cousins v. Hannibal, &c. R. Co., 66 Mo. 572, the superintendent of the company took an idle locomotive from its roundhouse in the night, and ran it two

duty he is a stranger to his principal and cannot bind him. Very many cases hold that the master is not liable for a servant's willful and malicious trespass which he has neither commanded nor ratified and which was evidently perpetrated to gratify the private hate or malignity of the servant, although done under color of a discharge of the duty which he has undertaken for his employer.[53] Thus it is held that where a person who applies to

and one-half miles for a doctor for a sick neighbor. On the way he carelessly drove the engine upon and killed the plaintiff's mule. But the Supreme Court of Missouri held that the company was not liable for the death of the mule. In Morier v. St. Paul &c. R. Co., 31 Minn. 351-353, 17 N. W. 952, 47 Am. Rep. 793, a case in which an action was brought against the company for damages that resulted from a fire kindled by its sectionmen on its right of way to cook their dinners on a day when they were working for the company, before and after their dinner, Judge Mitchel, of the Supreme Court of the state of Minnesota, states this rule in these words: "If the act be done while the servant is at liberty from the service, and pursuing his own, ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 1 Thomp. Neg. (2d ed.), § 522, et seq., 885, 886; White Supplement, to Thomp. Neg., §§ 518-614; Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373; Storey v. Ashton, L. R. 4 Q. B. 476; Mitchenn v. Crassweller, 13 C. B. 237; McClenaghan v. Brock, 5 Rich. L. (S. Car.) 17." To the same effect are Campbell v. Providence, 9 R. I. 262, and Garretzen v. Duenckel, 50 Mo. 104, 107, 111, 11 Am. Rep. 405. See also Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37; Central of Georgia R. Co. v. Morris, 121 Ga. 484, 49 S. E. 606, 104 Am. St. 164; Obertoni v. Boston &c. R. Co., 186 Mass. 481, 71 N. E. 980, 67 L. R. A. 422.

[53] McManus v. Crickett, 1 East 106; Evansville &c. R. Co. v. Baum, 26 Ind. 70; Hibbard v. New York &c. R. Co., 15 N. Y. 455; Illinois Central R. Co. v. Downey, 18 Ill. 259, and authorities cited in last preceding note. See also as to this being the rule where the act is outside the scope of the employment, St. Louis Southwestern R. Co. v. Harvey, 144 Fed. 806; Dougherty v. Chicago &c. R. Co., 137 Iowa 257, 114 N. W. 902, 14 L. R. A. (N. S.) 590, and notes, 126 Am. St. 282. Everingham v. Chicago &c. R. Co., 148 Iowa 662, 127 N. W. 1009, Ann. Cas. 1912C, 848. Compare Bowens v. Illinois Cent. R. Co., 136 Fed.

have his baggage checked, and by his abusive language provokes a quarrel with the baggageman, in the course of which the baggageman injures him with a hatchet, he cannot hold the railroad company liable for his injuries.[54] The principle is one of wide sweep and is illustrated by many cases presenting divers phases.[55] It is held that an agent employed to control and super-

306, 70 L. R. A. 915 (holding company not liable) with Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37, 7 L. R. A. (N. S.) 927 (holding company liable under somewhat similar circumstances). Where one agrees to supply a railroad company with timber for construction of its road, and employes of subcontractors under him committed trespasses in getting timbers for such construction, the railroad company is not liable under the statute providing that an employer is not liable for torts of his employes, engaged in an independent business, when there is no evidence of a ratification by the company. Parker v. Waycross & F. R. Co., 81 Ga. 387, 8 S. E. 871.

[54] Little Miami R. Co. v. Wetmore, 19 Ohio St. 110, 2 Am. Rep. 373. The weight of authority holds the employer liable for willful injuries in a proper case. See post, §§ 1793, 2489.

[55] Stephenson v. Southern &c. Co., 93 Cal. 558, 29 Pac. 234, 15 L. R. A. 475, 27 Am. St. 226; Walton v. New York &c. Co., 139 Mass. 556, 2 N. E. 101; McKeon v. Citizen's &c. Co., 42 Mo. 79; Garretzen v. Duenckel, 50 Mo. 104, 11 Am. Rep. 405; Cousins v. Hannibal &c. Co., 66 Mo. 572; Farber v. Missouri &c. Co., 116 Mo. 81, 22 S. W. 631; Walker v. Hannibal &c. Co., 121 Mo. 575, 26 S. W. 360, 24 L. R. A. 363, 42 Am. St. 547; Farber v. Missouri Pacific Co., 32 Mo. App. 378; Pittsburgh &c. Co. v. Shields, 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, 21 Am. St. 840; Towanda &c. Co. v. Heeman, 86 Pa. St. 418; Cunningham v. Grand Trunk Railroad, 31 U. C. Q. B. 350; McKenzie v. Mcleod, 10 Bing. 385; Mitchell v. Crassweller, 13 C. B. 237. In many cases the question whether the act was performed within the scope of the agent's authority is one of fact. Kimball v. Cushmann, 103 Mass. 194, 4 Am. Rep. 528; Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. 361; Redding v. South Carolina &c. Co., 3 S. Car. 1, 16 Am. Rep. 681. But the question is often one of law. Stone v. Hill, 45 Conn. 44, 29 Am. Rep. 635; Storey v. Ashton, L. R. 4. Q. B. 476. See generally Rounds v. Delaware &c. Co., 64 N. Y. 129, 21 Am. Rep. 597; Cormack v. Digby, 9 I. R. C. L. 557; Burns v. Poulson, L. R., 8 C. P. 563; Sleath v. Wilson, 9 Carr. & P. 607; Whatman v. Pearson, L. R. 3 C. P. 422. Pollock says, "whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome." Pollock Torts, marginal page 71. This statement of the law is not entirely correct, for there are cases in which

vise the lands of a railway corporation cannot render the company liable in damages for malicious prosecution by instituting a criminal prosecution for larceny of the company's property, even though the prosecution is shown to be malicious and without probable cause.[56] So where a railroad inspector imprisoned the plaintiff on a charge of drunkenness and refusal to pay his fare, and preferred a charge against him before a magistrate by whom he was dismissed, the court held that the company was not liable in the absence of anything going to show that the inspector was authorized to make the arrest or that the fact of the plaintiff being in custody was known to the company.[57] If, however, the

the court must determine, as matter of law, whether the agent was acting within the scope of his authority.

[56] Pressley v. Mobile &c. R. Co., 15 Fed. 199. The same ruling was made in a somewhat similar case where a foreman and crew assaulted a party. Waller v. Great Northern R. Co., 18 S. Dak. 420, 100 N. W. 1097, 70 L. R. A. 731. But if it was part of the duty of a ticket agent of a corporation to post in his office notices pertaining to the business carried on there, the corporation is liable for a libel contained in a notice posted by him, though in excess of his authority Fogg v. Boston &c. R. Co., 148 Mass. 513, 20 N. E. 109, 12 Am. St. 583. And the railroad company is liable for a malicious prosecution instituted by the general manager, although its charter did not authorize his act. Gulf &c. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. 743.

[57] Eastern Counties R. Co. v. Broom, 15 Jur. 297, 2 Eng. L. & Eq. 406. See also Daniel v. Atlantic Coast Line R. Co., 136 N. Car. 517, 48 S. E. 816, 67 L. R. A. 455; Allen v. London &c. R. Co., L. R. 6 Q. B. 65, 23 L. T. 612. But where the agent is employed to detect and arrest persons who unlawfully interfere with its business, and while acting within the scope of his employment he arrests an innocent person, the corporation is liable. Louisville &c. Co. v. McKee, 92 Ind. 371, 47 Am. Rep. 193; Evansville &c. R. Co. v. McKee, 99 Ind. 519, 5 Am. Rep. 102; Pennsylvania Co. v. Weddle, 100 Ind. 138; Higgins v. Watervliet &c. R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Lynch v. Metropolitan &c. R. Co., 90 N. Y. 77, 43 Am. Rep. 141; Galveston &c. R. Co. v. Donahoe, 56 Tex. 162. See Goff v. Great Northern R. Co., 30 L. J. Q. B. 148, holding a railroad company liable for an arrest made by one of its servants under an authority to make arrests in certain cases, conferred upon railway employes by statute. There is, however, a conflict of authority. The Supreme Court of Maryland in the case of Central R. Co. v. Brewer, 78 Md. 63, 28 Atl. 615, held that a street railway company is not liable for a malicious prosecution and false

act is within the scope of the agent's duty, and is performed in the line of service, the great weight of authority is that the master is liable, although the act is wilful.

§ 252 (215). **Scope of authority—General conclusion.**—The conflict among the authorities to which we have referred makes it, we know, hazardous to venture to state a general conclusion, but we think that it is safe to affirm that, where cars or other equipments or appliances are owned and used for particular purposes and this is matter of general knowledge, no agent or servant of a railway company has authority to impose a duty upon the company by inviting a third person to use such equipments or appliances for his own pleasure or convenience, such person not being in the service of the company, having no business relations with it, and there being no emergency warranting a departure from the ordinary course of conduct or business. We have, indeed, stated our general conclusion in narrower terms than the best reasoned cases warrant, and are inclined to think the conclusion should be stated in broader terms. In our opinion, no agent or servant of a railroad company has general authority to devote any of the property of the company to uses entirely foreign and different from that to which the property was devoted by the corporation. The most liberal view that can be justly taken in favor of one who acts upon an invitation given by an agent or servant of the company to use its property for a purpose

arrest of an individual by its president and superintendent on a charge of having passed counterfeit money, unless such officers have express authority for such action or it is ratified by the company, citing Carter v. Machine Co., 51 Md. 290, 34 Am. Rep. 311; Tolchester Co. v. Steimmier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846. The conflicting cases are collected in a note to Ritchie v. Waller, 63 Conn. 155, 28 Atl. 29, 27 L. R. A. 161, 38 Am. St. 361. See also Conchin v. El Paso &c. R. Co., 13 Ariz. 259, 108 Pac. 260, 28 L. R. A. (N. S.) 88, and note; Mansfield v. Burns &c. Detective Agency, 102 Kans. 687, 171 Pac. 625, L. R. A. 1918D, 571, and note; Pearson v. Great Southern Lumber Co., 134 La. 117, 63 So. 759, L. R. A. 1916F, 1247, and note; Mose v. Campbells Creek R. Co., 75 W. Va. 62, 83 S. E. 721, L. R. A. 1915C, 1183, and note (company liable for act of special police officer appointed by public authorities at instance of company though act is prompted by personal motives of the officer.)

essentially different from that to which the property is devoted by the company is that he is a bare licensee to whom the company, ordinarily at least, owes no duty except that of doing him no wilful injury. There is, in truth, strong reason for regarding such a person as a mere trespasser. The cases which hold that one who undertakes to render service for a railroad company upon the request of an agent or employe who has no authority to bind the company by such a request is a mere volunteer to whom the company is responsible for wilful wrongs, but not for injuries resulting from negligence, support the conclusion stated.[58]

§ 253 (216). Contracts by agents—General doctrine.—The general rules applicable to contracts by agents of corporations apply to contracts by agents of railroad companies, varied only by the peculiar facts or by the nature of the business to which the contracts relate. It is not our purpose to consider the subject of agency generally, but to treat it only so far as is necessary to the

[58] We cite a few of the many cases which by their direct judgments or by their reasoning sustain our conclusion. Chicago &c. R. Co. v. Bryant, 65 Fed. 969; Arasmith v. Temple, 11 Ill. App. 39; Ream v. Pittsburgh &c. R. Co., 49 Ind. 93; Everhart v. Terre Haute &c. R. Co., 78 Ind. 292, 41 Am. Rep. 567; Pittsburgh &c. v. Adams, 105 Ind. 151, 5 N. E. 187; Wright v. Rawson, 52 Iowa 329, 3 N. W. 106, 35 Am. Rep. 275; Osborne v. Knox &c. R. Co., 68 Maine 49, 28 Am. Rep. 16; Gilshannon v. Storybook &c. Co., 10 Cush. (Mass.) 228; Walton v. New York &c. Co., 139 Mass. 556, 2 N. E. 101; Mellor v. Merchants' &c. Co., 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792; Keating v. Michigan &c. Co., 97 Mich. 154, 56 N. W. 346; Morier v. Railway Co., 31 Minn. 351, 353, 17 N. W. 952, 47 Am. Rep. 793; Louisville &c. Co. v. Douglass, 69 Miss. 723, 11 So. 933, 30 Am. St. 583; Cousins v. Railroad Co., 66 Mo. 572; Wyllie v. Palmer, 137 N. Y. 248, 33 N. E. 381, 19 L. R. A. 285; Flower v. Pennsylvania Co., 69 Pa. St. 210, 8 Am Rep. 251; Baird v. Petit, 70 Pa. St. 477; Campbell v. Providence, 9 R. I. 262; McClenaghan v. Brock, 5 Rich. L. (S. Car.) 17; Washburn v. Nashville &c. R. Co., 40 Tenn. 638, 75 Am. Dec. 784; Mayton v. Texas &c. Co., 63 Tex. 77, 51 Am. Rep. 637; Gulf &c. Co. v. Dawkins, 77 Tex. 228, 13 S. W. 932; Texas &c. R. Co. v. Skinner, 4 Tex. Civ. App. 661, 23 S. W. 1101; Mitchell v. Crassweller, 13 C. B. 237; Murray v. Currie, L. R. 6 C. P. 24. See also White v. Levi, 137 Ga. 269, 73 S. E. 376; Southern R. Co., v. Pope, 133 Ky. 835, 119 S. W. 237; Lynch v. Boston &c. R. Co., 226 Mass. 522, 116 N. E. 248, L. R. A. 1917E, 819, and note. Post, §§ 1305, 1580, 1581, 1582.

unity and completeness of the plan of our work. It may be said at the outset that an agent may bind the corporation by any contract which he may make within the scope of his apparent authority, although he exceeds his real authority, unless the party with whom he is dealing knows or ought to know the contract to be one which he is not authorized to make, but he cannot bind the company by an act outside of the real or apparent scope of his authority.[59] It has been held that a railroad company can neither be bound by a contract made by a person who is not its agent, nor can it ordinarily enforce a contract made by a person who is not its agent.[60] We suppose, however, that the doctrine

[59] Harrison v. Missouri Pacific R. Co., 74 Mo. 364, 41 Am. Rep. 318. Where the brakeman took up the tickets for the conductor and returned the wrong part of a return ticket to a passenger, thinking, as he testified, that "one-half of the ticket was good for a ride either way," the railroad was bound to accept such part of the ticket in payment for the return passage, and was held liable in damages for a refusal so to do. Lake Erie &c. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464. See as to whether conductor can waive conditions in stockdrovers' pass, note in 27 L. R. A. (N. S.) 646. Persons held out as the general agent and the state agent of a foreign corporation, who employ a general manager to assist them in its work bind the corporation by their contract, if the other party is ignorant of the limitation on their authority. Equitable Endowment Assn. v. Fisher, 71 Md. 430, 18 Atl. 803. See also as to implied authority of superintendent of department to contract with reference to matters relating thereto, note in 38 L. R. A. (N. S.) 1135. But an officer of a corporation not authorized to transact the general business of the company with third persons cannot bind the company by certifying that the company has no lien on certain shares of stock. Foster v. Cleveland &c. Co., 56 Fed. 434; Montgomery &c. Co. v. Hurst, 9 Ala. 513; Montgomery &c. Co. v. Hardaway, 104 Ala. 100, 16 So. 29; St. Louis &c. Co. v. Hendricks, 48 Ark. 177, 2 S. W. 783, 3 Am. St. 220; Dye v. Virginia &c. Co., 9 Mackey (D. C.) 63; Chicago &c. Co., v. Volk, 45 Ill. 175; Kenton Ins. Co. v. Bowman, 84 Ky. 430, 1 S. W. 717; Niebles v. Minneapolis &c. Co., 37 Minn. 151, 33 N. W. 332; Fowlds v. Evans, 52 Minn. 551, 54 N. W. 743; Deming v. Grand Trunk &c. Co., 48 N. H. 455; Beattie v. Delaware &c. Co., 90 N. Y. 643; Katzenstein v. Raleigh &c. R. Co., 84 N. Car. 688, 6 Am. & Eng. R. Cas. 464; International &c. Co. v. Ragsdale, 67 Tex. 24, 2 S. W. 515; Wood v. Ontario &c. Co., 24 U. C. C. P. 334; London & Northwestern R. Co. v. Bartlett, 7 H. & N. 400.

[60] Chicago &c. Co. v. Estes, 71

of the cases cited in the note must be qualified by the rule that an effective ratification is equivalent to precedent authority. Strictly speaking, the relation of principal and agent cannot exist in the absence of a contract, express or implied.[61] This doctrine sustains the decisions which adjudge that a volunteer cannot be regarded as the agent or employe of a railroad company, although he may, in fact, assume to perform acts in its service.

§ 254 (217). Declarations and admissions of agents.—The familiar rule is that a principal is not bound, as a general rule, by the declarations or admissions of an agent unless made in the course of business or line of duty of the agent and while "the transaction is depending." This rule is one of extensive application. An agent may bind the corporation by his declarations and admissions made in and about the execution of the duties of his employment in the same manner that an agent of a private individual may bind his principal.[62] It is, however, essential to the

Iowa 603, 33 N. W. 124, 30 Am. & Eng. R. Cas. 276; Estes v. Chicago &c. Co., 72 Iowa 235, 33 N. W. 647. See also note in L. R. A. 1918F, 8-137.

[61] Central Trust Co. v. Bridges, 57 Fed. 753, 57 Am. & Eng. R. Cas. 452; Fischer v. Merchants' Despatch &c. Co., 13 Mo. App. 133; Kelly v. Lehigh &c. Co., 8 Daly (N. Y.) 291. In the case first cited the court said: "An agency is created—authority is actually conferred—very much as a contract is made, i. e., by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency." This rule does not apply where the principal holds out another as his agent, for in such a case the liability rests upon the ground of estoppel.

[62] Montgomery R. Co. v. Hurst, 9 Ala. 513; Union &c. Co. v. Hepner, 3 Colo. App. 313, 33 Pac. 72; Louisville &c. Co. v. Buck, 116 Ind. 566, 19 N. E. 453, 2 L. R. A. 520, 9 Am. St. 883; Ohio &c. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32 N. E. 831, 19 L. R. A. 773; Covington R. Co. v. Ingles, 15 B. Mon. (Ky.) 637; Whitworth v. Detroit &c. R. Co., 81 Mich. 98, 45 N. W. 500; Malecek v. Tower Grove R. Co., 57 Mo. 17; Henderson v. Railroad Co., 17 Tex. 560, 67 Am. Dec. 675; International &c. Co. v. Lewis (Tex. Civ. App.), 23 S. W. 323. See generally note in Ann. Cas. 1912C, 109; also Hill v. Pullman Co., 188 Fed. 497; Touchberry v. Northwestern R. Co., 88 S. Car. 47, 70 S. E. 424; Deaver-Jeter Co. v. Southern R. Co., 91 S. Car. 503, 74 S. E. 1071, Ann Cas. 1914A, 230.

competency of such declarations, as a general rule, that they be not narratives of past occurrences, but, in a sense at least, part of the res gestae.[63]

§ 255 (218). **Declarations of agent—Res gestae.**—The settled rule is that the declarations of an agent made after the transaction is closed or usually long after an event has happened, are not admissible against the principal.[64] The authorities are substantially agreed that the declarations are not competent unless made under such circumstances and at such a time and place as to be regarded as part of the res gestæ;[65] but there is much diversity

[63] To be admissible the declarations must be made by the agent acting within the scope of his authority, dum fervet opus. Bensley v. Brockway, 27 Ill. App. 410; Deere v. Bagley, 80 Iowa 197, 45 N. W. 557; Corrister v. Kansas City &c. Co., 25 Mo. App. 619; Bevis v. Baltimore &c. R. Co., 26 Mo. App. 19; Southerland v. Wilmington &c. Co., 106 N. Car. 100, 11 S. E. 189. See also Axtell v. Northern Pac. R. Co., 9 Idaho 392, 74 Pac. 1075; Pennsylvania R. Co. v. Orem Fruit &c. Co., 111 Md. 356, 73 Atl. 571; Hogan v. Kelly, 29 Mont. 485, 75 Pac. 81; St. Louis &c. R. Co. v. Carlisle, 34 Tex. Civ. App. 268, 78 S. W. 553; St. Louis Southwestern R. Co. v. Gilbert (Tex. Civ. App.), 136 S. W. 836; 1 Elliott Ev. §§ 252, 564, 565.

[64] Atchison &c. Co. v. Parker, 55 Fed. 595; St. Louis &c. Co. v. McLelland, 62 Fed. 116; Huntsville &c. Co. v. Corpening, 97 Ala. 681, 12 So. 295; Chewning v. Ensly &c. R. Co., 100 Ala. 493, 14 So. 204; Ft. Smith Oil Co. v. Slover, 58 Ark. 168, 24 S. W. 106; St. Louis &c. R. Co. v. Kelley, 61 Ark. 52, 31 S. W. 884; Borland v. Nevada Bank, 99 Cal. 89, 33 Pac. 737, 37 Am. St. 32; Johnson v. East Tennessee &c. Co., 90 Ga. 810, 17 S. E. 121; Holt v. Spokane &c. Co., 3 Idaho 703, 35 Pac. 39; Chicago &c. Co. v. Johnson, 36 Ill. App. 564; McCarthy v. Muir, 50 Ill. App. 510; Bellefontaine &c. Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201; Ohio &c. Co. v. Levy, 134 Ind. 343, 32 N. E. 815; Petrie v. Columbia &c. Co., 27 S. Car. 63, 2 S. E. 837; Waldrop v. Greenwood &c. Co., 28 S. Car. 157, 5 S. E. 471; La Rue v. St. Anthony &c. Co., 3 S. Dak. 637, 54 N. W. 806; Wendt v. Chicago &c. Co., 4 S. Dak. 476, 57 N. W. 226; Weideman v. Tacoma &c. Co., 7 Wash. 517, 35 Pac. 414; Grisim v. Milwaukee &c. Co., 84 Wis. 19, 54 N. W. 104.

[65] Vicksburg &c. Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. ed. 299; Chicago &c. Co. v. Becker, 32 Fed. 849; Memphis &c. Co. v. Womack, 84 Ala. 149, 4 So. 618; Durkee v. Central Pacific &c. Co., 69 Cal. 533, 11 Pac. 30, 58 Am. Rep. 562; Pittsburgh &c. Co. v. Theobald, 51 Ind. 246; Ohio &c. Co. v. Stein, 133 Ind. 243, 31 N. E. 180, 32

of opinion as to what declarations can be considered as part of the res gestæ. Some of the cases have unduly extended the rule and allowed prejudicial declarations to go to the jury[66] unmindful of the sound principle that declarations of a third person are generally incompetent and that the declarations of an agent are held competent as exceptions to the general rule. Other cases have erred, as we think, in allowing expressions of opinion to go in evidence as part of the res gestæ.[67] It seems to us that an opinion of a witness cannot be regarded as part of an occurrence or transaction, and that only the facts connected with the occurrence can be strictly said to form part of the res gestæ.

§ 256 (219). Declarations must relate to matter in scope of authority and in controversy.—As a general rule, declarations of an agent not relating to the transaction or occurrence are not admissible against the principal, nor are declarations not connected with matters over which the agent has authority.[68] It has been

N. E. 831; Blanchard &c. Co. v. Garritson, 43 Ind. App. 303, 87 N. E. 151; State v. Pomeroy, 25 Kans. 349; Michigan &c. Co. v. Coleman, 28 Mich. 440, 446; Adams v. Hannibal &c. Co., 74 Mo. 553, 41 Am. Rep. 333; State v. Tilley, 3 Ired. L. (N. Car.) 424; Southerland v. Wilmington &c. Co., 106 N. Car. 100, 11 S. E. 189; Luby v. Hudson River &c. Co., 17 N. Y. 131; Waldele v. New York &c. R. Co., 95 N. Y. 274, 47 Am. Rep. 41; Martin v. New York &c. Co., 103 N. Y. 626, 9 N E. 505; Cincinnati &c. Co. v. Mara, 26 Ohio St. 185. See generally note in Ann. Cas. 1912C, 109.

[66] Gorman v. Minneapolis &c. Co., 78 Iowa 509, 43 N. W. 303; Omaha &c. Co. v. Chollette, 41 Nebr. 578 59 N. W. 921; Texas &c. Co. v. Lester, 75 Tex. 56, 12 S. W. 955; Gulf &c. Co. v. Compton, 75 Tex. 667, 13 S. W. 667; International &c. R. Co. v. Smith (Tex.), 14 S. W. 642, 44 Am. & Eng. R. Cas. 324; Linderberg v. Cresent Co., 9 Utah 163, 33 Pac. 692; Hooker v. Chicago &c. Co., 76 Wis. 542, 44 N. W. 1085, 41 Am. & Eng. R. Cas. 498. For instances of declarations held admissible, see 1 Elliott Ev. §§ 564, 565, and Elliott Ev. § 2510.

[67] Elledge v. National &c. Co., 100 Cal. 282, 34 Pac. 720, 38 Am. St. 290. See Metropolitan &c. Co. v. Collins, 1 App. D. C. 383; St. Louis &c. Co. v. Paup (Ark.), 22 S. W. 213; Alabama &c. Co. v. Hill, 90 Ala. 71, 8 So. 90, 9 L. R. A. 442, 24 Am. St. 764.

[68] Missouri &c. Co. v. Stults, 31 Kans. 752, 3 Pac. 522, 15 Am. & Eng. R. Cas. 97; Wells v. Alabama &c. Co., 67 Miss. 24, 6 So. 737; Chillicothe v. Raynard, 80 Mo. 185; Younce v. Broad River &c. Co., 155 N. Car. 239, 71 S. E. 329, Ann. Cas.

held that declarations of an agent, although made at the time of the occurrence, are not competent against the principal because not connected with it.[69] It is important that the rule admitting declarations of agents be confined within its legitimate limits, as its extension is likely to result in unjust injury.

1912C, 107, and other cases cited in note; Baltimore &c. Co. v. Christie, 5 W. Va. 325; Kirby v. Great Western &c. Co., 18 L. T. N. S. 658. See generally Seaboard Air Line R. Co. v. Sikes, 4 Ga. App. 7, 60 S. E. 868; Hilbert v. Spokane &c. R. Co., 20 Idaho 54, 116 Pac. 1116; Dummington v. Louisville &c. R. Co., 153 Ky. 388, 155 S. W. 750; Warner v. Maine Cent. R. Co., 111 Maine 149, 88 Atl. 403; Crowley v. Boston Elev. R. Co., 204 Mass. 241, 90 N. E. 532; 1 Elliott Ev. § 252.

[69] Butler v. Manhattan R. Co., 143 N. Y. 417, 38 N. E. 454, 26 L. R. A. 46, 42 Am. St. 738. We quote from the opinion the following. "We think there was error also in one of the rulings upon the admission of evidence. The plaintiff's wife testified to the closing of the gate and the blow received, and stated that at the time the guard was looking in the opposite direction; that immediately after the blow she made an exclamation of pain. Then plaintiff's counsel then asked the witness 'What the guard said in reply to her exclamation of pain.' The question was objected to by the counsel for defendant as incompetent and hearsay, whereupon the plaintiff's counsel said: "I intend to prove that the brakeman in charge of the brakes at the moment of the blow did not treat her (the plaintiff's wife) with respect, but, on the contrary, insulted her.' The trial judge, after warning the plaintiff's counsel, finally allowed the question to be put, and the witness answered. He said: 'I can go to hell; shut up.' The defendant's counsel excepted to the evidence. The only claim made in support of the ruling of the court is that the remark of the brakeman was part of the res gestae. We think the ruling cannot be supported upon this ground. The only circumstance upon which it can be claimed to have been part of the res gestae was its connection in point of time with the transaction under investigation, viz.: The alleged injury from the closing of the gate. While proximity in point of time with the act causing the injury is, in every case of this kind essential to make what was said by a third person competent evidence against another as part of the res gestae, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But, as in this case, the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as res gestae. It was as independent of the principal fact, and as incompetent as evidence, as

§ 257 (220). Exercise of authority by agents—Illustrative cases.—As a general rule the authority of an agent extends to the doing of all subordinate acts which properly accompany the principal act which he is to do. Thus, a power given by a corporation to an agent to purchase property for the corporation necessarily carries with it the power to obligate the company to pay, notwithstanding the fact that a by-law forbids the contracting of any debt for a company except by order of the directors.[70] If, however, he has never been clothed with any real or apparent authority by the corporation, the person who deals with him relying upon his representations as to his authority has no recourse on any one but the person who assumes to be the agent of the corporation.[71] And where the acts done are outside of the ordinary duties of similar agents in corporations generally, the presumption, in the absence of anything to the contrary, will be that they were done without authority.[72] Accordingly, it is held

though the act and the remark had been much further separated in point of time. Res gestae in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. See Waldele v. New York &c. R. Co., 95 N. Y. 274, 47 Am. Rep. 41, and cases cited. The remark of the brakeman was brutal, and for that reason was calculated to prejudice the jury, but it had nothing to do with the question at issue, viz., whether the plaintiff's wife sustained an injury through the defendant's negligence, and, having been admitted against the protests of the defendant's counsel, its admission was reversible error."

[70] Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823, 28 Am. & Eng. Corp. Cas. 12.

[71] Talladega Ins. Co. v. Peacock, 67 Ala. 253; Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202. Even in cases of negotiable instruments, those dealing with an agent must inquire into his authority. Silliman v. Fredricksburg &c. R. Co., 27 Grat. (Va.) 119. An agency cannot be proved by proof of the oral declarations of the supposed agent himself. Missouri Pacific R. Co. v. Stults, 31 Kans. 752, 3 Pac. 522.

[72] Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Marquette &c. R. Co. v. Taft, 28 Mich. 289. But see where the act is within the scope of the ordinary and appropriate duties of such officers or agents. National State Bank v. Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. 330; Eureka Iron &c. Works v. Bresnehan, 60 Mich. 332, 23 N. W. 524; Lucky Queen Min. Co. v. Abraham, 26 Ore. 282, 38 Pac. 65.

that without a special authority conferred upon him in the particular instance, neither an assistant roadmaster nor a master of transportation can be presumed to have authority to represent a railroad company in claiming disputed titles.[73] And it has also been held that the trackmaster of a railroad company, having charge of a section of its roadbed, which includes an ash-pit, has no authority to make a contract allowing one to have all the coals and ashes dumped by locomotives at the pit as compensation for keeping it clear.[74] The fact that a civil engineer of a railroad, who had no special authority to employ men, told a man to see to delivering some freight which was on the steps of the freight house, and to look to things there, and remain until the company discharged him, creates no right of action against the company; and such an employment does not become binding upon the company by being ratified by the station agent who is not shown to have had authority in the matter.[75] It is also apparently held in a recent case that a division superintendent had no authority to direct a section foreman to assist in unloading cattle-guard timber, that not being part of the foreman's duty, and that the foreman while so engaged was not an employe of the company.[76] So it has been held that a station agent has no authority to employ third persons to watch the station for burglars, and that no implication of authority to do so arises from the fact that the station agent himself had authority to do the acts.[77]

[73] Drew v. Comstock, 57 Mich. 176, 23 N. W. 721.

[74] Little v. Kerr, 44 N. J. Eq. 263, 14 Atl. 613.

[75] Willis v. Toledo &c. R. Co., 72 Mich. 160, 40 N. W. 205. But see Wilson v. Kings Co. El. R. Co., 114 N. Y. 487, 21 N. E. 1015.

[76] Bryan v. International &c. R. Co. (Tex. Civ. App.), 90 S. W. 693, citing Freeman v. San Antonio Brew. Co., 38 Tex Civ. App. 396, 85 S. W. 1165, where it is held that a foreman of one department had no authority to order a workman in his department to work in another separate department, and that the relation of master and servant did not exist with respect to such work and the servant could not recover as a servant while injured in such separate department.

[77] Lipscomb v. Houston &c. R. Co., 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. 804. But see for instances in which the company has been held liable where the agent apparently had authority as so held out or from a long course of dealing. Florida &c. R. Co. v. Vernidoe, 81 Ga. 175, 7 S. E. 129; Batavian Bank v. Minneapolis &c. R. Co., 123

§ 258 (221). Scope of authority—Illustrative cases.—A person climbed upon a railroad train on which he was forbidden by the rules of the company to ride, and was compelled by an employe of the company, who had no authority over the train, to alight while it was in motion, and was thereby injured. The company was held not liable.[78] It has been held that a locomotive engineer, being subordinate to the conductor in charge of the train, has no authority to impose a duty upon a railroad company to persons whom he permits to ride on the train in violation of the rules of the company.[79] A similar doctrine is held with reference to the authority of the baggagemaster to permit persons to ride on a train,[80] and a like doctrine was applied in a case where a person was riding on the train by invitation of a brakeman.[81] A somewhat different doctrine was held in a case where a person was invited to get on an engine,[82] but the doctrine of the case referred to seems to us to be unsound. An employe has no authority to invite persons to ride on the hand-car for their own pleasure or convenience.[83] It has, however, been held that a trainmaster has authority to invite persons to ride on a hand-car,[84] but in our

Wis. 389, 101 N. W. 687; 2 Thomp. Corp. (2d ed.), §§ 1468, 1590, 1603. And where he was superintendent or manager of a department, or the like. Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135, and other cases there cited in note.

[78] Towanda Coal Co. v. Heeman, 86 Pa. St. 418; Marion v. Chicago &c. R. Co., 59 Iowa 428, 13 N. W. 415, 44 Am. Rep. 687. But if one with authority to put him off the train should do so in an improper manner and thereby cause him to be injured, the company would be liable. Carter v. Louisville &c. R. Co., 98 Ind. 552, 49 Am. Rep. 780; Benton v. Chicago &c. R. Co., 55 Iowa 496, 8 N. W. 330; Rounds v. Delaware &c. R. Co., 64 N. Y. 129.

[79] Chicago &c. Co. v. Casey, 9 Ill. App. 632, citing Chicago &c. Co. v. Mitchie, 83 Ill. 427.

[80] Reary v. Louisville &c. Co., 40 La. Ann. 32, 3 So. 390, 8 Am. St. 497, 34 Am. & Eng. R. Cas. 277.

[81] Candiff v. Louisville &c. Co., 42 La. Ann. 477, 7 So. 601.

[82] Nashville &c. Co. v. Erwin, (Tenn.) 3 Am. & Eng. R. Cas. 465. But see Ohio &c. Co. v. Allender, 47 Ill. App. 484. Clarke v. Colorado &c. R. Co., 165 Fed. 408, 19 L. R. A. (N. S.) 988, and cases cited in note

[83] International &c. Co. v. Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521. See Poole v. Chicago &c. Co., 56 Wis. 227, 14 N. W. 46.

[84] International &c. Co. v. Prince, 77 Tex. 560, 14 S. W. 171, 19 Am.

opinion this decision is erroneous, for a hand-car, as every one is bound to know, is not kept or used by a railroad company for carrying persons not in its service or having business with it. In a well considered case it was held that a section foreman had no authority to invite persons to ride on a hand-car,[85] and the doctrine asserted in that case we regard as the true one.[86]

§ 259 (221a). Authority of agents—Emergencies and special circumstances.—Special circumstances may sometimes give authority to an agent over a particular matter or to do an act in regard to which he would ordinarily have no authority either express or implied. That is to say, facts may exist which may greatly broaden an agent's ordinary authority, and the special circumstances may be such that an act of an officer, or even of an agent who is not an officer, may bind the company, when,

St. 795, 44 Am. & Eng. R. Cas. 294. See Prince v. International &c. Co., 64 Tex. 144.

[85] Hoar v. Maine Central Co., 70 Maine 65, 35 Am. Rep. 299. The court cited the cases of Graham v. Toronto &c. Co., 23 U. C. C. P. 541; Sheerman v. Toronto &c. Co., 34 U. C. Q. B. 451, and in the course of the opinion said: "A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers, a section foreman with his handcar has no right to impose upon the defendant the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know this much. If the risk is much greater by this mode of conveyance, the plaintiff's intestate, by adopting it, assumed the extra risk arising therefrom, and must be held to abide the unfortunate consequences. No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance."

[86] See Clarke v. Colorado &c. R. Co., 165 Fed. 408. See St. Louis &c. R. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418n, and other cases cited in note; Pittsburgh &c. R. Co. v. Hall, 46 Ind. App. 219, 90 N. E. 498, 91 N. E. 743; Willis v. Atlantic &c. R. Co., 120 N. Car. 508, 26 S. E. 784; Rathbone v. Oregon R. Co., 40 Ore. 225, 66 Pac. 909; International &c. R. Co. v. Cock, 68 Tex. 713, 5 S. W. 635, 2 Am. St. 521.

under ordinary circumstances such officer or employe would have no authority in the premises. Thus, an emergency may arise in which there is an absolute duty resting on the company to act at once, and in which, either because its own interests require it or because of such duty to others to be present by some representative and to act at once, or both, the highest agent on the ground, or some other agent, depending somewhat upon the circumstances of the particular case, may act for and bind the company to the extent, at least, that the emergency requires. Such cases are of course, exceptional, but it is easy to suppose cases where a conductor, or an engineer, or even a brakeman or switchman, in the absence of any one else, would be authorized to do some act to save life, or the like, not ordinarily within the scope of his employment or duty, and even to bind or make the company responsible. We suppose, for instance, that if the wires were down, and all communication were cut off because of a storm, and the engine should break down and human life would be endangered by delay and failure to repair, or even perishable freight ruined, the conductor, or, perhaps, the engineer, under some circumstances, would have authority to purchase a small piece of material necessary to make temporary repairs, or that the conductor, under such circumstances, might employ necessary assistance to save perishable freight in case of a wreck. Certainly if there were a wreck and passengers were caught under a car and injured, and in imminent danger of being crushed to death, a conductor, being the highest representative present, would have authority to employ assistance, if necessary, to raise the car and rescue such passengers. Other illustrations might be given,[87] but the question

[87] See post, § 344. See also Crossan v. New England R. Co., 149 Mass. 196, 21 N. E. 367, 3 L. R. A. 766, 14 Am. St. 408; Baldwin Railroads, 253. In the course of the opinion in Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752, it is said: "The authority of an agent is to be determined from the facts of the particular case. Facts may exist which will greatly broaden or greatly lessen an agent's authority. A conductor's authority in the presence of a superior agent may dwindle into insignificance, while in the absence of a superior it may become broad and comprehensive. An emergency may arise which will require the corporation to act instantly, and if the conductor

has usually arisen in regard to the employment of physicians and surgeons, and that branch of the subject merits more than a general reference. It will be considered in the following section.

§ 260 (222). **Authority of agents—Employment of surgeons.**—It may be affirmed that the employment of a physician or surgeon is not ordinarily within the scope of the authority of a subordinate agent or employe, but that there may be extraordinary cases giving authority to employ a surgeon or physician.[88] Neither a roadmaster,[89] section agent,[90] yardmaster,[91] nor stationmaster,[92] will be presumed to have authority to employ a

is the only agent present, he must act for the corporation, and if he acts at all, all his acts are of just as much force as that of the highest officer of the corporation. There are cases, where the train is distant from the supervision of superior officers, where the conductor must act, and act for the company, and where, for the time, and under the exigencies of the occasion, he is its sole representative, and if he be its only representative, he must, for the time and the exigency, be its highest representative. Simple examples will prove this to be true. Suppose, for illustration, that a train is brought to a halt by the breaking of a bolt, and that near by is a mechanic who can repair the broken bolt and enable the train to proceed on its way, may not the conductor employ the mechanic? Again suppose a bridge is discovered to be unsafe, and that there are timbers at a neighboring mill which will make it safe, may not the conductor, in behalf of his principal, employ men to haul the timber to the bridge? Once more, suppose the engineer of a locomotive to be disabled, and that it is necessary to at once move the train to avoid danger, and there is near by a competent engineer, may not the conductor employ him to take the train out of danger?" In St. Louis &c. R. Co. v. Hunt, 6 Ala. App. 434, 60 So. 530, it is held that a conductor has authority to discharge all subordinate brakemen.

[88] See Hunick v. Meramec Quarry Co., 262 Mo. 560, 172 S. W. 43, and authorities there reviewed.

[89] Louisville &c. R. Co. v. McVay, 98 Id. 391, 49 Am. Rep. 770. See also Peninsular R. Co. v. Gary, 22 Fla. 356, 1 Am. St. 194.

[90] Tucker v. St. Louis &c. R. Co., 54 Mo. 177.

[91] Marquette &c. R. Co. v. Taft, 28 Mich. 289.

[92] Cox v. Midland &c. R. Co., 3 Exch. 268. See also Godshaw v. J. N. Struck & Bros., 109 Ky. 285, 58 S. W. 781, 51 L. R. A. 668. A railroad company will be held to be legally liable to furnish necessary medical attendance and care to passengers injured by its fault, since it

physician to attend a servant of the company injured in the line of his duties. So, also, it is held that there is nothing in the duties of the company's solicitor,[93] or surgeon,[94] or engineer,[95]

has contracted to carry them safely, and is liable for any failure to do so. But no such liability attaches when they are hurt by an inevitable accident, such as the derailment of a train by a cyclone. Union Pacific R. Co. v. Beatty, 35 Kans. 265, 10 Pac. 845, 57 Am. Rep. 160. And a railroad company will be held liable for any necessary care bestowed upon an injured employe at the instance and request of the principal agent, which it may have upon the ground and in a position to engage such care, in an emergency calling for immediate action. Since an employer does not stand to his servants as a stranger, but owes them the duty imposed by the dictates of humanity. Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Terre Haute &c. R. Co. v. Brown, 107 Ind. 336, 8 N. E. 218. But such authority by implication from necessity will not be extended any further than the necessities of the case require. Louisville &c. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320.

[93] Neither a conductor nor a solicitor of a railroad company can ordinarily contract for surgical attendance upon an injured passenger or employe, so as to bind the company. St. Louis &c. R. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092.

[94] Mayberry v. Chicago &c. R. Co., 75 Mo. 492; Terre Haute &c. R. Co. v. Brown, 107 Ind. 336, 8 N. E. 218. See also Smith v. Chicago &c. R. Co., 104 Iowa 147, 73 N. W. 581; Burke v. Chicago &c. R. Co., 114 Mich. 685, 72 N. W. 997.

[95] In an action by a physician against a railroad company for professional services rendered to an employe of the company who had sustained an injury on its cars, it was held that evidence that the engineer of the train, on which the injury happened, telegraphed to a station agent to have a doctor at the station when the train arrived, does not show an employment of the plaintiff by the company, in the absence of evidence of the authority of the engineer to bind the company. Cooper v. New York Central &c. R. Co., 6 Hun (N. Y.) 276. But it would seem that evidence that he was in sole charge of the train, and the employes' injury required immediate attention would be sufficient to show his authority. Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Marquette &c. R. Co. v. Taft, 28 Mich. 289, per Cooley, J. The doctrine of these cases last cited is to be carefully limited and rigidly confined to cases where there is pressing and urgent emergency requiring immediate action. There is, of course, no general duty resting on the employer to care for sick or wounded employes, and the duty to obtain the services of a surgeon is not a general one, but a transient one arising out of and only existing during an emergency. An agent can not do

or conductor[96] from which such authority can be presumed. But an emergency calling for immediate action in order to save life or prevent suffering may be sufficient to confer authority upon the subordinate to employ necessary surgical aid, if he is the highest representative of the company on the ground.[97] There may be cases of immediate urgency when it will be within the scope of the agent's employment to render those imperative services which the dictates of justice and humanity hold to be due from an employer to a servant injured while engaged in his

more than the immediate urgency requires without exceeding his authority.

[96] St. Louis &c. R. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092; Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Tucker v. St. Louis &c. R. Co., 54 Mo. 177. See also Northern Central R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545; Wills v. International &c. R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273. In Hays v. Wabash R. Co., 119 Mo. App. 439, 95 S. W. 299, the defendant railroad company had a book of rules, one of which had been delivered to the plaintiff, a local surgeon retained by the defendant, and one of such rules provided that in cases of wrecks or accidents, where either passengers or employes are injured, the nearest competent surgeon should be summoned and the nearest hospital and the chief officers of the road should be notified by wire, giving the name and whereabouts of the injured persons, the name of the surgeon in attendance, and the like. Plaintiff was wired by the conductor of the train to meet the same at a certain station and take care of a passenger who had been injured, and on the arrival of the train met and conducted the passenger to a hospital, where he performed an operation and subsequently cared for him. The court held that the plaintiff was at least entitled to recover the reasonable value of his services in treating such passenger for a reasonable time until the defendant's claim agent could have been notified and his answer returned.

[97] Arkansas Southern R. Co. v. Loughridge, 65 Ark. 300, 45 S. W. 907; Bonnette v. St. Louis &c. R. Co., 87 Ark. 197, 112 S. W. 220, 16 L. R. A. (N. S.) 1081; Terre Haute &c R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Salter v. Nebraska &c. Co., 79 Nebr. 373, 112 N. W. 600, 13 L. R. A. (N. S.) 545. But see Cox v. Midland Counties R. Co., 3 Exch. 268; Houghton v. Pilkington, (1912) 3 K. B. 308, Ann. Cas. 1913C, 790. And in some jurisdictions the authority has been denied where the injured person was a trespasser. Adams v. Southern R. Co., 125 N. Car. 565, 34 S. E. 642; Wills v. International &c. R. Co., 41 Tex. Civ. App. 58, 92 S. W. 273. But compare Dych v. Vicksburgh &c. R. Co., 79 Miss. 361, 30 So. 711.

service;[98] and not only this, but in cases of urgent emergency it may become his duty to take such measures as will prevent needless suffering and loss of life.[99] And even though the agent had no authority to engage a physician, such an employment may be ratified, and it is held that a physician employed by the conductor of a train to care for a man injured by the train can

[98] Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752. In Marquette &c. R. Co. v. Taft, 28 Mich. 289, Judge Cooley says: "We shall not stop to prove that there is a strong moral obligation resting upon any one engaged in a dangerous business, to do what may be immediately necessary to save life or prevent an injury becoming irreparable, when an accident happens to a person in his employ. We shall assume this to be too obvious to require argument * * *. There can be no doubt that it is within the scope of somebody's employment for a railway to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case; and if no one is authorized to do as much for the faithful servant of the company who is in like manner injured, but all persons in its employ are impliedly forbidden to incur any expense beyond what may be necessary to remove him out of the way of their trains and machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then, if such is the law, the court must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law."

[99] In the case of Northern Central R. Co. v. State, 29 Md. 420, 96 Am. Dec. 545, a man was so injured by a collision with the defendant's train as to become unconscious. The company's agents believing him to be dead, but without careful examination, laid him upon a box in the tool house and left him without care over night. The man recovered consciousness in the night, but because of the lack of attention to his wounds, bled to death. The court held that it is the duty of agents in charge of a railroad train to take care of one injured by the train which they are operating, and to do it with a proper regard to his safety and the laws of humanity. And that the above facts were evidence that he came to his death by the negligence of the company's servants, although he may have been negligent in getting upon the track in the first place. See also Humick v. Meramac Quarry Co., 262 Mo. 560, 172 S. W. 43, and authorities there reviewed.

recover against the railroad company for his services if, after knowledge of his employment by the conductor, the company failed to notify him that it would not be responsible.[1] The authority of such a subordinate agent, however, arises only with the emergency which makes it necessary for him to possess it, and ends with such emergency.[2] And neither a conductor,[3] a roadmaster,[4] a section agent,[5] a station agent,[6] nor the company's physician possessing authority to purchase medicines on the company's credit,[7] can bind it by a contract for nursing and

[1] Terre Haute &c. R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650. To the same effect see Toledo &c. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484, where a letter was written to the general superintendent by the station agent, by whom a nurse and physician were employed stating the facts, and he did not disclaim liability for the company. Toledo &c. R. Co. v. Prince, 50 Ill. 26, holding that the superintendent, to escape liability, should repudiate the station agent's act in such a case and direct him to apprise the surgeon of such dissent. Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770, holding the company bound by a ratification by the general manager of a contract for nursing made by the roadmaster. See also Indianapolis &c. R. Co. v. Morris, 67 Ill. 295.

[2] St. Louis &c. R. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092; Louisville &c. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A 320; Ohio &c. R. Co. v. Erly, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546, and note; Cushman v. Cloverland Coal Co., 170 Ind. 402, 406, 84 N. E. 759, 760 (citing text).

[3] Sevier v. Birmingham &c. R. Co., 92 Ala. 258, 9 So. 405; St. Louis &c. R. Co. v. Hoover, 53 Ark. 377, 13 S. W. 1092; Indianapolis &c. R. Co. v. Morris, 67 Ill. 295. A conductor having procured or consented to the attendance of a competent surgeon upon an injured brakeman cannot bind the company by engaging additional surgeons. Louisville &c. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320.

[4] Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770.

[5] Tucker v. St. Louis &c. R. Co., 54 Mo. 177. But see Bigham v. Chicago &c. R. Co., 79 Iowa 534, 44 N. W. 805.

[6] Atlantic &c. R. Co. v. Reisner, 18 Kans. 458, where the court says: "The authorities cited sustain the proposition that a station agent of a railroad company is not authorized, by virtue of his position as such agent, to employ a hotelkeeper, at the expense of the company, to attend to one of its brakemen, injured while working for the company, nor to furnish such employes with board and lodging while disabled." See also Tucker v. St. Louis &c. R. Co., 54 Mo. 177.

[7] Mayberry v. Chicago &c. R. Co.,

care bestowed on an employe during a protracted illness, though such contracts may be ratified by the company[8] and made binding upon it if it owes either a legal or moral obligation to the injured party.[9] In the case of officers and superior agents having general authority to enter into contracts for the company, however, the courts hold that authority to procure care and medical attendance of an injured employe is incident to such general authority. Accordingly it is held that the general manager,[10] or the general superintendent,[11] or an assistant super-

75 Mo. 492, 11 Am. & Eng. R. Cas. 29. See also Southern R. Co. v. Grant, 136 Ga. 303, 71 S. E. 422, Ann. Cas. 1912C, 472 (citing text). To much the same effect are Bonnett v. St. Louis &c. R. Co., 87 Ark. 197, 112 S. W. 220, 128 Am. St. 30, 16 L. R. A. (N. S.) 1081 (holding a physician so employed by a conductor in an emergency has no authority to employ an assistant); Bond v. Hurd, 31 Mont. 314, 78 Pac. 579, 3 Ann. Cas. 566.

[8] Indianapolis &c. R. Co. v. Morris, 67 Ill. 295; Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770. See also Reynolds v. Chicago &c. R. Co., 114 Mo. App. 670, 90 S. W. 100 (by claim agent).

[9] In Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770, the court says: "There is no evidence as to how Barnett was injured; but inasmuch as the general manager ratified contracts for taking care of him, and the company paid for such service (except the claim of appellee), it should be presumed —there being no evidence to the contrary—that the injury was so inflicted as that the contract for his care was not ultra vires."

[10] Atlantic &c. R. Co. v. Reisner, 18 Kans. 458; Walker v. Great Western R. Co., L. R. 2 Exch. 228. In this case, Chief Baron Kelley, in the course of the argument, inquired, "Must a board be convened before a man who has both legs broken can have medical assistance?" Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770, where it is held that the courts will presume a general authority on the part of one holding the position of "general manager." But it has been held otherwise as to the general manager of an ordinary private corporation. J. F. Spelman v. Gold Mine &c. Co., 26 Mont. 76, 66 Pac. 597, 55 L. R. A. 640, 91 Am. St. 402. Cushman v. Cloverland Coal Co., 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078; and cases and notes in 34 L. R. A. (N S.) 350; and Ann. Cas. 1912C, 474, where other cases on both sides of the question as to corporations other than railroads are cited and reviewed. See also Holmes v. McAllister, 123 Mich. 493, 82 N. W. 220, 48 L. R. A. 396.

[11] Toledo &c. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484. Cairo &c. R. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Terre Haute &c.

intendent,[12] having general supervising authority over the interests of a railroad company possesses authority to make such contracts on behalf of the company.[13] And in England it is held that the sub-inspector of railway police has implied power to employ surgical aid for an injured employe.[14] If the railroad company assumes to furnish a physician or surgeon to treat an injured passenger[15] or employe,[16] it takes upon itself only the

R. Co. v. Stockwell, 118 Ind. 98, 20 N. E. 650; Cincinnati &c. R. Co. v. Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503; Atchison &c. R. Co. v. Reecher, 24 Kans. 228; Contra, Stephenson v. New York &c. R. Co., 2 Duer (N. Y.) 341. See Marquette &c. R. Co. v. Taft, 28 Mich. 289, where a divided court, in an opinion written by Judge Cooley, Christiancy, C. J., concurring, held that he has such power, Graves and Campbell, J. J., dissenting.

[12] Bigham v. Chicago, M. & St. P. R. Co., 79 Iowa 534, 44 N. W. 805; Pacific R. Co. v. Thomas, 19 Kans. 256. See also Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. 172. But compare Brown v. Missouri &c. R. Co., 67 Mo. 122, holding that a division superintendent would not be presumed to have power to bind the company for a "small bill of drugs furnished a woman who had been hurt by a locomotive or cars of the company." The court says: "No proof was offered as to the duties of such officer, and the courts cannot take judicial notice of them."

[13] See Trenor v. Central Pacific R. Co., 50 Cal. 222; Indianapolis &c. R. Co. v. Morris, 67 Ill. 295; Tucker v. St. Louis &c. R. Co., 54 Mo. 177; Cox v. Midland Counties R. Co., 3 Exch. 268.

[14] Langan v. Great Western R. Co., 30 L. T. N. S. 173.

[15] In Secord v. St. Paul &c. R. Co., 18 Fed. 221, 224, Shiras, J., says: "If it assumes the responsibility of engaging a surgeon, and placing him in charge of parties that may be injured, then it is responsible thus far; that the person it selects must be a competent man; he must be reasonably fitted for the duties which he is called upon to perform. In other words, it will not do for the company to take up some incompetent man, who is not fit by education or experience to undertake the responsibilities of any case that may be placed in his hand. If it does engage a physician and surgeon who is sufficiently experienced, that is all that can be expected of the railroad company, and is all of its liability."

[16] In the case of South Florida R. Co. v. Price, 32 Fla. 46, 13 So. 638, the Supreme Court of Florida says: "The plaintiff, however, in this case undertakes in his declaration to fasten liability upon the defendant company upon a further charge that a surgeon, who was employed by said company to render medical and surgical aid to injured

obligation to furnish a competent man, skilled in his profession, and having done so is not responsible if he proves negligent in caring for this particular patient. In the absence of an express contract entered into on behalf of the company by some one authorized to represent it, a physician can have no claim against the company for services rendered to an injured employe or passenger. He can not render the services gratuitously and then sue the railway company upon an implied assumpsit.[17] And even though the company's representative may have promised on behalf of the company that his bill should be paid, a physician cannot hold it liable where it does not appear that the services were rendered in reliance upon such promise or upon the credit of the company.[18]

employes, did, in the exercise of his duty as such physician and surgeon, set the injured arm of plaintiff in such an unskilled and negligent manner as to render it ill-shaped and forever useless to him in the performance of any manual labor. There is no allegation or proof that the physician and surgeon so alleged to have been employed by the defendant company was not competent and skilled in the line of his profession; and, in the absence of such allegation and the proof to sustain it, the defendant is not liable for any negligent exercise by such surgeon of his profession in the treatment of the plaintiff. Even though we should admit it to be within the corporate powers of such a company to obligate itself to the rendition of medical or surgical aid to its sick or injured employes, by assuming it as a duty or otherwise, or to become liable under any circumstances for any negligence of any such surgeon acting in the line of his profession, still it seems to be well settled that it will have performed its entire duty in that respect when it employs a person of ordinary competence and skill in that profession; and that, having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such. Secord v. Railway Co., 18 Fed. 221; McDonald v. Mass. &c. Hospital, 120 Mass. 432, 21 Am. Rep. 529; O'Brien v. Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Laubheim v. De Koninglyke N. S. Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. 815. See also Ohio &c. R. Co. v. Early, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546, and note; Atchison &c. R. Co. v. Zeiller, 54 Kans. 340, 38 Pac. 282; Chicago &c. R. Co. v. Howard, 45 Nebr. 570, 63 N. W. 872.

[17] Toledo &c. R. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Ellis v. Central Pacific R. Co., 5 Nev. 255.

[18] Northern Central R. Co. v. Prentiss, 11 Md. 119; Caney v. South Pacific Coast R. Co., 63 Cal. 501, where the court says: "The

§ 261 (223). **Physicians and surgeons.**—If a railroad exercises reasonable care in selecting a physician or surgeon to treat an injured employe it is not liable for the acts of such surgeon or physician.[19] The physician or surgeon so employed does not become the agent of the company. As we have elsewhere said, there is no general duty to care for sick or injured employes or to employ surgeons to attend them.[20] There are exceptional cases where an urgent emergency imposes upon the company a special duty to secure surgical attention, but, as elsewhere said, such a duty is transient and special, coming into existence with the emergency and with the emergency expiring.[21]

§ 262 (224). **Delegation of power by directors.**—The directors are held to be superior officers and as such possessors of

plaintiff, in his testimony and on the trial, admitted, and his witnesses proved, that the services were rendered in pursuance of his original employment by those who were wounded, and not otherwise. There was, therefore, no contract, express or implied, between the plaintiff and the defendant in relation to the services which are the subject of the suit, and as there is no prejudicial error in the record the judgment and order are affirmed.

[19] Secord v. St. Paul &c. R. Co., 18 Fed. 221; Union Pac. Railway Co. v. Artist, 60 Fed. 365; South Fla. Railroad Co. v. Price, 32 Fla. 46, 13 So. 638; Pittsburgh &c. Co. v. Sullivan, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313; Eighmy v. Union Pac. R. Co., 93 Iowa 538, 61 N. W. 1056; McDonald v. Mass. &c. Hospital, 120 Mass. 432, 21 Am. Rep. 529; O'Brien v. Cunard Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Allan v. State Steamship Co., 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. 556; Van Tassell v. Manhattan &c. Hospital, 60 Hun 585, 15 N. Y. S. 620; Laubheim v. De Koninglyke &c. Co., 107 N. Y. 228, 13 N. E. 781, 1 Am. St. 815; Haas v. Missionary Society &c., 6 Misc. 281, 26 N. Y. S. 868; Fire Insurance Patrol v. Boyd, 120 Pa. St. 624, 15 Atl. 553, 1 L. R. A. 417, 6 Am. St. 745; Quinn v. Kansas City &c. R. Co., 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. 767.

[20] Sevier v. Birmingham &c. Co., 92 Ala. 258, 9 So. 405; Toledo &c. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484; Toledo &c. Co. v. Prince, 50 Ill. 26; Cairo &c. Co. v. Mahoney, 82 Ill. 73, 25 Am. Rep. 299; Union &c. Co. v. Beatty, 35 Kans. 265, 10 Pac. 845, 57 Am. Rep. 160. Wennell v. Adney, 3 B. & P. 252; Cooper v. Phillips, 4 C. & P. 581; Sellen v. Norman, 4 C. & P. 80; Newby v. Wiltshire, 2 Esp. 739.

[21] Pittsburgh &c. Co. v. Sullivan, 141 Ind. 83, 40 N. E. 138, 27 L. R. A. 840, 50 Am. St. 313.

very extensive powers, and they may delegate to agents or employes authority of wide scope,[22] but they cannot delegate powers which they are specially required to exercise by the provisions of the charter,[23] or by necessary implication. The powers which they are held by implication to be unable to delegate are generally said to be such as require the exercise of judicial or personal discretion as a board,[24] such as declaring dividends, making calls, leasing the franchises and property of the company or executing a mortgage upon them, or entering into a consolidation agreement with another company, where such powers are lodged in the directors.[25] What powers are and what are not specially enjoined upon the directors personally and required to be executed by them in person must generally be ascertained from the charter or act of incorporation. Powers of a legislative or judicial nature necessarily exercised in governing the corporation cannot be delegated unless the statute by express words or fair implication confers a right to delegate them.

§ 263 (225). **Employment of sub-agents and servants.**—The general rule is that the authority of an agent cannot be delegated unless power to delegate is expressly or impliedly conferred upon him. Authority to employ sub-agents may often be implied from the rank and position of the agent, but, as a rule, agents of inferior rank and limited authority cannot right-

[22] Burrill v Nahant Bank, 43 Mass. 163, 35 Am. Dec. 395; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Manchester &c. R. Co. v. Fisk, 33 N. H. 297. Hoyt v. Thompson, 19 N. Y. 207; See also Lewis v. Albemarle &c. R. Co., 95 N. Car. 179; Davis v. Memphis City R. Co., 22 Fed. 883; New York &c. R. Co. v. Smith, 20 R. I. 134, 37 Atl. 636. The directors may appoint all necessary subordinate officers. Kitchen v. Cape Girardeau &c. R. Co., 59 Mo. 514.

[23] York &c. R. Co. v. Ritchie, 40 Maine 425; Farmers' Mut. In. Co. v. Chase, 56 N. H. 341; Silver Hook Road v. Greene, 12 R. I. 164; Read v. Memphis &c. Co., 9 Heisk. (Tenn.) 545; County of Palatine Loan &c. Co., Re, 43 L. J. Eq. 588.

[24] Percy v. Millaudon, 3 La. 568; Farmers' Mut. Ins. Co. v. Chase, 56 N. H. 341; Patterson v. Portland Smelting Works, 35 Ore. 96, 56 Pac. 407; Silver Hook Road v. Greene, 12 R. I. 164.

[25] See ante under the various titles of dividends, calls, etc.

fully employ other agents or servants. Ordinarily a mere agent cannot, without the authority or consent, express or implied, of the corporation, employ another to perform the duties required of him so as to bind the corporation, especially in anything which requires the exercise of judgment and discretion,[26] or of skill,[27] in its performance. But in the case of superintendents, managers and agents invested with general powers, an authority to employ subordinate agents is implied from necessity and custom, even if not expressly given.[28]

§ 264 (226). Notice to agents or officers.—Notice given to, or knowledge acquired by an officer[29] or an agent of a corporation, when acting for the corporation within the scope of his authority,[30] concerning matters about which he is acting or has

[26] York &c. R. Co. v. Ritchie, 40 Maine 425; Brewster v. Hobart, 15 Pick. (Mass.) 302; Gillis v. Bailey, 21 N. H. 149; Silver Hook Road v. Greene, 12 R. I. 164.

[27] Everhart v. Terre Haute &c. R. Co., 78 Ind. 292, 41 Am. Rep. 567, where a brakeman employed plaintiff to perform some of his duties, and the plaintiff being injured by the company's negligence, the company was held not liable. Kent Com. (9th ed.), 854, 856.

[28] See Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135, and other cases cited in note. But compare Stephens v. John L. Roper Lumber Co., 160 N. Car. 107, 75 S. E. 933, 41 L. R. A. (N. S.) 1141. When the regular brakeman is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of the absent brakeman, and, for the time being, such person is an employe of the railroad, with all of an employe's rights. Sloan v. Central R. Co., 62 Iowa 728, 16 N. W. 331.

[29] Notice to the president when acting for the corporation is notice to the corporation. Hoffman &c. Co. v. Cumberland &c. Co., 16 Md. 456, 77 Am. Dec. 311; First Nat. Bank v. Gifford, 47 Iowa 575; Barnes v. Trenton Gas. Co., 27 N. J. Eq. 33. But the notice or information must be given or acquired while he was acting as president. Winchester v. Baltimore &c. R. Co., 4 Md. 231; Miller v. Illinois Central R. Co., 24 Barb. (N. Y.) 312. So notice to the secretary was held sufficient. Trenton Banking Co. v. Woodruff, 2 N. J. Eq. 117.

[30] Schenck v. Mercer County Mut. Ins. Co., 24 N. J. L. 447; Marine Mfg. Co. v. Harding, 155 Ind. 648, 58 N. E. 194; Goodall v. New Eng. Mut. Fire Ins. Co., 25 N. H. 169. But such knowledge should be imputed to the corporation only so long as the agency remains; and where an agent possessing knowledge not acquired by any

authority to act, will be imputed to the corporation.[31] But the knowledge must be shown to relate to the business of his agency, and must not be merely casual knowledge, but must usually be knowledge acquired while acting as agent.[32] And the corporation will be chargeable with notice of all facts within the knowledge of a person assuming to act for it, relative to the business in hand, in case it ratifies and adopts his acts.[33] Notice to or notice acquired by an individual stockholder alone will not bind the corporation,[34] and it is held that the fact that he afterwards becomes an officer will not render it binding.[35] There are many decisions to the effect that notice to an agent at some previous time and when he was engaged in a different business will not bind his principal unless it is shown to have been actually disclosed to him,[36] and the better reason, we are

usage, custom or course of business of the company, such as knowledge of the arbitrary mark of a consignee of goods shipped by railroad, ceases to serve as agent, the company cannot be charged with such knowledge. Great Western Railway v. Wheeler, 20 Mich. 419. See generally Pittsburgh &c. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111; Ohio &c. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134.

[31] 2 Thomp. Corp. (2d ed.), § 1645. It is essential that notice should relate to matters over which the authority of the agent extends and should be more than mere casual information gathered as an individual. Day v. Wamsley, 33 Ind. 145.

[32] Brown v. Bankers' &c. Co., 30 Md. 39; Goodloe v. Godley, 13 S. & M. (Miss.) 233, 51 Am. Dec. 159, Willard v. Denise, 50 N. J. Eq. 482, 26 Atl. 29, 35 Am. St. 788; notes in 24 Am. St. 228-233, and 38 Am. St. 770; 2 Thomp. Corp. (2d ed.), §§ 1647, 1649; note in Ann. Cas. 1912C, 295.

[33] Hovey v. Blanchard, 13 N. H. 145. See also Singleton v. Bank of Monticello, 113 Ga. 527, 38 S. E. 947; 2 Thomp. Corp. (2d ed.), § 1659.

[34] Danville Bridge Co. v. Pomeroy, 15 Pa. St. 151; Black v. Camden &c. R. Co., 45 Barb. (N. Y.) 40; Nashville &c. R. Co. v. Elliott, 1 Coldw. (Tenn.) 611, 78 Am. Dec. 506.

[35] Housatonic Bank v. Martin, 42 Mass. 294; Union Canal Co. v. Lloyd, 4 W. & S. (Pa.) 393. See also Brennan v. Emery &c. Co., 99 Fed. 971; Kearny Bank v. Froman, 129 Mo. 427, 31 S. W. 769, 50 Am. St. 456; Casco Nat. Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. 705.

[36] Miller v. Illinois Central R. Co., 24 Barb. (N. Y.) 312; Astor v. Wells, 4 Wheat. (U. S.) 466, 4 L. ed. 616; Pepper v. George, 51 Ala. 190; Keenan v. Missouri Ins. Co., 12 Iowa 126; Plympton v. Preston,

inclined to think, supports this rule. Very respectable authority, however, holds that notice or knowledge received by an agent before he was appointed as such is imputable to the principal in regard to matters in which he is afterward employed, if it can be shown that the facts were then present in the agent's mind, or that knowledge of them was so recently acquired that it should be presumed that he still had it in mind;[37] but this doctrine we are inclined to regard as unsound. The rule in England[38] is that which we have said we believe to be supported by the better reason.[39] So, if the agent is acting adversely to the corporation, and his interests are adverse, there is no presumption that he will inform the corporation in regard to such

4 La. Ann. 356; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Winchester v. Baltimore &c. R. Co., 4 Md. 231; Washington Bank v. Lewis, 22 Pick. (Mass.) 24; Trenton v. Pothen, 46 Minn. 298, 49 N. W. 129, 24 Am. St. 250; Reed's Appeal, 34 Pa. St. 207. In McComb v. Chicago &c. R. Co., 7 Fed. 426, it was held that an officer could not be made a party to a bill of discovery when he did not derive his information in his official capacity, but derived it from a participation in the creation of the corporation.

[37] The Distilled Spirits, 11 Wall. (U. S.) 356, 20 L. ed. 167; Fairfield Savings Bank v. Chase, 72 Maine 226, 39 Am. Rep. 319; Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Hovey v. Blanchard, 13 N. H. 145; Ingalls v. Morgan, 10 N. Y. 178. See also note in 24 Am. St. 229, 230, where this view is taken and additional authorities are cited upon both sides, and see generally 2 Thomp. Corp. (2d ed.), § 1651.

[38] Dresser v. Norwood, 17 C. B. N. S. 466. But the older cases hold to the other rule. Preston v. Tubbin, 1 Vern. 286; Lowther v. Carlton, 2 Atk. 242; Hiern v. Mill, 13 Ves. 114.

[39] For cases forming exceptions to the general rule that notice to the agent is notice to the principal, see Thompson &c. Co. v. Capitol &c. Co., 65 Fed. 341; Innerarity v. Bank, 139 Mass. 322, 1 N. E. 282, 52 Am. Rep. 710; Allen v. South R. Co., 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. 185; De Kay v. Hackensack Water Co., 38 N. J. Eq. 158; Kennedy v. Green, 3 Mylne & K. 699; Espin v. Pemberton, 3 De Gex & J. 547; Rolland v. Hart, L. R. 6 Ch. App. 678; Cave v. Cave, L. R. 15 Ch. Div. 639; Kettlewell v. Watson, L. R. 21 Ch. Div. 685, 707; Frankel v. Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736. The doctrine of the cases cited is that when the agent is attempting to defraud his principal notice to him is not notice to the principal.

matter, and his notice or knowledge in that regard is not, therefore, imputed to the corporation in such a case.[40]

§ 265 (227). Ratification.—Even though the agent is not shown to have received any authority from the corporation, and it does not appear that he has been held out to the world as possessing any such authority, and no former acts of his are shown from which his authority as an agent could be presumed, yet the corporation will be bound if it is shown to have knowingly ratified the particular act in question[41] by express adoption of the contract,[42] either in whole or in part,[43] by availing itself of the proceeds or benefits arising from an execution of the contract by the other party,[44] or by neglecting to disavow and actively condemn the unauthorized act for a long time and until

[40] Lamson v. Beard, 94 Fed. 30; Arlington &c. Co. v. Bluethenthal, 36 App. Cas. (D. C.) 209, Ann. Cas. 1912C, 294, and note citing other cases; Booker v. Booker, 208 Ill. 529, 70 N. E. 709, 100 Am. St. 250; Corcoran v. Snow Cattle Co., 151 Mass. 74, 23 N. E. 727; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. 770, and note; Camden Safe &c. Co. v. Lord, 67 N. J. Eq. 489, 58 Atl. 607; Grinster v. Scranton &c. Co., 181 Pa. St. 327, 37 Atl 550, 59 Am. St. 650; 2 Thomp. Corp (2d ed.), § 1655.

[41] Stuart v. London &c. R. Co., 16 Jur. 209, 10 Eng. L. & Eq. 57. Evidence that representatives of a corporation agreed that certain land should be used as a highway and that such agreement was afterward ratified is not rendered inadmissible by the fact that no such authority was given the representatives in the resolution authorizing the purchase of the land. People v. Eel River, &c. R. Co., 98 Cal. 665, 33 Pac. 728.

[42] McLaughlin v. Detroit &c. R. Co., 8 Mich. 99.

[43] United States Rolling Stock Co. v. Atlantic &c. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380.

[44] Davidson v. Bridgeport, 8 Conn. 472; Gilman &c. R. Co. v. Kelly, 77 Ill. 426; Bangor &c. R. Co. v. Smith, 47 Maine 34; Hilliard v. Goold, 34 N. H. 230, 66 Am. Dec. 765; Scott v. Middletown &c. R. Co., 86 N. Y. 200; Kickland v. Menasha &c. Co., 68 Wis. 34, 31 N. W. 471, 60 Am. Rep. 831. When a corporation receives without objection, the benefit of a contract made by any agent in its behalf, for a purpose authorized in its charter, it may be presumed to have authorized or ratified the contract. Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157. See also Tylee v. Illinois Cent. R. Co., 97 Nebr. 646, 150 N. W. 1015 (claim agent's contract).

innocent third persons have been thereby induced to put themselves in a position from which they cannot be taken without loss if the act should be held invalid.[45] What is a reasonable time in which to disavow an act of the agent after being informed of what he has done will depend upon the particular circumstances of the case. If the corporation and its officers have knowledge that the other contracting party is making large expenditures on the faith of the contract, they must act promptly if they would disaffirm it.[46] Ratification from long silence has been held a question for the jury.[47] But ratification should not be lightly presumed especially where the act is wholly beyond the ordinary duties of the officer or agent performing it;[48] for no individual member can represent the corporation in its aggregate capacity, except by consent. Thus, proof that the plaintiff's men were seen at work upon a turnpike road by different members of the corporation owning it, and by its agent who was authorized to bind the corporation only by written contracts, was held insufficient to establish a claim for pay for such work, where it was not shown that any authorized agent of the corporation, or any one who had previously acted for the corporation in such matters, had requested that the work should be done or promised to pay for it.[49]

[45] Indianapolis Rolling Mill Co. v. St. Louis &c. R. Co., 120 U. S. 256, 7 Sup. Ct. 542, 30 L. ed 639; Hazelhurst v. Savannah &c. R. Co., 43 Ga. 13; Sheldon &c. Co. v. Eickemeyer &c. Co., 90 N. Y. 607; United States &c. Stock Co. v. Atlantic &c. R. Co., 34 Ohio St. 450, 32 Am. St. 380. See also Kelly v. Newburyport &c. R. Co., 141 Mass. 496, 6 N. E. 745:

[46] United States &c. Stock Co. v. Atlantic &c. R. Co., 34 Ohio St. 450, 32 Am. St. 380.

[47] First Nat. Bank v. Reed, 36 Mich. 263. See Arkansas &c. R. Co. v. Dickinson, 78 Ark. 483, 95 S. W. 802; Hall v. New York &c. R. Co., 27 R. I. 525, 65 Atl. 278; 1 Elliott Gen. Pr. § 426.

[48] Kersey Oil Co. v. Oil Creek &c. R. Co., 12 Phila. (Pa.) 374.

[49] Hayden v. Middlesex Tpk. Co., 10 Mass. 397, 6 Am. Dec. 143. See Cox v. Midland R. Co., 18 Law J. N. S. Exch. 65. But where an engineer who had previously made such contracts which had been ratified by the corporation, promised that parties furnishing materials to build a bridge for the company should be paid, it was held bound by such promise. Beattie v. Delaware &c. R. Co., 90 N. Y. 643.

§ 266 (228). **Acts that may be ratified.**—It is competent for a railroad company to ratify any act of an agent performed within the scope of the corporate power. The general rule is that a corporation can only ratify contracts which it has power to enter into,[50] and it is powerless to ratify one which it is prohibited from making by its charter, by public policy or by general statute.[51] It is, in general, true that a void act cannot be ratified. A recovery, however, may be had on the quantum meruit in many cases for the value of the property actually received by the company. Such a recovery does not, as a general rule, rest upon the void contract, but there are cases which hold that a recovery can be had on the contract.[52]

§ 267 (229). **Ratification—What constitutes.**—A ratification will be presumed only in case the corporation was aware of all the material facts and circumstances which would influence it in adopting or rejecting the contract,[53] or had such means of

[50] Board &c. v. Lafayette &c. R. Co, 50 Ind. 85; Pacific R. Co. v. Thomas, 19 Kans. 256; Scott v. Middletown &c. R. Co., 86 N. Y. 200; United States &c. Stock Co. v. Atlantic &c. R. Co., 34 Ohio St. 450, 32 Am. St. 380; Boston &c. R. Co. v. New York &c R. Co., 13 R. I. 260; Miller v Rutland &c. Co., 36 Vt. 452.

[51] Such a contract is as if no contract had ever been made, and, of course, incapable of ratification. Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Taymouth Tp. v. Koehler, 35 Mich. 22; Alexander v. Cauldwell, 83 N. Y. 480.

[52] Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Bank v. Patterson, 7 Cranch (U. S.) 299, 3 L. ed. 351; Railway Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; Pennsylvania &c. Co. v. St. Louis &c. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Pennsylvania R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; Missouri Pacific Co. v. Sidell, 67 Fed. 464; State Board &c. Co. v. Citizens' &c. Co., 47 Ind. 407, 17 Am. Rep. 702; Schipper v. Aurora, 121 Ind. 154, 158, 22 N. E. 878, 6 L. R. A. 318; Dill v. Wareham, 7 Metc. (Ky.) 438; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; DeGroff v. American &c. Co., 21 N. Y. 124; Bissell v Michigan &c. Co., 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504.

[53] Gilman &c R. Co. v. Kelley, 77 Ill. 426.

knowing that it was chargeable with negligence in not being informed of them.[54] The rule stated is a familiar one, and little else than its bare statement is required. We refer in the note to a few of the great number of cases which assert and apply the rule.[55]

§ 268 (230). **Compensation of officers.**—As a general rule there is no implied promise to pay corporate officers anything for their services, but they are presumed to serve without compensation unless some provision for payment is made by statute, by contract, or by resolution of the board of directors.[56] Where a certain compensation is agreed upon before the services are rendered, payment of it will be enforced. Accordingly, it is held that a by-law of a corporation, providing that "no debts shall be contracted by the company unless there are funds in the treasury to meet the same," does not apply to the salary

[54] Hotchin v. Kent, 8 Mich. 526; Exchange Bank v. Monteath, 17 Barb. (N. Y.) 171.

[55] Western &c. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. ed. 470; Russ v. Telfener, 57 Fed. 973; W. O. Johnson & Sons v. Des Moines &c. R. Co., 129 Iowa 281, 105 N. W. 509; First Nat. Bank v. Badger &c. Co., 54 Mo. App. 327; Sherrill v. Weisiger &c. Co., 114 N. Car. 436, 19 S. E. 365; Battaglia v. Thomas, 5 Tex. Civ. App. 563, 23 S. W. 1118. It is familiar and established law that the act of an agent must be ratified in toto or entirely repudiated. Rader v. Maddox, 150 U. S. 128, 14 Sup. Ct. 46, 37 L. ed. 1025; Nicklase v. Griffith, 59 Ark. 641, 26 S. W. 381; Stanard Milling Co. v. Flower, 46 La. Ann. 315, 15 So. 16; Tallman v. Kimball, 74 Hun 279, 26 N. Y. S. 811; Graff v. Callahan, 158 Pa. St. 389, 27 Atl. 1009; Brown v. Parsons, 10 Utah 233, 37 Pac. 346. A principal who seeks to escape liability for the unauthorized act of the agent must repudiate it within a reasonable time after it comes to his knowledge. Swartz v. Duncan, 38 Nebr. 782, 57 N. W. 543.

[56] Officers of corporations are presumed to perform the duties of their trust gratuitously, unless otherwise provided by a statute or a contract. Smith v. Putnam, 61 N. H. 632; Barril v. Calendar Insulating &c. Co., 50 Hun 257, 19 N. Y. S. 877; Toponce v. Corinne Mill, C. & S. Co., 6 Utah 439, 24 Pac. 534. There is no implied promise to pay the president of a private corporation for his services. McAvity v. Lincoln Pulp &c. Co., 82 Maine 504, 20 Atl. 82. See McMullen v. Ritchie, 64 Fed. 253; Starbuck v. Housatonic R. Co., 83 Hun 534, 32 N. Y. S. 87; Potts v. Rose Valley Mills, 167 Pa. St. 310, 31 Atl. 655.

of the secretary of such corporation especially when it has received the consideration for the indebtedness contracted.[57] And a by-law or resolution adopted by the directors of a corporation that the salary of the president shall be paid monthly out of the money that may come into the hands of the treasurer from the first sale of bonds is held not to exempt the corporation from liability therefor in case the bonds are not sold.[58] Officers and agents, of whom active duties are required, not chosen from among the directors are, ordinarily, entitled to a reasonable compensation for services rendered at the request of the corporation or of its authorized representatives.[59] Payment for labor as well as for materials useful in carrying on the business of the corporation may usually be made in money or its equivalent; and, if in the latter, the transaction cannot be impeached for error of judgment on the part of the officers as to the value of the services or property.[60]

§ 269 (231). Individual liability of agents for their torts.—Although the corporation becomes bound to answer for any wrongs committed by an agent in the course of his employment, the agent is not thereby discharged from liability. He must an-

[57] McCracken v. Halsey Fire Engine Co., 57 Mich. 361, 24 N. W. 104.

[58] Indianapolis &c. R. Co. v. Hyde, 122 Ind. 188, 23 N. E. 706. But a resolution fixing the salary of a charter officer elected for one year at a sum certain per month does not necessarily fix that rate for the year. Bennett v. St. Louis Car Roofing Co., 23 Mo. App. 587.

[59] Rogers v. Hastings &c. R. Co., 22 Minn. 25; Missouri River R. Co. v. Richards, 8 Kans. 101; St. Louis &c. R. Co. v. Grove, 39 Kans. 731, 18 Pac. 958. Where, at the request of a corporation, a man became its general agent and purchased a large number of shares of its capital stock, and gave active and valuable service to the company, expecting that when it became prosperous he would have a large salary for the future, with some compensation for the past but with no agreement as to salary—the fact that he stated several times to other stockholders that he was serving without compensation will not defeat his right to reasonable pay for his services when the corporation has become insolvent. Bard v. Banigan, 39 Fed. 13.

[60] Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823, 28 Am. & Eng. Corp. Cas. 12.

swer for his frauds,[61] misrepresentations,[62] and other wrongful acts,[63] even though he does them by the express direction of a superintendent or other superior officer of the corporation.[64]

§ 270 (232). **Bonds of officers and agents.**—The officers and agents of a corporation are liable to it for any loss occasioned by their misconduct or neglect,[65] and it is competent for the corporation to take a bond from an officer or agent to secure the faithful performance of his duty. The right to require such a bond is given by statute in many states,[66] but such statutes are but an affirmance of the common law,[67] and any corporation may pass a valid by-law requiring security to be given by its agents.[68] Even though the charter prescribes the security to be taken, such provision will be held merely directory and a different bond may be enforced against the sureties in case of the agent's default.[69] If the bond is executed and delivered to the corporation, and the officer enters upon the discharge of his duties, it may be enforced against the sureties upon a breach of its conditions without showing any formal acceptance of it by

[61] Dodgson Case, 3 De Gex & S. 85; Attorney-General v. Leicester, 7 Beav. 176.

[62] Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Fusz v. Spaunhorst, 67 Mo. 256; Meyer v. Amidon, 45 N. Y. 169; Henderson v. Lacon, L. R. 5 Eq. 249. See also Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. ed. 82.

[63] Berghoff v. McDonald, 87 Ind. 549; Richardson v. Kimball, 28 Maine 463; Harriman v. Stowe, 57 Mo. 93; Cameron v. Kenyon &c. Co., 22 Mont. 312, 56 Pac. 358, 74 Am. St. 602; Horner v. Lawrence, 37 N. J. L. 46; Crane v. Onderdonk, 67 Barb. (N. Y.) 47; Elmore v. Brooks, 6 Heisk. (Tenn.) 45.

[64] Duluth v. Mallett, 43 Minn. 204, 45 N. W. 154, where the conviction of an engineer for obstructing a crossing was upheld, though it appeared that he acted only in obedience to orders.

[65] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662; Lexington R. Co. v. Bridges, 7 B. Mon. (Ky.) 556; Pontchartrain R. Co. v. Paulding, 11 La. 41; March v. Eastern R. Co., 43 N. H. 529.

[66] See Rev. Stat. Arizona 1913, §§ 2137, 2191-2194.

[67] 2 Thomp. Corp. (2d ed.), § 1390.

[68] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552. See Bank of North Liberties v. Cresson, 12 Serg. & R. (Pa.) 306; Peppin v. Cooper, 2 B. & Ald. 431.

[69] As where the charter prescribed a bond with two sureties, and a bond with only one surety was taken. Bank of Northern Liberties v. Cresson, 12 Serg. & R. (Pa.) 306.

the directors.[70] A total failure to execute any bond whatever will not prevent the person appointed to an office from being a legal agent of the corporation, even where the charter provides that he shall "give bond before he enters upon the duties of his office,"[71] although a failure to require a bond may render the officers whose duty it was to require the bond liable for any loss resulting from their failure to do so.[72] A bond is not void as to the obligors because it is signed by the officers who should examine and approve it,[73] nor because the officer neglected to be sworn.[74] But, if the principal knows of some fact which will materially affect the liability of the sureties,[75] as that he is being cheated by an agent,[76] and applies for security for the good conduct of the agent, but conceals this fact from the one who, in ignorance of it, becomes a surety for the agent, the obligation so obtained may be avoided by the surety. The corporate representative must, if fit opportunity offers, inform the surety of any material facts within his knowledge relative to the trustworthiness of the officer, such as prior defaults and the like, or the surety will not be bound.[77] And the corporation cannot, upon misconduct of the agent amounting to a substantial breach of the bond after it is executed, retain him in its employ and yet

[70] Amherst Bank v. Root, 2 Metc. (Mass.) 522.

[71] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552. But if the charter especially provided that he should not be deemed for any purpose in his office until an approval of his bond by the proper board, any acts which he did before such approval would be utterly void. Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552, per Story, J.

[72] Pontchartrain R. Co. v. Paulding, 11 La. 41.

[73] Amherst Bank v. Root, 2 Metc. (Mass.) 522.

[74] State Bank v. Chetwood, 8 N. J. L. 1.

[75] Franklin Bank v. Stevens, 39 Maine 532.

[76] Maltby's Case, cited in 1 Dow. 294. Where a station agent at the time of signing the official bond is in default, and the sureties are not informed of that fact, they will not be bound. Wilmington &c. R. Co. v. Ling, 18 S. Car. 116.

[77] Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50; Franklin Bank v. Cooper, 36 Maine 179; State v. Atherton, 40 Mo. 209; Western &c. Ins. Co. v. Clinton, 66 N. Y. 326; Dinsmore v. Tidball, 34 Ohio St. 411; Aetna Life Ins. Co. v. Mabbett, 18 Wis. 667.

hold the sureties liable for his future defaults, unless notice is given to the sureties and they expressly or impliedly consent to the agent's retention.[78] The fact that the agent is retained will not relieve the surety from a liability already accrued.[79] As a general rule the corporation is not bound upon discovering that an officer is in default to dismiss the officer and notify the sureties in order that they may take measures to protect themselves.[80] And where the officer or employe was a defaulter at the time of giving the bond, but this fact was unknown to the company, or where the corporation retains him in its employ after his default, but in ignorance of his misconduct, the surety is not thereby discharged, even though such ignorance arises from the negligence of officers of the corporation in failing to examine into the accounts of the person under bond.[81] The mere fact that a balance was due from the agent to the principal on account of money received by him, where it did not carry an imputation of misconduct on the part of the agent, was held not a material fact, the concealment of which would release the surety.[82] And the fact that a balance is found to be due from the agent to the corporation, and he is afterward allowed to continue in its employ will not necessarily release the sureties, for it is only where the default is evidently a dishonest one, amounting to a breach of the bond, that the corporation is bound to discharge the delinquent.[83] A bond will be presumed to be

[78] Taylor v. Bank of Kentucky, 2 J. J. Marsh (Ky.) 564; Wilmington &c. R. Co. v. Ling, 18 S. Car. 116. Phillips v. Foxall, L. R. 7 Q. B. 666.

[79] State Bank v. Chetwood, 8 N. J. L. 1; Union Bank v. Forstall, 11 La. 211.

[80] Grocers' Bank v. Kingman, 16 Gray (Mass.) 473; Morris Canal &c. Co. v. Van Vorst, 21 N. J. L. 100; Pittsburgh &c. R. Co. v. Shaeffer, 59 Pa. St. 350; Peel v. Tatlock, 1 Bros. & Pull. 419.

[81] Bowne v. Mt. Holly Nat. Bank, 45 N. J. L. 360; Watertown &c. Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231; Black v. Ottoman Bank, 15 Moore P. C. 472.

[82] Guardians &c. v. Strother, 24 Eng. Law & Eq. 183, 22 L. T. 84; Watertown &c. Ins. Co. v. Simmons, 131 Mass. 85, 41 Am. Rep. 196; Wilmington &c. R. Co. v. Ling, 18 S. Car. 116. See Vilwig v. Baltimore &c. R. Co., 79 Va. 449.

[83] Atlantic &c. Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Richmond &c. R. Co. v. Kasey, 30 Grat. (Va.) 218.

executed with reference to the time for which the officer or agent is appointed, if for a term certain, and the sureties cannot be held liable for his misconduct in any subsequent terms for which he may be chosen.[84] But they may, by the use of apt words in the bond, bind themselves for an indefinite number of successive terms during which he may hold his position.[85] Where one gives a bond as an officer of a corporation whose charter will soon expire, his bondsmen cannot be held liable for his defalcations while acting as an officer under an extension of the charter.[86] But the adoption of a by-law changing the time for holding the annual meeting, or changing the mode of conducting the business of the corporation after the termination of a lease of its property will not discharge the sureties.[87] It has also been held that the obligation of a bond is not avoided by the amalgamation of the company to which it was given with another under an act of parliament providing that all the securities of the old companies should be vested in the new, and the duties of the officer were unchanged.[88]

§ 271 (233). Sureties—Bonds of officers and agents.—The rules which govern as to the effect of changes in obligations of sureties apply to sureties on the bonds of corporate officers and agents. We shall not discuss the subject at length, but will refer to some general rules. A change in the contract in any material part, without the consent of the surety, will discharge him from his obligation[89] as where one who is working for a salary goes to work on a commission,[90] or where one who gives

[84] Chelmsford Co. v. Demarest, 7 Gray (Mass.) 7; Exeter Bank v. Rogers, 7 N. H. 21; Manufacturers' &c. Loan Co. v. Odd Fellows' Hall Assn., 18 Pa. St. 446.

[85] Middlesex Mfg. Co. v. Lawrence, 1 Allen (Mass.) 339. See Lexington &c. R. Co. v. Elwell, 8 Allen (Mass.) 371; Consolidated Nat. Bank v. Fidelity &c. Co., 67 Fed 874; Eastern R. Co. v. Loring, 138 Mass. 381.

[86] Thompson v. Young, 2 Ohio 334.

[87] Lexington &c. R. Co. v. Elwell, 8 Allen (Mass.) 371.

[88] Eastern Union R. Co. v. Cochrane, 24 Eng. L. & Eq. 495; London &c. R. Co. v. Goodwin, 3 Exch. 320.

[89] Miller v. Stewart, 9 Wheat. (U. S.) 680. 6 L. ed. 189.

[90] Northwestern R. Co. v. Whinray, 26 Eng. L. & Eq. 488.

bond as agent for an insurance company which has no authority to engage in banking is intrusted by it with the business of banking for the corporation, and embezzles funds intrusted to him for that purpose.[91] But a surety on the bond of a ticket seller, conditioned for his faithful performance of "all the duties of the said office which are or may be imposed upon him under this or any future appointment," is not released by the fact that the capital stock of the corporation is increased, that the travel becomes much greater and that the ticket agent's salary is nearly doubled after the bond is given.[92] The sureties on the official bond of an officer or agent of a private corporation conditioned for the faithful performance of his duties will not be held to any greater liability than would attach to the agent if no bond were given, unless the language of the bond clearly requires it.[93] Such a bond has reference to the agent's honesty,[94] and binds him only to the reasonable skill and ordinary diligence in performing the duties of his office[95] to which he is bound by the terms of an ordinary employment. And where a sum of money belonging to the corporation is stolen from the agent without his fault, his sureties cannot be held liable upon a bond which provides that he shall "well, truly and faithfully perform the duties required of him * * * and promptly pay over and promptly account for all moneys belonging to said company which shall be received by him as such agent."[96] The

[91] Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

[92] Eastern R. Co. v. Loring, 138 Mass. 381; Strawbridge v. Baltimore &c. R. Co., 14 Md. 360, 74 Am. Dec. 541. See also Bank of Wilmington v. Wollaston, 3 Harr. (Del.) 90; Morris Canal & Banking Co. v. Van Vorst, 21 N. J. L. 100.

[93] Planters' &c. Bank v. Hill, 1 Stew. (Ala.) 201, 18 Am. Dec. 39; Chicago &c. R. Co. v. Bartlett, 120 Ill. 603, 11 N. E. 867; Baltimore &c. R. Co. v. Jackson, 33 Alb. J. (N. Y.) 239.

[94] Union Bank v. Clossey, 10 Johns. (N. Y.) 271, 11 Johns. (N. Y.) 182.

[95] American Bank v. Adams, 12 Pick. (Mass.) 303. An officer of a private corporation is liable only for the care required of an ordinary trustee or bailee for hire, and is not an insurer of property coming into his hands. Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487.

[96] Chicago &c. R. Co. v. Bartlett, 120 Ill. 603, 11 N. E. 867; Bal-

corporation cannot, without the unanimous consent of the stockholders, condone gratuitously the fraud of its officers.[97]

timore &c. R. Co. v. Jackson, 33 Alb. L. J. (N. Y.) 239. So where property is lost without his fault. Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858.

[97] Hazard v. Durant, 11 R. I. 195. See as to right of stockholders to sue, notes in 97 Am. St. 30, et seq. See also Greathouse v. Martin, 100 Tex 99, 94 S. W. 322

CHAPTER XII.

DIRECTORS.

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308. Proof of the proceedings of the board of directors.
309. Notice to directors.
310. Directors — Admissions and declarations.
311. Ratification of the acts of directors.
312. Directors—Removal from office.
313. Compensation of directors.
314. Directors—Relation to stockholders — Preliminary.

Sec.
315. Directors considered trustees.
316. Directors as trustees—Illustrative cases.
317. Directors—Dealings with corporation.
318. Termination of fiduciary relations.
319. Directors—Liability of—Generally.
320. Directors—Liability in matter of contract.
321. Directors — Errors of judgment.
322. Directors—Liability for negligence.
323. Directors—Fraud on third persons.

§ 275 (234). **Different classes of officers—Generally.**—In the preceding chapter we have in a general way treated of the officers and agents of railway companies and shall now consider that class of corporate officers that may be said to be the governing officers of the corporation. Some of these officers are invested with powers that resemble governmental, legislative and judicial powers, while others are executive or ministerial officers. The common-law rule was quite strict, and under it only the members of the board of directors, or the governing board by whatever name designated, were regarded as officers of such superior rank and authority as to constitute them very much more than agents and servants,[1] but this doctrine has been greatly limited.

§ 276 (235). **The governing board—Generally.**—The power of corporate government is vested in a board of officers generally denominated "board of directors" or "board of trustees." The governing board is the highest representative of the corporation. The members of the board are the officers in whom are lodged the primary and highest corporate powers. They actively exercise the powers of the corporation, and, while it is true that the powers they exercise are in a sense delegated to them, yet their powers are not delegated powers in the same sense as are the

[1] Farwell v. Boston &c. Co., 45 Mass. 49, 38 Am. Dec. 339; Murray v. South Carolina R. Co., 1 McMul. (S. Car.) 385; Priestley v. Fowler, 3 M. & W. 1; Hutchinson v. York &c. Co., 5 Exch. 343; Bartonshill &c. Co. v. Reid, 3 Macq. 266; McFarlane v. Caledonian, &c. Co., 6 Macph. (Sc. Ct. of Sessions, 3d. Ser.) 102.

powers conferred upon agents, attorneys or employes.[2] The governing board must, under many statutes, exercise all corporate powers, for, while the shareholders select the members of the board, the board exercises powers which those who put them in office cannot rightfully exercise. As a rule corporate powers must be exercised by the governing board, or through agents and servants appointed directly or indirectly by it. Where the act of incorporation requires corporate powers to be exercised by the governing board itself they cannot be exercised by any other corporate department officers or agents, for where the mode of corporate action is prescribed it must be pursued.[3] The members of the governing board are usually designated as the directors, and we shall employ that term as a generic one denoting the officers invested with the principal powers.

§ 277 (236). **Governing board not the corporation.**—The board of directors is not in strictness the corporation unless made so by the act of incorporation.[4] Statements are found in some of the books and cases which seem to indicate that the board of directors constitute the corporation.[5] These statements, as we

[2] Bliss v. Kaweah &c. Co., 65 Cal. 502, 4 Pac. 507. See generally Mahoney Min. Co. v. Anglo-California Bank, 104 U. S. 192, 26 L. ed. 707; Nashua &c. R. Co. v. Boston &c. R. Co., 27 Fed. 821; Conro v. Port Henry &c. Co., 12 Barb. (N. Y.) 27; Union &c. Co. v Rocky Mountain &c. Co., 2 Colo. 565; United Soc. v. Underwood, 9 Bush. (Ky.) 609, 15 Am. Rep. 731; McCullough v. Moss, 5 Den. (N. Y.) 567, 575; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 416; Dana v. Bank of United States, 5 Watts & S. (Pa.) 223; 2 Thomp. Corp. §§ 1065, 1066.

[3] Beatty v. Manne Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; People v. Utica &c. Co., 15 Johns. (N. Y.) 358, 383, 8 Am Dec. 243; New York &c. Co. v. Ely, 2 Cow. (N. Y.) 678; Willcocks, Ex parte, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Hosack v. College &c., 5 Wend. (N. Y.) 547. See also Flagg v. Manhattan R. Co., 20 Blatchf. (U. S.) 142.

[4] Tiffets v. Walker, 4 Mass. 597; Reg. v. Paramore, 10 Ad. & El. 286; Regina v. New York, 2 Q. B. 847; Mayor &c. v. Simpson, 8 Q. B. 65; Grant Corp. 365.

[5] Maynard v. Fireman's Ins. Fund, 34 Cal. 48, 91 Am. Dec. 672. See generally Hoyt v. Thompson, 19 N. Y. 207; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 416; Cleveland &c. R. Co. v. Himrod &c. Co., 37 Ohio St. 321, 41 Am. Rep.

believe, assert an erroneous doctrine, for broad and comprehensive as are the powers of the board of directors, the body politic and corporate is distinct from the board, and there are corporate powers which the board cannot exercise. The board cannot, unless expressly authorized by the act of incorporation, prescribe the qualifications of its own members, enact by-laws, amend articles of association, increase capital stock or effect a consolidation with another company, for power to do these things, and others, dwells elsewhere.[6]

§ 278 (237). **The board of directors represents the corporation.** —When duly organized and officially acting within the scope of the authority conferred upon it by the charter or the valid by-laws of the corporate body, the board of directors represents and acts for the corporation to the exclusion of the individual stockholders. As we have elsewhere said, action by the stockholders where the charter, or act of incorporation, requires action by the board of directors, is ineffective. In such cases the stockholders are substantially strangers to the corporation so far as corporate action is concerned. They elect the directors, but they cannot perform the duties or exercise the functions enjoined upon the board of directors by law. The stockholders are not co-owners of the corporate property, and hence cannot act in regard to it as joint-owners of property can do where the title is in natural persons.[7] Shareholders cannot convey the corpo-

509; Leavitt v. Oxford &c. Co., 3 Utah 265, 1 Pac. 356, 4 Am. & Eng. Corp. Cas. 234; Miller v. Rutland &c. R. Co., 36 Vt. 452.

[6] Chicago &c. Co. v. Allerton. 18 Wall. (U. S.) 233, 21 L. ed. 902: State v. Adams, 44 Mo. 570; Dayton &c. R. Co. v. Hatch, 1 Disney (Ohio) 84; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; 2 Thomp. Corp. (2d ed.), §§ 1182, 1187-1189. In Nashua &c. Co. v. Boston &c. Co., 27 Fed. 821: "The general power of the board of directors to perform all corporate acts refers to ordinary transactions and not to fundamental and organic changes, like increasing its capital stock or leasing its plant," citing Cass v. Manchester &c. Co., 9 Fed. 640; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950. See also Bedford R. Co. v. Bowser, 48 Pa. St. 29.

[7] Williamson v. Smoot, 7 Mart. (La.) (O. S.) 31, 12 Am. Dec. 494; Spurlock v. Missouri Pacific R. Co., 90 Mo. 199, 12 S. W. 219; Mickles v. Rochester &c. Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103; Burrall

rate real estate for the reason that the title is in the corporation,[8] and conveyances must be made by the authorized representatives of the corporation. A conveyance made by all the stockholders may be upheld in equity where facts are alleged and proved sufficient to invoke the assistance of the court of conscience, but the conveyance in and of itself is not effective to carry the title.[9] In various modes the question as to the authority of the stockholders to act for the corporation has been presented and the conclusion generally declared is that it is only in exceptional cases that their acts can be regarded as those of the corporation.[10] A stockholder may, of course, be appointed an agent of the corporation and his acts, within the scope of his

v. Bushwick R. Co., 75 N. Y. 211. See also Lawson v. Black Diamond &c. Co., 44 Wash. 26, 86 Pac. 1120. In the case of American &c. Co. v. Norris, 43 Fed. 711, the court said: "It is the familiar law that a corporation has a personality of its own distinct from that of its stockholders, that it is not affected in the remotest degree by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligations assumed by its stockholders." The court cited Pullman &c. Co. v. Missouri Pacific Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; Davis &c. Co. v. Davis &c. Wagon Co., 20 Fed. 699; Moore &c. Co. v. Towers &c. Co., 87 Ala. 206, 6 So. 41, 13 Am. St. 23. The court also distinguished the case from that of Beal v. Chase, 31 Mich. 490. The case of American &c. Co. v. Taylor Mfg. Co., 46 Fed. 152, is the same case as that from which we have quoted and was heard upon an amended bill. See generally Hancock v. Holbrook, 9 Fed, 353; Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721.

[8] Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Wheelock v. Moulton, 15 Vt. 519; Myers v. Perigal, 2 DeGex, M. & G. 599; Edwards v. Hall, 6 DeGex, M. & G. 74, 92. See generally Gillett v. Bowen, 23 Fed. 625; Langdon v. Hillside &c. Co., 41 Fed. 609; Shay v. Terolumie &c. Co., 6 Cal. 73; Harris v. Muskingum &c. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372; Tomlinson v. Bricklayer's Union, 87 Ind. 308; Whitmann v. Cox, 26 Maine 355; Smith v. Hurd, 12 Metc. (Mass.) 371, 46 Am. Dec. 690; Moffat v. Winslow, 7 Paige (N. Y.) 124; Carothers v. Alexander, 74 Tex. 309, 12 S. W. 4.

[9] American &c. Co. v. Taylor &c. Co., 46 Fed. 152; Society &c. v. Abbott, 2 Beav. 559.

[10] Gordon v. Swan, 43 Cal. 564. See also 2 Thomp. Corp. (2d ed.), §§ 1175, 1178.

authority, will be binding on the corporation, but his authority will be attributable to his appointment and not to his position as a shareholder.[11]

§ 279 (238). **Directors—Generally.**—The principal officers of a private corporation are, as already indicated, the directors. A choice of directors is an essential step in its organization, and in many of the states it is specified that the corporate powers are to be exercised by them.[12] It is competent for the legislature to constitute the board of directors the corporation, and where there is a statute making the directors the corporation, they are necessarily the possessors of the whole corporate power not elsewhere lodged. But, as a rule, directors are elective officers, chosen as the chief representatives of the corporation.

§ 280 (239). **Number of directors.**—The number of directors is fixed by charter or by the law providing for the incorporation of railroads, or is left to be determined by the stockholders within certain limits. Where the number is not fixed by the charter, or the statute under which the company is organized, it may be fixed by the stockholders by appropriate action. Where the number is fixed definitely by the constating articles or articles of association it cannot be changed except in the manner provided by law, or by an authorized change or amendment of such articles.[13]

§ 281 (240). **Directors—How chosen—Generally.**—Directors are usually chosen by the stockholders.[14] In the absence of statutory provisions vesting the power elsewhere it properly resides in the stockholders of the company. The members compose the corporation and it is for them to choose their representatives in some authorized or appropriate mode, unless the statute prescribes the mode; but in the event that a mode is prescribed the stockholders cannot rightfully pursue any other. As we

[11] See 2 Thomp. Corp., § 1610.

[12] 2 Thomp. Corp. (2d ed.), §§ 1066, 1067.

[13] Mower v. Staples, 32 Minn. 284. See also Greenville &c. R. Co. v. Johnson, 8 Baxt. (Tenn.) 332.

[14] 2 Thomp. Corp. (2d ed.), § 1066.

shall see presently, an immaterial or unsubstantial deviation from the mode prescribed will not vitiate the election.

§ 282 (241). **Eligibility to the office of director.**—Where the act of incorporation requires that, to render a person eligible to the office of director, he shall possess certain prescribed qualifications, he cannot be rightfully chosen to the office unless he possesses the required qualifications. In this, as in all other matters, the act under which the company is incorporated constitutes the paramount law.[15] At common law, any person capable of acting as the business agent for another may be a director.[16] Persons under the disability of coverture or infancy are eligible to the office of director unless the statutory law interdicts the selection of such persons. Non-residents may, in the absence of statutory prohibition, be eligible to the office of director,[17] but if residence is required by the statute a non-resident is ineligible. Where the statute does not make the ownership of stock essential to eligibility to the office of director a person who is not a stockholder may be elected.[18] If the charter or by-laws enacted in accordance with it require that directors shall be stockholders, then the persons chosen must be the owners of stock.[19] It has been held, however, that where one is ap-

[15] Horton v. Wilder, 48 Kans. 222, 29 Pac. 566; State v. Manufacturers &c. Co., 50 Ohio St. 45, 33 N. E. 401, 24 L. R. A. 252, 29 W. L. Bull. 160, 29 Ohio L. J. 160.

[16] People v. Webster, 10 Wend. (N. Y.) 554.

[17] Commonwealth v. Hemmingway, 131 Pa. St. 614, 18 Atl. 992, 7 L. R. A. 357; Commonwealth v. Detwiler, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357; McCall v. Bryam Mfg. Co., 6 Conn. 428. See State v. Smith, 15 Ore. 98, 14 Pac. 814; and note in 24 L. R. A. 252.

[18] Wight v. Springfield &c. Co., 117 Mass. 226, 19 Am. Rep. 412; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; St. Lawrence Steamboat Co., In re, 44 N. J. L. 529; Kerchner v. Gettys, 18 S. Car. 521; Stock, Ex parte, 33 L. J. Ch. 731; British &c. Assn., Re, L. R. 5 Ch. Div. 306. See Fey v. Peoria &c. Co., 32 Ill. App. 618; Penobscot, &c. Co. v. Dummer, 40 Maine 172, 63 Am. Dec. 654; Despatch Line v. Bellamy &c. Co., 12 N. H. 265, 37 Am. Dec. 203; Corporate Directors, Re, 7 Pa. Co. Ct. 178. See generally Trisconi v. Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. 175; Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380.

[19] Bartholomew v. Bently, 1 Ohio St. 37. It is held that actual bene-

pointed director by the articles of association he is a de jure officer, although he did not at the time of his appointment own the number of shares required by the articles of association.[20] The conclusion reached in the case cited in the note is placed upon the ground that the articles of association only relate to officers appointed in the future.

§ 283 (242). **Ineligibility because of connection with competing lines.**—It is held that a director of one company is incompetent to serve as director of a company having adverse interests, and, if chosen, the court will remove him and replace him by trustees of its own appointing.[21] The decisions to which we refer seem to be supported by sound reason. Directors occupy fiduciary relations to the corporation and they ought not to be interested adversely to the corporation. It has, however, been held that the fact that a stockholder intends, if elected a director, to vote for an arrangement by which another corporation will control the company cannot, though such an arrangement be illegal, affect the validity of his election.[22]

ficial ownership is requisite. Bainbridge v. Smith, L. R. 41 Ch. Div. 462, 33 Am. & Eng. Corp. Cases 172; Stock, Ex parte, 33 L. J. Ch. 731; Newcomb, Matter of, 63 Hun 633, 18 N. Y. S. 549. See Nathan v. Tompkins, 82 Ala. 437, 2 So. 747; Hazelhurst v. Savannah &c. R. Co., 43 Ga. 13; Richards v. Attleborough &c. Bank, 148 Mass. 187, 19 N. E. 353, 1 L. R. A. 781; Chemical &c. Bank v. Colwell, 132 N. Y. 250, 30 N. E. 644; Argus Printing Co., In re, 1 N. Dak. 434, 48 N. W. 347, 26 Am. St. 639; Commonwealth v. Detwiler, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357; Cumming v. Prescott, 2 Younge & C. Exch. 488; Pulbrook v. Richmond &c. Co., L. R. 9 Ch. Div. 610.

[20] Karuth's Case, L. R. 20 Eq. 506; Portal v. Emmens, 1 Com. Pl. Div. 664.

[21] Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. 590. In West Virginia a corporation may provide by by-law that no person who is attorney against it in a suit shall be eligible to serve as director. Cross v. West Virginia Central &c. R. Co., 37 W. Va. 342, 16 S. E. 587, 18 L. R. A. 582. But the mere fact that one is a director in two companies is not necessarily a disqualification where the duties or interests do not conflict. Mobile &c. R. Co. v. Owen, 121 Ala. 505, 25 So. 612.

[22] Ohio & M. R. Co. v. State, 49 Ohio St. 668, 32 N. E. 933. See also Stanley v. Luse, 36 Ore. 25, 58 Pac. 75.

§ 284 (243). **Election of ineligible person to office of director.**—It is generally held that the election of an ineligible person to the office of director is voidable only and not absolutely void.[23] If the election is not void, but merely voidable, it would seem to follow that the person chosen is invested with color of office and, ordinarily, is not to be regarded as a mere usurper. He is not, to be sure, an officer de jure, but it seems to us that he is to some extent and for some purposes a corporate representative; but there are authorities holding that an ineligible person cannot be a de facto officer.[24] It is also held that votes cast for an ineligible candidate are "thrown away."[25] For the reasons given and upon the authorities referred to in the next paragraph, we are inclined to the opinion that an ineligible candidate formally elected and inducted into office may be an officer de facto.[26]

§ 285 (244). **Officers de facto—Generally.**—Where the rights of third persons are involved an officer may be such de facto, although in strict right he is not eligible to the office and has not been legally elected. It would be a hardship upon third persons who deal with corporations to require them at their peril to determine whether persons acting as corporate officers under color of right are in fact the officers of the corporation. The question is essentially different in cases where third persons are concerned from what it is in cases where the person claiming to be an officer asserts some right by virtue of the office. Where there is color of right under a corporate election and corporate recognition of the acts of the person claiming to be a director, third persons who in good faith act upon the belief that he is

[23] The doctrine goes back to the case of Crawford v. Powell, 2 Burr. 1013. See also note in 15 L. R. A. 418.

[24] People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344; Craw v. Easterly, 54 N. Y. 679; Easterly v. Barber, 65 N. Y. 252.

[25] See Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 72 Am. St. 427; Tramways Co., In re, 5 Ch. Div. 963.

[26] Horton v. Wilder, 48 Kans. 222, 29 Pac. 566. See also Burr v. McDonald, 3 Grat. (Va.) 215; note in 15 L. R. A. 418, 2 Thomp. Corp. (2d ed.), §§ 1111, 1113. As to when they are not de facto officers, see Waterman v. Chicago &c. R. Co., 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, and note.

an officer are entitled to protection. The same principle which protects persons who deal with persons having color of right to a public office should protect those who deal with representatives of corporations, for it would be unjust to require persons dealing with corporate representatives acting as officers under color of right to investigate and decide whether the claim to office is well founded. The same principle which upholds acts of corporations de facto ought to be sufficient to uphold the acts of persons who with color of right assume the functions of corporate officers. We believe the conclusion we have stated to be supported by principle and authority.[27]

§ 286 (245). Election of ineligible person—Who may question right to office.—A private person who has no interest whatever in the affairs of a railroad corporation cannot successfully challenge the right of an ineligible person to hold the office to which he

[27] Mahoney Min. Co. v. Anglo-California Bank, 104 U. S. 192, 26 L. ed. 707; Atlas Nat. Bank v. Gardner &c. Co., Fed. Cas. No. 635, 8 Biss. 537; Rockville &c. v. Van Ness, 2 Cranch (U. S.) 449, Fed. Cas. No. 11986; Selma &c. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344; Moses v. Tompkins, 84 Ala. 613, 4 So. 763; Cahill v. Kalamazoo &c. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Tucker v. Aiken, 7 N. H. 113, 135; Despatch Line &c. v. Bellamy, 12 N. H. 205, 37 Am. Dec. 203; Wallace v. Walsh, 125 N. Y. 26, 25 N. E. 1076, 11 L. R. A. 166; Demarest v. Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Atlantic &c. Co. v. Johnston, 70 N. Car. 348; Burr v. McDonald 3 Grat. (Va.) 215; 2 Thomp. Corp. (2d ed.), §§ 1111-1114. Contra, Newcomb, In re, 42 N. Y. St. 442, 18 N. Y. S. 16. In Beardsley v. Johnson, 121 N. Y. 224, 24 N. E. 380, it was held if a person elected to the office of director becomes ineligible and his place is filled by election, he is not even a director de facto, and service of process on him is void. There is, as every one knows, an essential difference between cases where the rights of innocent third persons are involved and cases where the rights of the claimant are asserted by him, and so there is between cases involving rights of third persons and cases where the state assails the right of the claimant to the office. Ebaugh v. German, &c. Church, 3 E. D. Smith (N. Y.), 60; People v. Albany &c. Co., 55 Barb. (N. Y.) 344; County &c. Co., In re, L. R. 5 Ch. App. 288. See generally Cooper v. Curtis, 30 Maine 488; Charitable Assn. v. Baldwin, 1 Metc. (Mass.) 359; Mechanich's &c. Bank v. Burnet &c. Co., 32 N. J. Eq. 236; Atlantic &c. Co. v. Johnston, 70 N. Car. 348.

was chosen, except in cases where it is otherwise provided by statute. One who actively and knowingly participates in securing an illegal election and the choice of persons not qualified, cannot be heard to complain of the result of the election. If the complainant has been guilty of an intentional wrong he is not in a situation to invoke the assistance of the courts.[28]

§ 287 (246). Directors de facto—Illustrative cases.—Persons acting as officers although their term of office had expired and they were holding over have been held to be officers de facto, but it seems to us that they should be regarded as officers de jure.[29] Officers chosen at a day other than that specified are at least officers de facto, and there is authority as well as reason for holding them to be officers de jure in the just sense of the term.[30] It has been held that a director elected by a minority of the stockholders is a de facto director.[31] So an officer elected under an unconstitutional statute has been held to be an officer de facto.[32] Officers elected at a meeting held outside of the state have been held to be de facto officers.[33] Directors discharging

[28] Wiltz v. Peters, 4 La. Ann. 339. Application of Syracuse &c. Co., Matter of, 91 N. Y. 1.

[29] Thorington v. Gould, 59 Ala. 461, 2 Thomp. Corp. (2d. ed.) § 1081.

[30] In Beardsley v. Johnston, 121 N. Y. 224, 24 N. E. 380, the provisions of a statute requiring the corporate election to be held on a designated day were directory and directors chosen on a day different from that specified were held officers de jure.

[31] Delaware &c. Co. v. Pennsylvania &c. Co., 21 Pa. St. 131. See also Bair v. Bank of Washington, 11 S. & R. (Pa.) 411; 2 Thomp. Corp. (2d ed.) § 1112.

[32] Leach v. People, 122 Ill. 420, 12 N. E. 726. See generally Norton v. Shelby County, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. ed., 178; Plymouth v. Painter, 17 Conn. 585, 44 Am. Dec. 574; Mallett v. Uncle Sam &c. Co., 1 Nev. 188, 90 Am. Dec. 484; State v. Curtis, 9 Nev. 325; Hamlin v. Kassafer, 15 Ore. 456, 15 Pac. 778, 3 Am. St. 176. Compare also Bradford v. Frankfort &c. R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

[33] Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Anglo-Californian Bank v. Mahoney &c. Co., 5 Sawy. (U. S.) 255, 258, Fed. Cas. No. 392; John v. Farmers &c. Bank, 2 Blackf. (Ind.) 367, 20 Am. Dec. 119; Ohio &c. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128, citing Trustees &c. v. Hill, 6 Cow. (N. Y.) 23, 16 Am. Dec. 429. All Saint's Church v.

the functions of office and holding under color of appointment by the legislature are de facto directors.[34] It has been adjudged that directors may be such de facto although the corporation was illegally or irregularly organized.[35] We suppose, however, that there can be no officers de facto, and, of course, no officers de jure, where there is no statute authorizing the organization of the corporation, for in such a case there could be no color of right, and color of right is essential to create an officer de facto. Mere irregularities in the mode of conducting an election will not, unless very material and substantial, impair the title of the persons chosen as directors, and as to third persons, officers chosen will be de facto officers, although there may be many irregularities and errors in conducting the election.

§ 288 (247). De facto directors—Two boards.—If there are two boards of directors the question as to whether there can be de facto directors is perplexing. If those claiming to be directors have color of title, are not mere usurpers, and have acted as directors for a considerable length of time, we think that as to third persons, acting in good faith and without notice, in the ordinary course of business, they should be regarded as directors de facto.[36] The question is, of course, radically different where it arises in a suit or action by innocent third persons from what it is when it arises in a suit or action by one claiming rights as an officer, or in a suit or action by one who actively participates in giving the claimants color of office and seeks to obtain personal benefit through the acts of such persons, for in

Lovett, 1 Hall (N. Y. S. Ct.) 191. See also Commonwealth v. Milton, 12 B. Mon. (Ky.) 222, 54 Am. Dec. 522; Aspinwall v. Ohio &c. Co., 20 Ind. 329, 83 Am. Dec. 329; Bradford v. Frankfort &c. R. Co., 143 Ind. 383, 40 N. E. 741, 41 N. E. 819; Wright v. Lee, 2 S. Dak. 596; 51 N. W. 706.

[34] Ellis v. North Carolina, 68 N. Car. 423. See generally Humphreys v. Mooney, 5 Colo. 282; Smith v. Bank, 18 Ind. 327; Smith v. Erb, 4 Gill. (Md.) 437; Savage v. Ball, 17 N. J. Eq. 142; People v. Staton, 73 N. Car. 546, 21 Am. Rep. 479.

[35] Hackensack &c. Co. v. DeKay, 36 N. J. Eq. 548.

[36] Lebanon &c. Co. v. Adair, 85 Ind. 244; Waterman v. Chicago &c. Co., 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. 228; Genesee Tp. v. McDonald, 98 Pa. St. 444.

such cases there is reason for holding that the corporation is not bound by the acts of the claimants of the office.[37]

§ 289 (248). Holding over—Failure to elect.—Where officers are elected for a designated term and the stockholders fail to elect at the time fixed for the election, the officers will hold over, unless the statute otherwise provides, and their official acts will bind the corporation.[38] A failure to elect officers at the time prescribed does not work a dissolution, unless the statute expressly or impliedly makes such failure operate as a dissolution.[39] Where the stockholders refuse or neglect to elect officers and corporate affairs are put in jeopardy by such failure, or the rights of property are thereby prejudiced the court may, upon the suit of a party who shows equity, and makes it appear that his rights are in danger of being impaired or destroyed, appoint a receiver to take charge of the affairs of the corporation.[40]

§ 290 (249). Powers of directors—Source of.—The statute under which a railroad company is organized is the source of power and the stockholders cannot invest the persons chosen as directors with powers not conferred upon the corporation by the

[37] Hildreth v. McIntire, 1 J. J. Marsh. (Ky.) 206, 19 Am. Dec. 61; Conway v. St. Louis, 9 Mo. App. 488. See also Moses v. Tompkins, 84 Ala. 613, 4 So. 763. See also Waterman v. Chicago &c. R. Co., 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. 228; Genesee School Dist. v. McDonald, 98 Pa. St. 444. See generally concerning effect of acts of de facto directors as to stockholders and corporation and concerning rights as between such directors and stockholders. 2 Thomp. Corp. (2d ed.), §§ 1117-1119.

[38] Thorington v. Gould, 59 Ala. 461; Cassell v. Lexington &c. Co., (Ky.) 9 S. W. 701; South Bay &c. Co. v. Gray, 30 Maine 547; Huguenot &c. Bank v. Studwell, 6 Daly (N. Y.) 13; Olcott v. Tioga &c. Co., 27 N. Y. 546, 84 Am. Dec. 298; Currie v. Mutual &c. Co., 4 Hen. & M. (Va.) 315, 4 Am. Dec. 517. See also New York &c. R. Co. v. Motil, 81 Conn. 466, 71 Atl. 563; Schmidt v. Pritchard, 135 Iowa 240, 112 N. W. 801; Penobscot &c. R. Co. v. Dunn, 39 Maine 587.

[39] Cahill v. Kalamazoo &c. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; Knowlton v. Ackley, 8 Cush. (Mass.) 93; Philips v. Wickam, 1 Paige (N. Y.) 590.

[40] Lawrence v. Greenwich &c. Co., 1 Paige (N. Y.) 587; Ward v. Sea &c. Co., 7 Paige (N. Y.) 294

charter.[41] The stockholders have authority to select the persons to whom such powers are to be intrusted, but individual stockholders do not stand in the relation of principals.[42] The corporation, however, does occupy the position of a principal, for the directors are its agents or representatives.

§ 291 (250). **Powers of directors—Generally.**—As a general rule, except so far as their action is controlled by special provisions of the charter, or of by-laws adopted under its authority, the directors may do any act within the general range of the ordinary business of the company which the company itself may do.[43] As elsewhere said, the board of directors is the governing department of the corporation and it is through the board or those acting under it, that ordinary corporate affairs are managed and the usual corporate business transacted. The implied powers of the directors generally have merely as wide a range as the implied powers of the corporation itself. Comparatively few powers are reserved to the stockholders of railroads in this country. The right to elect the directors, and to pass upon ques-

[41] It is not necessary, however, that all powers be expressly conferred upon the corporation by the charter, for many powers exist by necessary implication.

[42] Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159; Dayton &c. R. Co. v. Hatch, 1 Disn. (Cin. Sup. Ct.) 84; Wood Hydraulic &c. Co. v. King, 45 Ga. 34; Chetlain v. Republic &c. Ins. Co., 86 Ill. 220; Shaw v. Norfolk County R. Co., 16 Gray (Mass.) 407.

[43] Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159; Wright v. Oroville &c. Co., 40 Cal. 20. See also Reichwald v. Commercial Hotel Co., 106 Ill. 439; Phillip v. Aurora Lodge, 87 Ind. 505; Eastern R. Co. v. Boston &c. Co., 111 Mass. 125, 15 Am. Rep. 13; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489; Heidrick v. Pittsburgh &c. R. Co., 239 Pa. 29, 86 Atl. 527. Where two railroads in adjoining states are operated together, and additional land and depot buildings are necessary in one of the states to enable them to retain their increased business, the directors of the railroad in the other state have power to contract to pay a proper portion of the cost of these extended business facilities, though, as a general rule, they have no authority to expend money upon buildings outside the states in which their road is located, without the consent of the stockholders. Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363, 42 Am. & Eng. Cas. 688.

tions of leasing or selling the franchises and property, of increasing or decreasing the capital stock, of consolidating with other corporations,[44] and other matters of a fundamental or organic nature do not, however, properly belong to the directors, for those powers properly belong to the stockholders.[45] The board of directors is the proper agency to make ordinary corporate contracts. Its power in this respect is very broad and comprehensive. The board, unless so required by statute, is not bound to make all contracts itself, but may in most instances empower officers or agents to make ordinary business contracts. Contracts entered into by the board of directors will always be binding upon the company, where the contracts are within the scope of the corporate powers, and are made in pursuance of some object embraced by the charter.[46] The rule stated is a general one of wide sweep, but, wide as the rule is, it is always to be understood that the power to contract, its extent and limitations, must be ascertained from the act of incorporation. The action of the board of directors in making contracts cannot be controlled even by a majority of the stockholders, where the power to contract is conferred upon the board by the act of incorporation[47] and where they act in good faith; that is, the action

[44] See Dayton &c. R. Co. v. Hatch, 1 Disn. (Cin. Super. Ct.) 84. The stockholders and not the directors are the proper parties to increase the capital stock where no provision is made as to how it is to be done. Wheeler, In re, 2 Abb. Pr. N. S. (N. Y.) 361. Or to agree to an amendment of the charter. Witter v. Mississippi &c. R. Co., 20 Ark. 463.

[45] Organic or fundamental changes in the corporate body, its organization or object cannot be made by the directors except where the charter authorizes the directors to make such changes. There is an important distinction between conducting and managing general corporate affairs and making changes of the nature of those mentioned. See 2 Thomp. Corp. (2d ed.), §§ 1182, 1187-1189.

[46] Hodder v. Kentucky &c. R. Co., 7 Fed. 793; Dayton &c. R. Co., v. Hatch, 1 Disn. (Cin. Sup. Ct.) 84; Protection L. Ins. Co. v. Foote, 79 Ill. 361; Cicotte v. Anciaux, 53 Mich. 227; Union Mut. Ins. Co. v. Keyser, 32 N. H. 313, 64 Am. Dec. 375; Record v. Central Pac. Co., 15 Nev. 167; Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159; Fackiner v. Grand Junction R. Co., 4 Ont. R. Ch. Div. 350.

[47] Wardell v. Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509; Flagg v. Manhattan R. Co., 20 Blatchf.

cannot be controlled directly. It may, however, often be controlled indirectly by voting the directors out of office, in a legal mode. Where the rights of third persons have intervened the stockholders cannot annul the action of the directors, unless they have violated the provisions of the charter or transcended their authority; and not always, even in such cases, for there may be conduct or acts constituting an estoppel which will preclude the stockholders from successfully assailing the action of their representatives. The authority and discretion of the directors, being intrusted to them by the effective agreement of all the stockholders expressed in the charter or articles of association, can be controlled by the majority or by any other agent in comparatively very few cases.[48]

§ 292 (251). **Powers of directors—Illustrative cases.**—Where two railway corporations of different states whose lines connected entered into an agreement to operate and manage their road as one system, it was held that the directors of one company were authorized without the previous approval of the stockholders to pay for the construction of a passenger station in the state foreign to that in which it was created, and into which its line did not extend, where it appeared that the construction of the passenger station was for the purpose of enabling the joint man-

(U. S.) 142, 10 Fed. 413. Directors do not exceed their powers by making an agreement, with apparently good reasons and in good faith, to reduce the amount of money payable under a lease of their corporation, especially if nearly nine-tenths of the stockholders have acquiesced. Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

[48] Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Banet v. Alton &c. R. Co., 13 Ill. 504; Bardstown &c. Tpk. Co. v. Rodman (Ky.), 13 S. W. 917; Belfast &c. R. Co. v. Belfast, 77 Maine 445, 1 Atl. 350; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 241; Karnes v. Rochester &c. R. Co., 4 Abb. Pr. N. S. (N. Y.) 107; Sims v. Street R. Co., 37 Ohio St. 556. But if they act in matters where their private interests are concerned any stockholders may have their action set aside. Hedges v. Paquett, 3 Ore. 77. A tripartite agreement between three corporations having been adjudged void as to one, the directors of the other companies may, in their honest discretion, bring action to sever the contractual relations. Beveridge v. New York Elevated R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.

agement to retain and extend its increasing business.[49] Directors usually have power to fix and provide for the payment of the salaries of the officers of the company.[50] So, it has been held that they have power to pay part of the corporate indebtedness in stock of the company,[51] and authority to compensate one of their number for services rendered the company not within the line of his duties as director,[52] and to issue bonds to pay debts contracted for constructing and completing the road and to mortgage the corporate property to secure the payment of the same.[53] The directors of a railroad company have no authority, implied or general, to appropriate its bonds to aid in the construction of the line of another corporation.[54] Nor have they power to postpone the time of an annual election of officers, so as to continue themselves in office.[55] Directors have power to borrow money to conduct the business of the corporation, and ordinarily, they may pledge its personal property or mortgage its real estate to secure money borrowed for corporate purposes.[56] They have power, except where the law otherwise

[49] Nashua &c. Co. v. Boston &c. Co., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363.

[50] St. Louis &c. Co. v. Tierman, 37 Kans. 606, 15 Pac. 544, 40 Am. & Eng. R. Cas. 525; Falkiner v. Grand Junction &c. Co., 4 Ont. R. Ch. Div. 350, 16 Am. & Eng. R. Cas. 591. See also 8 Thomp. Corp. § 1182.

[51] County Court v. Baltimore &c. Co., 35 Fed. 161.

[52] Ten Eyck v. Pontiac &c. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. 633, 37 Am. & Eng. R. Cas. 273.

[53] McLane v. Placerville &c. Co., 66 Cal. 606, 6 Pac. 748, 26 Am. & Eng. R. Cas. 404. See also 2 Thomp. Corp. (2d ed.), § 1189. But as elsewhere shown, there are limitations upon the right of a railroad company to mortgage or contract so as to prevent it from performing its public duties.

[54] Starbuck v. Mercantile Trust Co., 9 Ry. & Corp. L. J. 203. See also Western Md. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887.

[55] Elkins v. Camden &c. R. Co., 36 N. J. Eq. 467.

[56] Ridgeway v. Farmers Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; Taylor v. Agricultural &c. Co., 68 Ala. 229; Hopson v. Aetna &c. Co., 50 Conn. 597; Wood v. Wheelan, 93 Ill. 153; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Tupp v. Swanzey &c. Co., 20 Mass. 291, 15 Am. Dec. 209; Burrell v. Nahant Bank, 43 Mass. 163, 35 Am. Dec. 395; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Davis v. Flagstaff &c. Co., 2 Utah 74. See generally Flagg v. Manhattan &c.

provides, to make contracts for the transportation of property,[57] and, as it has been held, to make a contract with another company to divide the earnings of the two companies.[58] It has been held that directors have no authority to organize a second company in another state and impose the expense upon the home company.[59] It has been adjudged that where the directors and shareholders are not identical, the directors have no authority to bind the corporation by an agreement with a designated person that he shall be a director.[60] Unless authority is granted by the act of incorporation a board of directors has no power to invest corporate funds in the stock of other corporations.[61] There are exceptions to this general rule, but they are very rare. Stock of other corporations may be acquired as a security for,

Co., 10 Fed. 413; Chamberlain v. Bromberg, 83 Ala. 576, 3 So. 434; Union Bank v. Ellicott, 6 G. & J. (Md.) 363; Descombes v. Wood, 91 Mo. 196, 60 Am. Rep. 239; McCullough v. Moss, 5 Denio (N. Y.) 567, 575; Hoyt v. Thompson, 19 N. Y. 207, 216; Duncomb v. New York &c. Co., 88 N. Y. 1; Sheldon &c. Co., v. Eickemeyer &c. Co., 90 N. Y. 607; West of England Bank, In re, L. R. 14 Ch. Div. 317; Bank of South Australia v. Abrahams, L. R. 6 P. C. 265; Sheffield, &c. Co. v. Unwin, L. R. 2 Q. B. Div. 214.

57 Railroad Co. v. Furnace Co., 37 Ohio St. 434.

58 Elkins v. Camden &c. R. Co., 36 N. J. Eq. 241.

59 Eakins v. American White Bronze Co., 75 Mich. 568, 42 N. W. 982.

60 Seymour v. Detroit Rolling Mills, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186.

61 Joint Stock &c. Co. v. Brown, Law 8 Eq. Cases 381; Sumner v. Marcy, 3 Woodb. & M. (U. S.) 105, Fed. Cas. No. 13609; Mackintosh v. Flint &c. R. Co., 34 Fed. 582; Easun v. Buckeye &c. Co., 51 Fed. 156; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 122, 16 Am. St. 81; Commercial &c. Co. v. Board &c., 99 Ala. 1, 14 So. 490, 42 Am. St. 1; Mechanics &c. Assn. v. Meriden &c. Co., 24 Conn. 159; Central R. Co. v. Collins, 40 Ga. 582; Hazlehurst v. Savannah &c. R. Co., 43 Ga. 13, 58; People v. Chicago &c. Co., 130 Ill. 268, 22 N. E. 798, 17 Am. St. 319; Franklin &c. Co. v. Lewiston &c., 68 Maine 43, 28 Am. Rep. 9; Bank v. Hart, 37 Nebr. 197, 55 N. W. 631, 40 Am. St. 479; Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. 590; Central R. Co. v. Pennsylvania R. Co., 31 N. J Eq. 475; Valley &c. Co. v. Lake Erie &c. Co., 46 Ohio St. 44, 18 N. E. 486; Denny &c. Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. 130. See also Williams v. Johnson, 208 Mass. 544, 95 N. E. 90; State v. Atlantic City &c. R. Co., 77 N. J. L. 465, 72 Atl. 111.

or in payment of, a debt; for a railway company, unless its charter otherwise provides, is entitled to secure payment of claims owing to it, in the same manner as may be done by other business corporations, or by natural persons.[62] The directors of a corporation invested with authority to dispose of corporate funds may, as it has been held, accept stock of other corporations in payment,[63] but we regard the doctrine asserted by the cases referred to as one to be very cautiously received and very carefully applied. Where the statute authorizes the consolidation of railway corporations, and the purchase of the stock of the one company by the other, and a consolidation is rightfully effected, the purchase of stock may be made by the board.[64]

§ 293 (252). Directors—Powers of—Organic changes.—Directors have no general authority to make any fundamental changes in the purposes and objects of the corporation,[65] nor to accept an amendment to the charter making such changes,[66] un-

[62] Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 122, 16 Am. St. 81. See generally National Bank v. Case, 99 U. S. 628, 25 L. ed. 448; County Court &c. v. Baltimore &c. R. Co., 35 Fed. 161; Holmes &c. Co. v. Holmes &c. Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448, 8 Thomp. Corp. §§ 4063, 4064.

[63] Treadwell v. Salisbury &c. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Hodges v. New England &c. Co., 1 R. I. 312, 53 Am. Dec. 624.

[64] Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Ryan v. Leavenworth &c. Co., 21 Kans. 365; Atchison &c. R. Co. v. Cockran, 43 Kans. 225, 23 Pac. 151, 7 L. R. A. 414, 19 Am. St. 129; Hill v. Nisbet, 100 Ind. 341; State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164.

[65] Witter v. Mississippi &c. R. Co., 20 Ark. 463; Railway Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Venner v. Atchison &c. Co., 28 Fed. 581; Mississippi &c. R. Co. v. Gaster, 24 Ark. 96; Marlborough &c. Co. v. Smith, 2 Conn. 579; Fry v. Lexington &c. R. Co., 2 Metc. (Ky.) 314; Durfee v. Old Colony R. Co., 4 Allen (Mass.) 230; Joy v. Jackson &c. Plank Road Co., 11 Mich. 155; Hope &c. Co. v. Beckmann, 47 Mo. 93; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228; Black v. Delaware & R. Canal Co., 22 N. J. Eq. 130; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 233; Blatchford v. Ross, 5 Abb. Pr. R. N. S. (N. Y.) 434; Goodin v Evans, 18 Ohio St. 150; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450; Baker's Appeal, 109 Pa. St. 461; Era &c. Co., In re, 30 L. J. Eq. 137; Starbuck v. Mercantile Trust Co., 9 Corp. & Ry. L. J. 203; 2 Thomp. Corp. (2d ed.), § 1187.

[66] Mobile &c. Co. v. Steiner, 61 Ala. 559; Mississippi &c. R. Co. v.

less, perhaps, where such power is clearly lodged in them by the charter.[67] It has, however, been held that the power to accept amendments is lodged with the directors when it is given in general terms to the corporation, and the directors are intrusted with all of the corporate powers.[68] But we suppose that the doctrine of the case referred to can only apply where the statute impliedly or expressly vests the board with power to accept amendments, for that power properly resides in the stockholders. When the amendment is immaterial and does not work a fundamental change impairing the rights of the stockholders, or, possibly, where the legislature has reserved the right to amend, the directors may act upon the amendment.[69] If the legislature has reserved the power to amend, then an immate-

Gaster, 24 Ark. 96; Marlborough &c. Co. v. Smith, 2 Conn. 579; State v. Oftedal, 72 Minn. 498, 75 N W. 692; Hope &c. Co. v. Beckmann, 47 Mo. 93; Commonwealth v. Cullen, 13 Pa. St. 1333, 53 Am. Dec. 450; Baker's Appeal, 109 Pa. St. 461; Brown v. Fairmount &c. Co., 10 Phila. (Pa.) 32.

[67] In Dayton &c. R. Co. v. Hatch, 1 Disn. (Cin. Super. Ct.) 84, the court said: "That both the special charter of the plaintiff and the general railroad law contemplated that all corporate acts, including an assent to such an amendment as the one authorized, should be done by the board of directors, appears to be clear." In the note which follows we have ventured to question the soundness of the decision in the case here cited. Our judgment is that amendments which are fundamental in their nature must be accepted by all the stockholders except in cases where the statute expressly vests the whole corporate power in the directors or provides that amendments may be accepted by them. Venner v. Atchison &c. Co., 28 Fed. 581; Sprigg v. Western Tel. Co., 46 Md. 67; Buffalo &c. R. Co. v. Dudley, 14 N. Y. 336; Kenosha &c. R. Co. v. Marsh, 17 Wis. 13.

[68] Dayton &c. R. Co. v. Hatch, 1 Disn. (Cin Super. Ct.) 84. We think that the doctrine of the case cited is broader than principle or authority will justify; at all events, some of the expressions in the opinion require qualification and limitation. The doctrine laid down in Railway Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902, is the true one in our judgment.

[69] New Haven &c. R. Co. v. Chapman, 38 Conn. 56; Pacific R. Co. v. Hughes, 22 Mo. 291; Delaware &c. R. Co. v. Irick, 23 N. J. L. 321; Bailey v. Holister, 26 N. Y. 112; Bedford R. Co. v. Bowser, 48 Pa. St. 29. See also Eastern R. Co. v. Boston &c. R. Co., 111 Mass. 125, 15 Am. Rep. 13.

rial amendment cannot be justly said to impair the rights of stockholders, but it would be otherwise if the amendment were a material one and power to amend were not reserved.[70] Directors, although intrusted with extensive powers in the management of the corporation business, have, ordinarily, no authority to apply to the legislature for an enlargement of the corporate powers nor to accept a grant of such powers made upon their application.[71] Directors cannot, in the absence of any provisions of the charter giving them power, increase the capital stock,[72] since this is a change of a fundamental character, which, by introducing additional votes into the corporate body, would change the relative influence, control and profit of each member, and have the effect of making the stockholders members of a company in which they never consented to become members. Nor can they dispose of the company's property which is necessary to the transaction of its business, and wind up its affairs without special authority from the stockholders.[73] The rule just stated as to the disposition of property is a general one, but is not without exceptions. There may be cases, as for instance, where it is necessary to preserve corporate property and interests by an assignment, in which the directors may dispose of corporate property. The general rule is that the authority conferred upon the directors is granted them in order that they may carry forward the purposes for which the cor-

[70] See ante, § 56.

[71] Marlborough Mfg. Co. v. Smith, 2 Conn. 579. Any such action on their part would not bind the stockholders. Snook v. Georgia Imp. Co., 83 Ga. 61, 9 S. E. 1104. See to the effect that the directors cannot bind the stockholders by their acceptance of an amendment to the charter, where the legislature had not reserved the power to amend. Witter v. Mississippi &c. R. Co., 20 Ark. 463; Commonwealth v. Cullen, 13 Pa. St. 133, 53 Am. Dec. 450. See ante, § 56.

[72] Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Wheeler, In re, 2 Abb. Pr. N. S. (N. Y.) 361. See Durfee v. Old Colony R. Co., 5 Allen (Mass.) 230; Atlantic &c. R. Co. v. St. Louis, 66 Mo. 228.

[73] Rollins v. Clay, 33 Maine 132; Abbot v. American &c. Co., 33 Barb. (N. Y.) 578. See also Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 So. 981, 59 Am. St. 105; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737; 2 Thomp. Corp. (2d ed.) § 1189.

poration was organized, and not that they may terminate its existence.[74] Where no special authority[75] to do so is contained in the charter, the directors of a railroad company cannot execute a lease of the company's property without being directed by a regularly called meeting of the stockholders to do so.[76]

§ 294 (253). **Directors—Extent of authority—Generally.**—The authority of the board of directors extends to contracting debts in pursuance of the business and purposes of the corporation and pledging or conveying real or personal property in payment or as security.[77] It is held that the board may make an assignment of the property of the corporation for the benefit of its creditors, in a proper case, without the express authority or consent of the stockholder,[78] if it acts in good faith. The directors can, of course, only bind the corporation, as a rule as to corporate matters and by acts within the scope of the powers conferred upon the company.[79]

[74] Bank Comrs. v. Bank of Brest, 1 Harr. Ch. (Mich.) 106.

[75] Under this general doctrine it is held that authority to manage the business does not include power to lease the road. Metropolitan El. R. Co. v. Manhattan El. R. Co., 11 Daly (N. Y.) 373, where it is held that the directors could not lease the road, although the corporation was specially empowered to do so.

[76] Martin v. Continental Pass. R. Co., 14 Phila. (Pa.) 10, holding this to be true where the directors hold a majority of the stock. But where the directors owned all the stock, it was said that there was no one in a situation to complain. Barr v. New York &c. R. Co., 96 N. Y. 444. As elsewhere shown, a railroad company itself does not always have this power even if stockholders attempt to authorize it. See post, § 429, et seq.

[77] Miller v. Rutland &c. R. Co., 36 Vt. 452; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. Unless specially prohibited the directors may mortgage the corporate property to secure a debt which they may create. County Court of Taylor Co. v. Baltimore, &c. R. Co., 35 Fed. 161; Reichwald v. Commercial Hotel Co., 106 Ill. 439; Ellis v. Boston &c. R. Co., 107 Mass. 1; 2 Thomp. Corp. (2d ed.), § 1190.

[78] DeCamp v. Alward, 52 Ind. 468; Dana v. Bank of U. S., 5 Watts & S. (Pa.) 223; 2 Thomp. Corp. (2d ed.), § 1191. Of course it could only do so where the corporation itself is not prohibited from making such an assignment. Dana v. Bank of U. S., 5 Watts & S. (Pa.) 223.

[79] Ricord v. Central Pac. R. Co., 15 Nev. 167.

§ 295 (254). **Powers of directors—General conclusion.**—It may be safely affirmed that the general rule is that all the ordinary affairs and business of a railroad company are under the control and management of the board of directors and that in conducting that business and managing those affairs the board of directors is in effect the corporation, but is not the corporation so far as concerns matters beyond the ordinary corporate business and affairs. The difficulty is in determining what shall be considered as the ordinary affairs and business of the corporation, or of the nature of the corporate business or objects, is referred, that a change of the scheme of the corporate organization, or of the nature of the corporate business or objects, is not within the meaning of the cases which hold that the ordinary affairs and business of the corporation are to be managed and controlled by the board of directors. The shareholders cannot manage or control the ordinary corporate affairs, for the power over those affairs being vested in the board of directors necessarily excludes the shareholders. But the shareholders, although excluded from the management and control of ordinary corporate matters, do control all matters of a fundamental or organic nature.

§ 296 (255). **Directors—Official action—Preliminary.**—In discharging the duties and exercising the functions imposed by law upon the directors as the governing officers of the corporation they should act as a body, duly convened in session as an official board. What may be called governmental powers cannot be delegated, and powers that cannot be delegated must be exercised by the board of directors acting as a body. Individual and separate action is not official action. These governmental powers are in their nature legislative or judicial and require for their proper and rightful exercise deliberation and discussion. It is necessary, therefore, that such powers should be exercised by the board of directors so that there may be a com-

[80] Hoyt v. Thompson, 19 N. Y. 207, 217; Bathe v. Decatur &c. Co., 73 Iowa 11, 34 N. W. 484, 5 Am. St. 651. The first of these cases goes too far.

parison of views and an exercise of judgment and discretion by all the members of the board.

§ 297 (256). **Directors—Official action.**—Directors should act together as a board, and, upon principle, action by them separately is not valid or effective. A corporate act required to be performed by the directors is not effectively performed unless the directors convene as a body in obedience to the requirements of the charter or in accordance with the provisions of a by-law enacted under authority conferred by the charter or act of incorporation. Separate action of a majority of the directors is not the action of the board of directors. The members of the board, when acting together, are the authorized governing officers of the company, but the members acting separately are not.[81] The rule just stated applies, although a majority of the directors may separately assent to a given measure or control.[82]

§ 298 (257). **Directors—Delegation of authority.**—The directors cannot rightfully delegate to other corporate officers or agents powers which the law requires them to exercise themselves as a board.[83] But the strictness of this rule has been greatly re-

[81] Filon v. Miller &c. Co., 15 N. Y. S. 57; Kansas City &c. Co. v. Devol, 72 Fed. 717; Tennessee &c. R. Co. v. East Alabama R. Co., 73 Ala. 426; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 4 Pac. 106; Harris v. Muskingum &c. Co., 4 Blackf. (Ind.) 267, 29 Am. Dec. 372; Allemong v. Simmons, 124 Ind. 199, 23 N. E. 768; Kupfer v. South Parish, 12 Mass. 185; Tileston v. Newell, 13 Mass. 406; New Haven &c. Co. v. Hayden, 107 Mass. 525; Lockwood v. Thunder &c. Co., 42 Mich. 536, 4 N. W. 292; Browning v. Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. 691; Barcus v. Hannibal &c. Co., 26 Mo. 102; Readrich v. Wilson, 8 Baxt. (Tenn.) 108; Roberts v. Button, 14 Vt. 195.

[82] Butler v. Cornwall &c. Co., 22 Conn. 335; Cannon River &c. Co. v. Rogers, 51 Minn. 388, 53 N. W. 759; D'Arcy v. Tamar &c. Co., 4 Hurls. & Colt. 463; Bosanquet v. Shortridge, 4 Exch. 699. See also (to the effect that this is the rule, but that stockholders may waive it), Merchants' &c. Bank v. Harris Lumber Co., 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B, 715, and other cases cited in note.

[83] There is conflict in the adjudged cases as to what powers are incapable of delegation, and some of the cases go very far in restrict-

laxed in modern times and, where the charter or statute is not clearly prohibitive, it is generally held that they may delegate to a committee, or, perhaps, to other subordinate agents matters that may involve the exercise of judgments and discretion as well as ordinary routine duties.[83a] The directors may appoint agents to perform duties of a ministerial and executive character, but it does not follow from this that they can entrust to others the duties imposed upon them as such by law. There is an essential difference between appointing agents to perform duties not required of the board of directors, and assuming to delegate to others, authority vested in the directors as the governing board of the corporation. In many instances duties may be delegated to other agents or officers, but duties of a judicial or legislative nature which the law requires the directors to perform as a body, cannot be delegated. There are, no doubt, duties that may be performed through the medium of committees. The board may appoint a committee of its number to discharge certain duties, such as auditing the accounts of the financial officers, or arranging the terms of a lease or mortgage, but it has been held that the acts of the committee must be passed upon, or in some method adopted or ratified, by the board to make them binding on the corporation.[84] In other words, it is held in a number of the cases that the action of the committee must in some appropriate mode be made that of the board of directors, either by precedent authority or subsequent ratification.[85] Some cases hold that ministerial or executive

ing the right to delegate, while others go to the extreme in the other direction. Against authority to delegate, see Weidenfeld v. Sugar R. Co., 48 Fed. 615; Pike v. Bangor &c. R. Co., 68 Maine 445. Upholding delegation to executive committee, see Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 597, 16 Sup. Ct. 1173, 41 L. ed. 265; Hoyt v. Thompson, 19 N. Y. 207; Black River Imp. Co. v. Holway, 85 Wis. 344, 55 N. W. 418. See also Jones v. Williams, 139 Mo. 1, 39 S. W. 486, 40 S. W. 353, 37 L. R. A. 682, 61 Am. St. 436; 2 Thomp. Corp. (2d ed.), § 1200.

[83a] 8 Thomp. Corp. §§ 1202, 1207, 1211.

[84] Waite v. Winham Co. Mining Co., 36 Vt. 18.

[85] Berks &c. Road v. Myers, 6 Sergt. & R. (Pa.) 12, 9 Am. Dec. 402; Union &c. Co. v. Chicago &c. Co., 51 Fed. 309; Tippets v. Walker, 4 Mass. 595; Sheridan Electric

acts, the performance of which may be delegated, may be authorized or ratified by the assent of a majority of the board given separately, especially, if that has been the usage.[86] And it is also held that the concurrent action of a majority of the directors is sufficient in such a case,[87] without the formality of a meeting, but it is held that the action should, in such case, be taken by them as directors, and not in some other capacity, and that it should clearly appear that a majority of the board con-

Light Co. v. Chatham &c. Bank, 127 N. Y. 517, 28 N. E. 467. Power to appoint a committee and to invest them with authority to contract may be conferred upon the board of directors by the act of incorporation. In Chicago v. Union &c. Co., 47 Fed. 15, 17, the court said: "Summing up this question, the instrument was signed and attested by the proper officers. It was aproved by the executive committee, which excutive committee was granted ad interim by the board of directors all the power of that board; authority to make such delegation of power was given to the board by the by-laws. Power to make such by-laws was bestowed by the act of incorporation upon the stockholders. At the regular meeting the contract was approved by all the stockholders present. Under these circumstances if the contract was one which the corporation could make it was fully authorized and duly executed and binding."

[86] Bee v. San Francisco &c. R. Co., 46 Cal. 248; Estes v. German Nat. Bank, 62 Ark. 7, 34 S. W. 85; Foot v. Rutland &c. R. Co., 32 Vt. 633. See Rogers v. Hastings, 22 Minn. 25, where the corporation was held liable to compensate an agent employed by the directors without formal action by the board. See also Tenney v. East Warren Lumber Co., 43 N. H. 343, where it was held sufficient proof of the concurrence of the board to show that they assented separately.

[87] Despatch Line &c. v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Ross v. Crockett, 14 La. Ann. 811; Yellow Jacket Min. Co. v. Stevenson, 5 Nev. 224; Dey v. Jersey City, 19 N. J. Eq. 412; Stoystown &c. Tpk. Co. v. Craver, 45 Pa. St. 386. See Lyndeborough Glass Co. v. Massachusetts Glass Co., 111 Mass. 315, where the superintendent acted with the knowledge of all the directors except one in making a purchase, and that one learned of the superintendent's act soon afterward, but no action repudiating the purchase was ever taken. In a suit to recover the purchase price the court held that the purchase was authorized by the company. Directors holding a majority of the stock have power to agree that an individual may have the full amount that he can collect of a claim against a third person. Delaware City &c. Nav. Co. v. Reybold, 8 Houst. (Del.) 203, 14 Atl. 847.

sented.[88] It is to be said that some of the cases trench upon the rule forbidding the delegation of authority as well as upon the rule requiring the directors to act as a board, and so far as they do run counter to these rules they are of doubtful soundness.

§ 299 (258). Directors—Delegation of authority—Illustrative cases.—It is generally held that the directors cannot delegate the authority to make assessments, but it is also held that they may ratify an assessment made without adequate authority by an agent.[89] Some of the cases hold that the power to execute mortgages and leases of corporate property cannot be delegated, but on this point the authorities are in conflict.[90] Our opinion is that as to property not required to enable the corporation to exercise its corporate functions and discharge its duties to the public, the board of directors has power to delegate the authority to sell or lease. The board of directors may effectively authorize corporate officers or agents to sell and assign notes, bonds or other securities, belonging to the corporation.[91]

§ 300 (259). Directors—Action where the mode is prescribed. —If the statute prescribes the formalities to be observed by the directors in doing a given act, they must comply therewith, or their act may be voidable.[92] This rule applies to cases where ob-

[88] Junction R. Co. v. Reeve, 15 Ind. 236.

[89] Ante, § 200. Winsor, Ex parte, 3 Story (U. S.) 411, Fed. Cas. No. 17884; Silver Hook Road v. Greene, 12 R. I. 164.

[90] Female &c. Asylum v. Johnson, 43 Maine 180; Emerson v. Providence &c. Co., 12 Mass. 237, 7 Am. Dec. 66; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Gillis v. Bailey, 21 N. H. 149; Manchester &c. R. Co. v. Fisk, 33 N. H. 297; Lyon v. Jerome, 26 Wend. (N. Y.) 485, 37 Am. Dec. 271; Whitney v. Union &c. Co., 65 N. Y. 576; Dana v. Bank of United States, 5 Watts & S. (Pa.) 233; Leeds &c. Co., Re, 1 L. R. Ch. App. 561.

[91] Fleckner v. Bank of United States, 8 Wheat. (U. S.) 383, 5 L. ed. 631; Stevens v. Hill, 29 Maine 133; Northampton Bank v. Pepoon, 11 Mass. 288; Ridgway v. Farmers' Bank, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681; 2 Thomp. Corp. (2nd. ed.), § 1201.

[92] Leominster Canal Co. v. Shrewsbury &c. R. Co., 3 K. & J. 654; Leavenworth R. Co. v. County Court, 42 Mo. 171; Pittsburgh &c. R. Co. v. Clarke, 29 Pa. St. 146.

servance of the formalities is expressly declared by statute to be a necessary condition precedent,[93] and to all cases in which the effect of the act will be to destroy pre-existing rights,[94] or to impose burdens upon persons whose willingness to assume them depends on their assent to such formalities.[95] In such cases, all persons are bound at their peril to know whether the formalities have been observed or not. But with regard to formalities which are merely directory, a different rule is established. A substantial compliance in such a case is sufficient, and where the material formalities have been observed, a failure to comply with those which are not material will not invalidate the acts, at least as to innocent parties.[96] The failure to observe a formality cannot be set up by one who is bound to see to its observance, against those who have no knowledge of such failure,[97] unless they bore such a relation to the company that they knew or were bound to know that such formality was necessary and had the means of ascertaining whether it had been observed.[98] If the directors have general authority to do an act, all persons dealing with them in reference to such act may assume that it was regularly done, and that all necessary formalities were observed,[99] unless something appears on the face

[93] Leominster Canal Co. v. Shrewsbury &c. R. Co., 3 K. & J. 654; Homersham v. Wolverhampton Water Works, 6 Exch. 137.

[94] As where shares are forfeited for non-payment. Portland &c. R. Co. v. Graham, 52 Mass. (11 Metc.) 1; Lewey's Island R. Co. v. Bolton, 48 Maine 451, 77 Am. Dec. 236; Garden Gully &c. Co. v. McLister, L. R. 1 App. Cases 39.

[95] As where the corporation is authorized to incumber or transfer its property, if the stockholders vote to do so, or where aid may be levied by municipal corporations if the taxpayers so vote. Eagle v. Kohn, 84 Ill. 292; Concord v. Portsmouth Savings Bank, 92 U. S. 625, 23 L. ed. 628; Leavenworth R. Co. v. County Court, 42 Mo. 171.

[96] Town of Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583; Lane v. Schomp, 20 N. J. Eq. 82; Mott v. United States Ins. Co., 19 Barb. (N. Y.) 568; Bissell v. Michigan &c. R. Co., 22 N. Y. 258.

[97] New Castle &c. Marine Ins. Co., In re, 19 Beav. 97; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[98] Jackson Ins. Co. v. Cross, 9 Heisk. (Tenn.) 283; Mott v. United States Trust Co., 19 Barb. (N. Y.) 568; European R. Co., In re, L. R. 8 Eq. 444.

[99] Conn. Mut. Life Ins. Co. v. Cleveland &c. R. Co., 41 Barb. (N.

of the transaction to suggest inquiry.[1] Thus it has been held that a railroad corporation cannot dispute the validity of a mortgage given to secure its bonds that are owned by bona fide holders upon the ground that its directors authorized its execution at a meeting held outside of the state.[2] Nor can a corporation dispute the validity of acts authorized by its directors at a special meeting, upon the ground that proper notice of such special meeting was not given, where no objection to their validity was made by any director or stockholder until after the rights of innocent third parties had intervened.[3] When the mode of action and formalities to be observed are prescribed by the by-laws, even more liberal rules obtain in determining the rights of persons claiming by virtue of the acts of the directors. Such rule may be varied by usage,[4] at least where the by-laws are made by the directors.[5] And persons dealing with the corporation will not be held to so strict a knowledge of limitations and restrictions upon the general authority of the directors contained in the by-laws as of those contained in public statutes.[6] The observance of required formalities may be waived, and the corporation may become bound by acquiescence in informal acts,[7] ex-

Y.) 9. See also Bissell v. Michigan &c. R. Co., 22 N. Y. 258 (And see as to ratification or waiver of informalities. Merchants &c. Bank v. Harris Lumber Co., 103 Ark. 283, 146 S. W. 508, Ann. Cas. 1914B. 713 and 717n); Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Royal British Bank v. Turquand, 6 E. & B. 327.

[1] Eagle Ins. Co., Ex parte, 4 K. & J. 549.

[2] Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[3] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288. See also Merchants &c. Bank v. Harris Lumber Co., 103 Ark. 283, 146 S. W. 508, Ann. Cas. 713, and note where authorities on both sides of the general question are reviewed.

[4] Pittsburgh &c. R. Co. v. Clarke, 29 Pa. 146.

[5] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288. And a formality declared to be imperative may be so long and so universally disregarded as to cease to be operative. Walton, Ex parte, 26 L. J. Ch. 545.

[6] Bissell v. Michigan Southern R. Co., 22 N. Y. 258.

[7] Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Bragate v. Shortridge, 5 H. L. Cas. 297; Walton, Ex parte, 26 L. J. Ch. 545.

cept where the charter or public statutes make the observance of the formalities a condition precedent to the directors' authority to act.[8]

§ 301 (260). Directors—Meetings.—The official action of directors is taken in regular or special meetings convened in accordance with the provisions of the charter or by-laws. Strictly speaking, the functions of directors can only be exercised at such meetings. The rule is that the directors can exercise the powers specially intrusted to them only as a board convened in regular session as a board.[9] Thus, where the directors took part in a stockholders' meeting, at which the body of the stockholders executed a lease, the action was held void as beyond the powers of the stockholders, and the court said: "It is no answer, that individual stockholders who were present at the meeting when the lease was ordered, were also directors. They did not meet or act as directors, but as stockholders."[10] A majority of those present at a regularly convened meeting may act for the corporation,[11] but in order to constitute a regular meeting it is neces-

[8] Walton, Ex parte, 26 L. J. Ch. 545; Pittsburgh &c. R. Co. v. Clarke, 29 Pa. St. 146.

[9] Johnston v. Jones, 23 N. J. Eq. 216; Junction R. Co. v. Reeve, 15 Ind. 236; Morrison v. Wilder Gas Co., 91 Maine 492, 40 Atl. 542, 64 Am. St. 257; Schackelford v. New Orleans &c. R. Co., 37 Miss. 202; Calumet Paper Co. v. Haskell &c. Co., 144 Mo. 331, 45 S. E. 1115, 66 Am. St. 425; Yellow Jacket Min. Co. v. Stevenson, 5 Nev. 224; Buttrick v. Nashua &c. R. Co., 62 N. H. 413, 13 Am. St. 578; Green v. Miller, 6 Johns. (N. Y.) 38; Stoystown &c. Tpk. R. Co. v. Craver, 45 Pa. St. 386; King v. Great Marlow, 2 East. 244; Marseilles Extension R. Co., In re, L. R. 7 Ch. App. 161. See also Ney v. Eastern Iowa Tel. Co., 162 Iowa 525, 144 N. W. 383; Brinkerhoff Zinc. Co. v. Boyd, 182 Mo. 597, 91 S. W. 523. But see Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159, holding that the directors may give their assent separately if that is their usual practice.

[10] Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27.

[11] Hax v. R. T. Davis Mill Co., 39 Mo. App. 453; Smith v. Los Angeles Im. &c. Assn., 78 Cal. 289, 20 Pac. 677, 12 Am. St. 53; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. Provided, of course, that they are a majority of those present and voting. And even though an equal number be present who refrain from voting, still the votes of a majority of the number necessary to form a quorum will carry a measure where there are no dissenting votes. Rushville

sary that a quorum be present. In the absence of any special regulations,[12] a majority of the board is necessary to constitute a quorum.[13]

§ 302 (261). **Directors—Meetings—Stated and special.**—The charter sometimes provides for stated or general meetings of the board of directors, and also for the calling and holding of special meetings. It is barely necessary to suggest that where provisions are made by the charter for the time and place of holding stated meetings and for the mode of holding special meetings, those provisions must be substantially complied with in all material respects. Notice of special meetings must be given in the mode prescribed by the charter or corporate by-laws;[14] but of stated or regular meetings provided for by the charter or by-laws need not be given, as it is the duty of the directors to take notice of the provisions of the charter and by-laws of the company.

§ 303 (262). **Directors—Meetings—Notice.**—Where stated meetings are held, by the board at prescribed times fixed by the charter, or by-laws, or by resolution, all the directors are bound to take notice of the time and place of holding them.[15] The pre-

Gas Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388. Contra, Lawrence v. Ingersoll, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. 870.

[12] This rule is prescribed by statute in most of the states.

[13] Price v. Grand Rapids &c. R. Co., 13 Ind. 58; Cram v. Bangor House Proprietary, 12 Maine 354; Foster v. Mullanphy Planing Mill Co., 92 Mo. 79, 4 S. W. 260; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207. But it is held that the failure to fill two vacancies in a board consisting of five members does not destroy the right of the remaining three to make a quorum. Great Falls &c. R. Co. v. Ganong, 48 Mont. 54, 136 Pac. 390.

[14] Hunt v. School District, 14 Vt. 300, 39 Am. Dec. 225; Hatch v. Johnson &c. Co., 79 Fed. 828; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Long Island &c. R. Co., Matter of, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429; Doernbecher v. Columbia &c. Co., 21 Ore. 573, 28 Pac. 899, 28 Am. St. 766; 2 Thomp. Corp. (2nd. ed.), §§ 1138, 1140, 1146. See also Hayes v. Canada &c. S. S. Co., 181 Fed. 289; Great Falls &c. R. Co. v. Ganong, 48 Mont. 54, 136 Pac. 390.

[15] Warner v. Mower, 11 Vt. 385; Sampson v. Bowdoinham &c. Co., 35 Maine 78; Atlantic &c. Co. v.

sumption is in favor of the regularity of the meetings of corporate directors and the burden is on the party who assails their regularity to show that there were irregularities in calling, holding or conducting the meeting,[16] and where a quorum is present the presumption is that all were notified.[17] In order that special meetings held at other times or places may be such meetings as will empower the directors present to act for the corporation, all the directors must have proper notice of the time of meeting; but, if all the directors are present and participate in the proceedings the fact that notice has not been formally given is unimportant. If notice has not been given and the directors are not all in attendance at the meeting a very different question is presented. If some of the directors are not notified the proceedings will not, as a rule, be effective, although a quorum be present at the meeting and concur in the proceedings.[18] No-

Sanders, 36 N. H. 252; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104; People v. Batchelor, 22 N. Y. 128; Rex v. Hill, 4 Barn. & Cress. 436. See also Gumaer v. Cripple Creek Tunnel &c. Co., 40 Colo. 1, 90 Pac. 81; Western Imp. Co. v. Des Moines Nat. Bank, 103 Iowa 455, 72 N. W. 657.

[16] Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671; Stockton Combined Harvester Works v. Houser, 109 Cal. 1, 41 Pac. 809; Lane v. Brainerd, 30 Conn. 565; Hardin v. Iowa &c. Co., 78 Iowa 726, 43 N. W. 543, 6 L. R. A. 52; Sargent v. Webster, 12 Metc. (Mass.) 497; Chouteau &c. Co. v. Holmes, 68 Mo. 601, 30 Am. Rep. 807; Leavitt v. Oxford &c. Co., 3 Utah 265, 1 Pac. 356; Budd v. Walla Walla &c. Co., 2 Wash. Ter. 347, 7 Pac. 896.

[17] McCall v. Bryam &c. Co., 6 Conn. 428; Wells v. Rahway &c. Co., 19 N. J. Eq. 402; Leavitt v. Oxford &c. Co., 3 Utah 265, 1 Pac. 356. See for an extreme case Arms v. Conant, 36 Vt. 744. See generally Wood &c. Co. v. King, 45 Ga. 34; Wood v. Boney (N. J.), 21 Atl. 574; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64; 2 Thomp. Corp. (2nd. ed.), § 1148.

[18] Bank of Little Rock v. McCarthy, 55 Ark. 473, 18 S. W. 759, 29 Am. St. 60; Farwell v. Houghton &c. Works, 8 Fed. 66; School Dist. v. Bennett, 52 Ark. 511, 13 S. W. 132; Simon v. Sevier &c. Co., 54 Ark. 58, 14 S. W. 1101; Harding v. Vandewater, 40 Cal. 77; Paola &c. R. Co. v. Commissioners, 16 Kans. 302; Jackson v. Hampden, 16 Maine 184; Covert v. Rogers, 38 Mich. 363, 31 Am. Rep. 319; Baldwin v. Canfield, 26 Minn. 43, 1 N. W. 261; Chouteau &c. Co. v. Holmes, 68 Mo. 601, 30 Am. Rep. 807; State v. Ferguson, 31 N. J. L. 107; Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75; Pike County v. Rowland, 94 Pa. St. 238; Stevens v. Eden, 12

tice of special meetings should be given to all the members of the board as the charter or by-laws provide, or, if no provision is made, the directors should be notified personally.[19] As we have already indicated, the rule is that if all the directors attend at the meeting any irregularities in the manner of giving notice will be held to have been waived;[20] and this, it has been held, will be true if those who were not present duly acquiesce in the action of those who attended the meeting, provided there was a quorum present at the meeting.[21] Ratification of the proceedings of a meeting previously held will give them validity, although notice of the previous meeting may have been insufficient.[22] It has been held that if no objection is made to the regularity of a meeting until an act ordered thereat has been fully performed, the legality of such act cannot afterward be questioned in a court of equity on the ground of failure to give

Vt. 688. See also note in Ann. Cas. 1914B, 717, 718. Compare Edgerly v. Emerson, 23 N. H. 569, 55 Am. Dec. 207; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64. Bank v. Flour Co., 41 Ohio St. 552; Halifax &c. R. Co. v. Francklyn, 8 Ry. & Corp. L. J. 91; Mr. Taylor says that the decision in Edgerly v. Emerson, supra, is erroneous. Taylor Corp., 260 n. We concur in his view. Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99.

[19] See 2 Thomp. Corp. (2nd. ed.), § 1146, and see § 1147 as to when notice by mail is sufficient. Those present cannot bind the property of the corporation against the wishes of others not notified. Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; Kersey Oil Co. v. Oil Creek &c. R. Co., 5 W. N. C. (Pa.) 144, But see Edgerly v. Emerson, 23 N. H. 555; Bank v. Flour Co., 41 Ohio St. 552, 55 Am. Dec. 207. If the notice be sent in the prescribed manner, but directors who are out of the state fail to receive it, the action of the other directors is not thereby nullified. Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64.

[20] Judah v. American &c. Co., 4 Ind. 333; Jones v. Milton &c. Co., 7 Ind. 547; Stobo v. Davis Provision Co., 54 Ill. App. 440; People v. Peck, 11 Wend. (N. Y.) 604, 27 Am. Dec. 104.

[21] Reed v. Hayt, 109 N. Y. 659, 17 N. E. 418.

[22] In absence of fraud or conspiracy, defect in notice to directors, of a special meeting, is cured by subsequent ratification of the action there taken. County Court &c. v. Baltimore & O. R. Co., 35 Fed. 161. See also Portugese &c. Mines, In re, 45 Ch. Div. 16, 63 L. T. 423; 2 Thomp. Neg. (2nd. ed.), § 1143.

notice;[23] but this doctrine cannot prevail except in cases where injustice would result to innocent parties if it were not applied.

§ 304 (263). Directors—Meetings—Proxies—Quorum.—The rule prohibiting the delegation of authority requires the personal presence of directors at all meetings of the board and forbids voting by proxy. Where a definite number[24] constitutes a body intrusted with corporate duties or functions, it is necessary to effective action that a quorum of members be present, and a quorum consists of a majority of the members, unless the statute provides otherwise.[25] Proceedings at a meeting where there is not a quorum of the directors present are voidable but not absolutely void, and as they are not void they may be ratified.[26] Where a quorum is present a majority may effectively act.[27] It has been held that where the act of incorporation does not designate the number that shall constitute a quorum and confers power upon the board to enact by-laws the by-laws may fix the

[23] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288. See also Reed v. Hayt, 51 N. Y. Sup. Ct. 121.

[24] Where the body is composed of an indefinite number the rule is different. Ante, § 186.

[25] Tennessee &c. Co. v. East Alabama &c. R. Co., 73 Ala. 426; Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788; Price v. Grand Rapids &c. Co., 13 Ind. 58; Cram v. Bangor House, 12 Maine 354; St. Louis &c. Association v. Hennessy, 11 Mo. App. 555; Hax v. Davis &c. Co., 39 Mo. App. 453; Willcocks, Ex parte, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Stringham v. Oshkosh &c. Co., 33 Wis. 471.

[26] Samuel v. Holladay, 1 Woolw. (U. S.) 400, Fed. Cas. No. 12288; Hanson v. Dexter, 36 Maine 516; Atlantic &c. Co. v. Sanders, 36 N. H. 252. A different doctrine is asserted in Price v. Grand Rapids R. Co., 13 Ind. 58, but that case was wrongly decided. If the act was beyond the power of the directors it would be void, and if void, not capable of ratification.

[27] Cotton v. Davis, 1 Stra. 53; People v. Auditor, 33 Ill. 9; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516, citing 2 Kent's Com. 293, 5 Dane's Abr. 150; Sargent v. Webster, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; Cahill v. Kalamazoo &c. Co., 2 Dougl. (Mich.) 124, 43 Am. Dec. 457. In the opinion of Judge Dillon in Buell v. Buckingham are cited Rex. v. Monday, Cowp. 530; Southworth v. Palmyra R. Co., 2 Mich. 287; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Green v. Weller, 32 Miss. 650; Union &c. Co., In re, 22 Wend. (N. Y.) 591; Rogers, Ex parte, 7 Cow. (N. Y.) 526; 2 Thomp. Corp. (2nd ed.), § 1152.

number at less than a majority.[28] There is reason, we venture to suggest, for doubting the soundness of the doctrine declared in the case referred to. We think that as the rule requiring a majority in order to constitute a quorum is well established, the conclusion must be that the statute is to be considered in connection with that rule and not as a detached or fragmentary part of the law, and that silence upon the subject means that the usual and established rule of law shall prevail. A director whose presence is necessary to make a quorum cannot effectively vote upon a question in which he is individually, materially and directly interested, as, for instance, upon a contract with himself and the corporation, so that as to such a question there is no quorum present since the interested person is not as to the particular matter competent to act as a director.[29] When the president is a member of the board of directors it is proper to count him in ascertaining whether a quorum is present, but if he is not a director then he cannot be counted unless the act of incorporation so provides.[30]

§ 305 (264). Directors—Meetings outside of the state.—It is generally held that where there is no express provision to the contrary in the charter or in some general statute, the directors may meet outside of the state by which the corporation is created, and there transact ordinary corporate business.[31] It seems, in-

[28] Hoyt v. Thompson, 5 N. Y. 320; 2 Thomp. Corp. (2nd. ed.), § 1154. But this is certainly not true where the charter requires a majority. State v. Curtis, 9 Nev. 325.

[29] Bassett v. Fairchild, 132 Cal. 637, 64 Pac. 1082; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 576; Miner v. Belle Isle &c. Co., 93 Mich. 97, 53 N. W. 218; St. Louis v. Alexander, 23 Mo. 483; Foster v. Mullanphy &c. Mill, 92 Mo. 79, 4 S. W. 260; Van Hook v. Somerville &c. Co., 5 N. J. Eq. 137; 2 Thomp. Corp. (2nd. ed.), § 1157. See also Federal L. Ins. Co. v. Griffin, 173 Ill. App. 5. But see where there were enough competent directors voting. Foster v. Mullanphy, 92 Mo. 79, 4 S. W. 260; Leavitt v. Oxford &c. Co., 3 Utah 265, 1 Pac. 356; 2 Thomp. Corp. (2nd. ed.), § 1158.

[30] Glens Falls &c. Co. v. White, 18 Hun. (N. Y.) 214; Bank of Maryland v. Ruff, 7 Gill & J. (Md.) 448.

[31] Ohio &c. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199;

deed, that they may even meet in a foreign country.[32] We have qualified our statement that meetings may be held outside of the state which created the corporation by saying that such meetings may be held for the transaction of ordinary corporate business. This we have done because it is intimated by high authority that there are acts which cannot be rightfully done outside of the state.[33] It is, however, not easy to conceive what acts within the power of the board of directors may not be as well performed in one state as in another.[34] Some of the authorities make a distinction between the acts of the corporation itself and the acts of its officers and agents, holding that corporate acts which the corporation itself must do should be performed within the limits of the state by which it was created.

§ 306 (265). **Directors—Proceedings—Record.**—The statutes of many of the states require the directors to cause a record of

McCall v. Byram &c. Co., 6 Conn. 428; Wood &c. Company v. King, 45 Ga. 34; Reichwald v. Commercial &c. Co., 106 Ill. 439, 450; Bellows v. Todd, 39 Iowa 209; Smith v. Silver Valley &c. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; Thompson v. Natchez &c. Co., 68 Miss. 423, 9 So. 821; Missouri &c. Co. v. Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. 746; Bassett v. Monte Christo &c. Co., 15 Nev. 293; Smith v. Alvord, 63 Barb. (N. Y.) 415; Arms v. Conant, 36 Vt. 744.

[32] Bank of Augusta v. Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

[33] In Galveston Railroad v. Cowdrey, 11 Wall. (N. Y.) 459, 476, the court said: "No doubt it may be true, in many cases, that the extra-territorial acts of directors would be held void, as in the case cited from the Fourteenth New Jersey Chancery Reports, 383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases may be put where their acts would be held void without a prohibitory statute, and it is generally true that a corporation exists only within the jurisdiction of the territory that created it." See Hilles v. Parrish, 14 N. J. Eq. 380; Warren &c. Co. v. Aetna &c. Co., Fed. Cas. No. 17206, 2 Paine (U. S.) 501; Freeman v. Machias &c. Co., 38 Maine 343; Bank of Virginia v. Adams, 1 Parson Eq. Cas. (Pa.) 534.

[34] In Wright v. Bundy, 11 Ind. 398, 404, the court said: "The mere place where the active agents of a corporation enter into contract must, in general, be immaterial. The material question must be one of power, not of place."

their proceedings to be kept, and where such statutes exist it is the duty of the directors to cause a record of their proceedings to be made. Where there is no such statute, sound business policy requires a record of all the proceedings to be kept. But the failure or neglect of corporate officers to keep a record of their proceedings cannot, as a rule, prejudice the rights of third persons. Where a record is made and third persons have in good faith acquired rights upon the faith thereof the company will be estopped, provided the acts evidenced by the record were not ultra vires.[35] As a rule entries of record duly made in regular course are prima facie evidence of the facts recited.[36] The familiar general rule is that stockholders have a right to inspect the corporate records,[37] and it is held that it is no excuse for refusing to permit an inspection that the shareholder proposes to be assisted in the examination by his attorney.[38] Record entries, duly made and signed, may be sufficient evidence of a contract so as to take a case out of the statute of frauds.[39]

§ 307 (266). **Directors—Corporate records as evidence.**—The primary evidence of the proceedings of the board of directors is the record;[40] but, as elsewhere shown, the rights of third persons

[35] Stratton v. Lyons, 53 Vt. 130. A corporation is not bound where fraudulent interpolations have been made in its records without any fault on its part or that of its agents or officers. Holden v. Hoyt, 134 Mass. 181. It would be otherwise if the corporation were in fault.

[36] Hawkshaw v. Supreme Lodge &c., 29 Fed. 770; Isbell v. New York &c. Railroad Co., 25 Conn. 556; Rollins v. Shaver &c. Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. 427; Hathaway v. Addison, 48 Maine 440; Sanborn v. School District, 12 Minn. 17; Heintzelman v. Druids' &c. Assn., 38 Minn. 138, 36 N. W. 100; Beardsley v. Johnson, 49 Hun 607, 1 N. Y. S. 608; McIlhenny v. Beriz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705; McDaniels v. Flower Brook &c. Co., 22 Vt. 274. As to being the best evidence, see 3 Elliott Ev. § 1941, and see, generally, § 1943.

[37] Commonwealth v. Phœnix &c. Co., 105 Pa. St. 111, 51 Am. Rep. 184, 23 Am. L. Reg. (N. S.) 388, 23 Cent. L. J. 584, and notes.

[38] People v. Nassau &c. Co., 86 Hun 128, 33 N. Y. S. 244. Ante, § 197.

[39] Jones v. Victoria &c. Co., L. R. 2 Q. B. D. 314; Argus Co. v. Mayor, 55 N. Y. 495, 14 Am. Rep. 296.

[40] Owings v. Speed, 5 Wheat. (U. S.) 420, 424, 5 L. ed. 124; Thayer v. Middlesex &c. Co., 10 Pick. (Mass.) 326; Haven v. New Hamp-

are not prejudiced by the failure to keep a record, nor will the failure to keep a record preclude resort to parol testimony in the proper case.[41] Entries duly made are held competent evidence to prove payments to an employe of the company,[42] but it is held that corporate records are not competent to prove a claim against strangers to the company.[43] We suppose, however, that for some purposes corporate records are admissible even as against third persons, as, for instance, to show that a meeting of the directors was held on a certain day, or the like. Record entries are generally competent evidence against officers of the company,[44] but are not, of course, always conclusive upon them. A fraudulent entry may be attacked,[45] or the good faith of the directors' acts may be inquired into by giving parol proof as to what they really did.[46]

§ 308 (267). **Proof of the proceedings of the board of directors.** —Where the act of incorporation prescribes the mode in which the proceedings of the board of directors shall be proved, the

shire Asylum, 13 N. H. 532, 38 Am. Dec. 512; Wells v. Rahway &c. Co., 19 N. J. Eq. 402; Clark v. Farmers' &c. Co., 15 Wend. (N. Y.) 256; Buncombe &c. Co. v. McCarson, 1 Dev. & B. (N. Car.) 306; Bowick v. Miller, 21 Ore. 25, 26 Pac. 861. Dial v. Valley &c. Assn., 29 S. Car. 560, 8 S. E. 27. See 3 Elliott Ev. §§ 1941, 1943.

[41] Post, § 308; Whiting v. Wellington, 10 Fed. 810; Nashua &c. R. Co. v. Boston &c. R. Co., 27 Fed. 821; Allis v. Jones, 45 Fed. 148; Bay View &c. Co. v. Williams, 50 Cal. 353; Melledge v. Boston &c. Co., 5 Cush. (Mass.) 158; Morrill v. C. T. &c. Co., 32 Hun (N. Y.) 543; Pickett v. Abney, 84 Tex. 645, 19 S. W. 859.

[42] Ganther v. Jenks & Co., 76 Mich. 510, 43 N. W. 600. See Humphrey v. People, 18 Hun (N. Y.) 393; Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544.

[43] Graville v. New York &c. Co., 34 Hun (N. Y.) 224; Blair v. St. Louis &c. R. Co., 25 Fed. 684. See also Chesapeake &c. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890; 3 Elliott Ev. § 1945.

[44] First Nat. Bank v. Tisdale, 84 N. Y. 655; Allison v. Coal Co., 87 Tenn. 60, 9 S. W. 226. See Wallace v. Lincoln &c. Bank, 89 Tenn. 630, 15 S. W. 448; Rudd v. Robinson, 54 Hun 339, 7 N. Y. S. 535; Rudd v. Robinson, 126 N. Y. 113, 26 N. E. 1046, 12 L. R. A. 473, 22 Am. St. 816; Spellier &c. Co. v. Geiger, 147 Pa. St. 399, 23 Atl. 547; Olney v. Chadsey, 7 R. I. 224.

[45] Thorne v. Travelers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

[46] Waite v. Windham Co. Mining Co., 36 Vt. 18.

mode prescribed is generally exclusive. Where there is a record, of course that is the best evidence, and must be produced or some excuse shown justifying a resort to secondary evidence. But where it is not in conflict with some provision of the charter, the acts of the directors of a corporation, if not recorded, may be proved by parol.[47] Where records are lost, parol evidence of their contents is competent.[48] It has also been held that omissions in the records may be supplied by parol proof.[49]

§ 309 (268). **Notice to directors.**—Notice to the directors, when acting in their official capacity, is notice to the company.[50] Notice to individual directors when not acting for the corporation is not, ordinarily, effective as notice to the corporation.[51]

[47] Langsdale v. Bonton, 12 Ind. 467; Junction R. Co. v. Reeve, 15 Ind. 236; Weber v. Fickey, 52 Md. 500. In the case of Ten Eyck v. Pontiac &c. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. 633, 37 Am. & Eng. R. Cases, 273, the court said: "What is resolved upon at a meeting of a board of directors of a private corporation may be proven by the record of the proceedings of the board, if one is kept, and the proceedings entered, but if a record is not kept or the proceedings not recorded, parol evidence is admissible to show what was resolved upon, and by what vote it was carried." See Bank of Yolo v. Weaver, 96 Cal. xvii, 31 Pac. 160; McCall v. Byram &c. Co., 6 Conn. 428; Iowa Drug Co. v. Souers, 139 Iowa 72, 117 N. W. 300, 19 L. R. A. (N. S.) 115. See Cram v. Bangor, 12 Maine 354; Zihlman v. Cumberland &c. Co., 74 Md. 303, 22 Atl. 271; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Great Northern &c. Co., In re, 62 L. T. R. 231; 3 Elliott Ev. § 1947.

[48] Dix v. Akers, 30 Ind. 431, 3 Elliott Ev. §§ 1941, 1947.

[49] Taymouth v. Koehler, 35 Mich. 22; Ratcliff v. Teters, 27 Ohio St. 66.

[50] Fulton Bank v. New York &c. Canal Co., 4 Paige (N. Y.) 127; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537, 52 Am. R. 9; National Second Bank v. Cushman, 121 Mass. 490; Smith v. South &c. Bank, 32 Vt. 341, 76 Am. Dec. 179; 8 Thomp. Corp. § 1668.

[51] Farrel Foundry v. Dart, 26 Conn. 376; Gridley v. Lafayette &c. Co., 71 Ill. 200; Goodloe v. Godley, 13 Sm. & M. (Miss.) 233, 51 Am. Dec. 159; Thompson v. Central Passenger R. Co., 83 N. J. L. 777, 85 Atl. 201; Westfield Bank v. Cornen, 37 N. Y. 320, 93 Am. Dec. 573; German Mining Co., In re, 4 DeG. M. & G. 19. But see Fairfield &c. Bank v. Chase, 72 Maine 226, 39 Am. Rep. 319.

If the notice is effective upon directors in office it is effective upon their successors in office.[52]

[52] United &c. Co. v. Shriver, 3 Md. Ch. 381; Farmers' &c. Bank v. Payne, 25 Conn. 444, 68 Am. Dec. 367; Louisiana &c. Bank v. Senecal, 13 La. 525; Lancey v. Bryant, 30 Maine 466; Washington Bank v. Lewis, 22 Pick. (Mass.) 24; Pemigewassett Bank v. Rogers, 18 N. H. 255; Fulton Bank v. New York &c. Co., 4 Paige (N. Y.) 127; Edwards v. Grand Junction R. Co., 1 Myl. & Cr. (13 Eng. Ch. 559) 650. The settled rule is that directors acting as individuals merely cannot bind the company in any way, and the fact that one or two directors, constituting a minority of the board, have knowledge as individuals of certain facts is insufficient to prove notice to the corporation. Winchester v. Baltimore &c. R. Co., 4 Md. 231; Mercier v. Canonge, 8 La. Ann. 37; Fulton Bank v. New York &c. Canal Co., 4 Paige (N. Y.) 127; Peruvian R. Co. v. Thames &c. Ins. Co., L. R. 2 Ch. App. Cas. 617. Notice given to a director as an official to be communicated to the board has been held to bind the corporation. Boyd v. Chesapeake &c. Canal Co., 17 Md. 195, 79 Am. Dec. 646; National Bank v. Norton, 1 Hill (N. Y.) 572. It would seem that any knowledge of facts which comes to a director or directors privately, or by public rumor, but which is not communicated by them to the board will not bind the corporation. U. S. Ins. Co. v. Shriver, 3 Md. Ch. 381; Commercial Bank v. Cunningham, 41 Mass. 270, 35 Am. Dec. 322. Though if such knowledge is actually imparted by such director to the board at a regular meeting, the corporation is bound. Bank of Pittsburgh v. Whitehead, 10 Watts (Pa.) 397, 36 Am. Dec. 186. It is held in a few cases that the knowledge of a director who acts upon the matter as to which he has such knowledge, is the knowledge of the board, without regard to the manner in which he acquired it, and even though he did not communicate it to his fellows. Bank of U. S. v. Davis, 2 Hill (N. Y.) 451; North River Bank v. Aymar, 3 Hill (N. Y.) 262. But this principle is opposed by the weight of authority, and it has been held repeatedly, that where the interests of a director are opposed to those of the corporation no knowledge possessed by him will be imputed to it. Hatch v. Ferguson, 66 Fed. 668, 676; Frenkel v. Hudson, 82 Ala. 158, 2 So. 758, 60 Am. Rep. 736; First Nat. Bank v. Gifford, 47 Iowa 575; Wickersham v. Chicago Zinc Co., 18 Kans. 481, 26 Am. Rep. 784; Winchester v. Baltimore &c. R. Co., 4 Md. 231; Innerarity v. Bank, 139 Mass. 322, 1 N. E. 282, 52 Am. Rep. 710; Commercial Bank v. Cunningham, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; Barnes v. Trenton Gas. L. Co., 27 N. J. Eq. 33. See also First Nat. Bank v. Lowther Oil &c. Co., 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511. And knowledge by the directors of their own mismanagement will not be imputed to the corporation to raise the bar of the statute of limitations in a suit

§ 310 (269). **Directors—Admissions and declarations.**—Substantially the same rules that prevail in regard to officers and agents generally govern the subject of admissions and declarations by directors, but there is this important exception, namely, the directors, in order to bind the company, should act as a board duly convened. Admissions and representations must, as a rule, be made by at least a quorum of the directors acting as a body, in order to bind the corporation, unless special authority is shown.[53] When made at a time the board is not in session, they are the statements of individuals, and not of corporate representatives, except in cases where they are authorized to act as agents. It follows from the general rule we have stated that neither one director, nor any number of directors, except in cases where there is special authority from the company, can bind it by admissions or declarations.[54] Where, however, a director has special authority to act as an agent for the company, he can, of course, bind it by his acts and admissions like any other agent,[55] but his acts bind the company because of the special authority, and not simply because of his position as a director. In a case where a director is invested with special authority, then as to such matters as his authority covers notice to or

against them by the corporation or its stockholders. Ryan v. Leavenworth &c. R. Co., 21 Kans. 365, 404.

[53] Huntington &c. R. Co. v. Decker, 82 Pa. St. 119; Michigan &c. R. Co. v. Gougar, 55 Ill 503; Vicksburg &c R. Co. v. Ragsdale, 54 Miss. 200; Low v. Connecticut &c. R. Co., 45 N. H. 370; Soper v. Buffalo &c. R. Co., 19 Barb. (N. Y.) 310; Thew v. Porcelain Mfg. Co., 5 S. Car. 415. See Titus v. Cairo &c. Bank, 37 N. J. L. 98; St. Louis &c. R. C. v. Drennan, 26 Ill. App. 263; Meux's Case, 2 DeGex, M. & G. 522; Tottendell v. Fareham &c. Co., L. R. 1 C. P. 674.

[54] Michigan Cent. R. Co. v. Gougar, 55 Ill. 503; Fairfield County Tpk. Co. v. Thorp, 13 Conn. 173; Low v. Connecticut &c. R. Co., 45 N. H. 370; Matteson v. New York Cent. R. Co., 62 Barb. (N. Y.) 364; Smith v. North Carolina R. Co., 68 N. Car 107; Pennslyvania R. Co.'s Appeal, 80 Pa. St. 265; Charleston &c. R. Co. v. Blake, 12 Rich. L. (S. Car.) 634. See also Guillaume v. Fruit Land Co., 48 Ore. 400, 86 Pac. 883. Although a director of a railroad company owns a majority of the stock he cannot bind the company by a contract. Allemong v. Simmons, 124 Ind. 199, 23 N. E. 768, 7 R. & Corp. L. J. 416.

[55] Burnes v. Pennell, 2 H. L. Cases 497; Meux's Case, 2 DeG., M & G. 522.

knowledge acquired by him, is notice to the board of directors and the corporation.[56]

§ 311 (270). Ratification of the acts of directors.—The ordinary rules respecting the ratification of the acts of agents apply to the acts of directors. Some of the authorities indicate that as directors are officers of superior rank, ratification will be presumed upon less evidence than is required in cases where the acts are those of subordinate agents. Any acts which the corporation can authorize the directors to perform may be made valid by subsequent ratification, although they were outside of the directors' powers when performed.[57] The state may, by a subsequent legislative enactment, give validity to their unauthorized acts.[58] But we suppose that where the acts of the directors are entirely outside of the scope of their authority the state could not impose new and additional burdens upon the stockholders, thereby essentially changing the charter, without the consent, express or implied, of the stockholders of the company.

§ 312 (271). Directors—Removal from office.—The general rule is that a board of directors has no implied power to remove one of the directors and declare his office vacant. The power of removal may, of course, be given by the act of incorporation or by corporate by-laws enacted in accordance therewith, but the power is not inherent or implied. A director cannot, as a rule, be deprived of his office nor excluded by the board from taking

[56] Hoover v. Wise, 91 U. S. 308, 23 L. ed. 392; Fairfield Savings Bank v. Chase, 72 Maine 226, 39 Am. Rep. 319; Gen. Ins. Co. v. U. S. Ins. Co., 10 Md. 517, 69 Am. Dec. 174; Fulton Bank v. Canal Co., 4 Paige Ch. (N. Y.) 127.

[57] McLaughlin v. Detroit &c. R. Co., 8 Mich. 99; Farmers' &c. Co. v. Toledo &c. R. Co., 67 Fed. 49; Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362. See also Kessler v. Ensley, 123 Fed. 546; Greenleaf v. Norfolk &c. R. Co., 91 N. Car. 33; 2 Thomp. Corp. (2d ed.), § 1257. We do not mean, of course, to say that acts which as to the corporation itself are ultra vires can be ratified.

[58] Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105.

part in its proceedings;[59] but we are inclined to believe that there may be extraordinary cases where there is a clear and undoubted betrayal of trust in which the board would be justified in excluding one of its members from taking part in its proceedings.[60] A director cannot, according to many of the decided cases, be removed by a majority of the stockholders themselves,[61] unless the power to remove is given by the charter or by-laws.[62] It is said that to allow a majority of the stockholders to remove the directors at will would, to a very considerable extent, nullify the well-settled rule that the discretion of the directors cannot be controlled by the stockholders; but this line of reasoning is not very satisfactory. We can see no sufficient reason why the power of removal may not be vested in those who actually own the corporation and are primarily and principally interested, nor can we

[59] If they attempt to wrongfully exclude a director, he is entitled to an order restraining them from so doing. Pulbrook v. Richmond &c. Co., L. R. 9 Ch. Div. 610. See generally Mobile &c. R. Co. v. Owen, 121 Ala. 505, 25 So. 612; Deposit Bank v. Hearne, 104 Ky. 819, 46 S. W. 160; Commonwealth v. Detwiller, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357.

[60] Some of the courts hold that a director cannot be prevented from examining corporate records and books, but may secure an examination by mandamus, although the opposing directors regard him as acting in opposition to the corporate rights and interests. People v. Mott, 1 How. Prac. (N. Y.) 247; People v. Throop, 12 Wend. (N. Y.) 183. But we believe that there may be extreme cases where a director can be denied the right of inspection. State v. Einstein, 46 N. J. L. 479.

[61] Powers v. Blue &c. Assn., 86 Fed. 705; Johnston v. Jones, 23 N. J. Eq. 216; State v. Bryce, 7 Ohio (2d pt.) 82; Imperial &c. Co. v. Hampson, L. R. 23 Ch. Div. 1, 7. But see Bayless v. Orne, Freem. Ch. (Miss.) 161, 176; Adamantine Brick Co. v. Woodruff, 4 McArthur (D. C.) 318; Burr v. McDonald, 3 Grat. (Va.) 215, 224, holding that the director's right to his office being forfeited by his misconduct, he may be removed by the stockholders.

[62] Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13. The general laws of a number of the states provide for the removal of directors from office. By-laws of a corporation providing that when any director shall die, resign, neglect to serve, or remove out of the county, the board may proceed to supply the vacancy, do not authorize a director to be ousted by a vote of the board of directors on the ground of ineligibility. Commonwealth v. Detwiller, 131 Pa. St. 614, 18 Atl. 990, 7 L. R. A. 357, 28 Am. & Eng. Corp. Cas. 669.

avoid the conclusion that some of the courts have been misled by the early decisions regarding charitable corporations. The rules which apply to charitable corporations cannot apply in all their vigor to business corporations such as railway companies. It is reasoned in other cases that the interests of shareholders may be protected without the exercise of this power, since the directors, being trustees for the stockholders, may be removed by the court for an abuse of their powers, upon application to it by the parties in interest, and hence the stockholders should not be invested with power of removal.[63] Where power is given to the stockholders by the charter or by-laws to remove directors for a reasonable cause, the court will not, ordinarily, inquire into the sufficiency of a cause upon which they have acted,[64] nor will it interfere to control the actions of the directors under such conditions, but will leave the stockholders to depose them in case they do not perform their duties properly.[65]

§ 313 (272). **Compensation of directors.**—We have elsewhere treated in a general way of the compensation of corporate officers,[66] and we shall not again discuss the general subject. It may be said by way of preface that, ordinarily, directors are not entitled to compensation for services rendered in the capacity of directors unless provision is made for the payment of compensation by the charter or by-laws, nor will a contract to pay for such services be implied. Where, however, a director performs services under a contract that are clearly beyond the range of his official duties he is entitled to such compensation, in the absence

[63] Ward v. Davidson, 89 Mo. 445, 1 S. W. 846. See generally 2 Thomp. Corp. (2d ed.), §§ 1084, 1085. The power is generally reserved or given by statute or by-law. Making use of his position to further his private gains, or ceasing to hold the requisite number of shares, will cause a director to cease to hold his office in England. Companies Clauses, Act of 1845, 8 Vict. Ch. 16, § 86.

[64] Inderwick v. Snell, 2 Macn. & G. 216.

[65] Moses v. Tompkins, 84 Ala. 613, 622, 4 So. 763; Hattersley v. Earl of Shelburne, 10 Week. R. 881, 31 L. J. Ch. 873. See also Hedges v. Paquett, 3 Ore. 77; Neal v. Hill, 16 Cal. 145, 76 Am. Dec. 508. See generally as to removal by courts. 2 Thomp. Corp. (2d ed.), §§ 1100-1106.

[66] Ante, § 268.

of anything to the contrary, as a stranger performing similar services would be entitled to receive.[67] Unless the compensation is fixed by resolution or by-law before the services are rendered, a director is, as a rule, not entitled to pay for his services.[68] The

[67] Jackson v. New York Central R. Co., 2 Thomp. & C. (N. Y.) 653; New York &c. R. Co. v. Ketchum, 27 Conn. 170; Lafayette &c. R. Co. v. Cheeney, 87 Ill. 446; Shackelford v. New Orleans &c. R. Co., 37 Miss. 202; Hodges v. Rutland &c. R. Co., 29 Vt. 220. A director who performs services for the corporation at the request of the board of directors is entitled to recover, on an implied contract, what the services are reasonably worth, so far as the amount has not been fixed by resolution of the board. Ten Eyck v. Pontiac &c. R. Co., 74 Mich. 226, 41 N. W. 905, 3 L. R. A. 378, 16 Am. St. 633. A director who, independently of his duties as director, performs services for, and furnishes material to, the corporation, which are necessary and proper, has the same right as other persons to recover upon an implied contract for such services and materials. Greensboro &c. Turnp. Co. v. Stratton, 120 Ind. 294, 22 N. E. 247. To entitle him to pay there must have been an expectation at the time, on the part of the corporation, to pay therefor. Gill v. New York Cab Co., 48 Hun 524, 16 N. Y. S. 236. In Shackleford v. New Orleans &c. R. Co., 37 Miss. 202, it was held that attendance on the board meetings is the only service which a director will be presumed to render gratuitously. In Rogers v. Hastings &c. R. Co., 22 Minn. 25, it was held that a director who rendered special services as attorney and land commissioner at the request of the other directors might recover therefor. The question whether or not the services rendered were special, so that he is entitled to pay therefor, depends upon whether they were such as could be rendered by a person other than a director. Henry v. Rutland &c. R. Co., 27 Vt. 435. And a director may recover for services rendered by him as agent of the company at its request, but not in his character as director. Chandler v. Monmouth Bank, 13 N. J. L. 255. But it has been held that a director cannot, in the absence of contract, claim a commission for the sale of the corporation bonds. Hodges v. Rutland &c. R. Co., 29 Vt. 220. And that he cannot claim pay for services as managing director. Bolt & Iron Co., Re, 14 Ont. R. 211, 19 Am. & Eng. Corp. Cas. 165. And that even a director who serves without compensation cannot recover a reward offered by the corporation for the recovery of stolen property and the detection of the thief, since he only did his duty if he accomplished both. Stacy v. State Bank, 5 Ill. (4 Scam.) 91; Collins v. Godefroy, 1 Barn. & Adol. 950.

[68] Kilpatrick v. Penrose Ferry Bridge Co., 49 Pa. St. 118, 88 Am. Dec. 497; New York &c. R. Co. v. Ketchum, 27 Conn. 170; Coleman v.

fact that a director expected to be paid for his services will not alter the rule,[69] and it has been held that a subsequent promise to pay for them is ineffective for lack of consideration.[70] The compensation which has been fixed by the board, where they have a right to determine the compensation, may be increased by a vote of the board during his term, and will entitle him to such increased compensation for all services thereafter rendered.[71] But while it is competent for the board to fix the compensation to be given to directors as well as that of other officers and agents,[72] unless the by-laws or statute expressly provide otherwise, a director may also fill another office of the corporation;[73] yet where a director fills such other office, he will be entitled only to such compensation therefor as is fixed or agreed upon before the services are rendered.[74]

Second Ave. R. Co., 38 N. Y. 201; Hodges v. Rutland &c. R. Co., 29 Vt. 220. It is presumed that a stockholder, not a director of the corporation, who assumes the duties of the office and performs them without any agreement or provision for compensation, performs the official services gratuitously. Mather v. Eureka Mower Co., 118 N. Y. 629, 23 N. E. 993. An officer of a corporation, in order to recover compensation for his services, must show that he is an officer de jure. Waterman v. Chicago & I. R. Co., 34 Ill. App. 268, affirmed in 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. 228.

[69] New York &c. R. Co. v. Ketcham, 27 Conn. 170.

[70] Maux Ferry G. R. Co. v. Branegan, 40 Ind. 361; Loan Assn. v. Stonemetz, 29 Pa. St. 534; Dunston v. Imp. Gas Co., 3 B. & Ad. 125. He may receive pay for services rendered before he became director, under a resolution passed by the other members of the board. Branch Bank v. Collins, 7 Ala. 95; New York R. Co. v. Ketchum, 27 Conn. 170.

[71] It having been understood by the board of directors of a corporation that its officers were to be paid for their services, the board may afterwards fix and pay a reasonable sum. Stewart v. St. Louis &c. R. Co., 41 Fed. 736.

[72] Hodges v. Rutland &c. R. Co., 29 Vt. 220.

[73] A director may also be treasurer. Sargent v. Webster, 54 Mass. 497, 46 Am. Dec. 743.

[74] Holder v. Lafayette &c. R. Co., 71 Ill. 106, 22 Am. Rep. 89, where the director served as treasurer. Rogers v. Hastings &c. R. Co., 22 Minn. 25, where he served as secretary. It has been held that the action of the board of directors of a corporation in providing that the salary of the president should be fixed by him and another director, who together owned nearly all the

§ 314 (273). Directors—Relation of to stockholders—Preliminary.—The directors of a railroad company occupy fiduciary relation to the stockholders. The relation is essentially one of trust and confidence; but directors are not trustees in the strict or technical sense, since they do not hold the legal title to the corporate property and may in some cases deal with the corporation where their own individual interests are concerned. They are, however, trustees in the sense in which the term "trustees" is often used. The courts and text writers generally speak of them as trustees, and correctly so; but the use of the term trustees seems to have misled some judges and writers, for they have applied stricter rules to directors than authority sanctions or principle warrants. In the sense in which the term "trustees" is used in reference to the functions and duties of persons occupying fiduciary relations directors are trustees in all that term implies and are subject to the rules which govern that class of persons, but they are not trustees in the same sense as persons are who hold the legal title to property for the benefit of other persons, nor are they trustees for third persons who deal with the company.[75]

§ 315 (274). Directors considered trustees.—It is held in a very great number of cases that a director occupies the position

stock, and that the contract was ratified by the board of directors, is such an exercise of the board's authority to fix his salary as to constitute a contract on which he can recover. Bagaley v. Pittsburgh & L. S. Iron Co., 146 Pa. St. 478, 23 Atl. 837. We think that the case referred to is well decided, for the reason that there was an effective ratification of the acts of the president and the director authorized to act in conjunction with him, but if it were not for the element of ratification we should think there could be no recovery in such a case.

[75] In Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662, the court said: "Bank directors are often styled 'trustees,' but not in any technical sense. The relation between the corporation and them is rather that of principal and agent; certainly so far as creditors are concerned the relation is that of contract and not of trust. But, undoubtedly, under circumstances they may be treated as occupying the position of trustees to cestui que trust." Spering Appeal, 71 Pa. St. 11, 10 Am. Rep. 684. See also Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. 291, and note; McCourt v. Singers, 145 Fed. 103. But they do owe a duty to creditors especially in case of insolvency.

of a trustee for the stockholders,[76] and as such is prohibited from making use of his position or of the knowledge acquired by reason of holding the same to promote, either directly or indirectly, his private advantage at the expense of the corporation. The rule governing trustees generally, which prohibits them from using trust property for their own profit, applies to directors. Directors are bound to exercise the utmost good faith,[77] but are not absolutely prohibited from dealing with the corporation. Directors are bound to exercise their powers to promote the corporate interests and it is a breach of duty for them to make use of their powers to injure the corporate interests or impair corporate rights. They are guilty of a breach of trust if they make use of corporate property or funds for their individual gain.[78] A director cannot, without an inexcusable breach of trust, place

2 Thomp. Corp. (2d ed.), § 1219.

[76] Robinson v. Smith, 3 Paige (N. Y.) 222, 24 Am. Dec. 212; Koehler v. Black River Falls Co., 2 Blackf. (U. S.) 715, 17 L. ed. 339; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. 81; Bradbury v. Barnes, 19 Cal. 120; San Francisco &c. R. Co. v. Bee, 48 Cal. 398; Paine v. Lake Erie R. Co., 31 Ind. 283; Hale v. Republican &c. Co., 8 Kans. 466; Covington &c. R. Co. v. Bowler, 9 Bush. (Ky.) 468; European &c. R. Co. v. Poor, 59 Maine 277; Ward v. Salem St. R. Co., 108 Mass. 332; Michigan Air Line R. Co. v. Mellen, 44 Mich. 321, 6 N. W. 845; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505; Blake v. Buffalo Creek R. Co., 56 N. Y. 485; Simons v. Vulcan &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Great Luxembourg R. Co. v. Magnay, 25 Beav. 586; Aberdeen R. Co. v. Blakie, 1 Macq. 461; Verplanck v. Mercantile &c. Co., 1 Edw. Ch. 84; York &c. Co. v. Hudson, 16 Beav. 485; Imperial &c. Assn. v. Coleman, L. R. 6 H. L. 189; Albion &c. Co. v. Martin, 1 Ch. Div. 580; Bennett's Case, 5 DeGex, M. & G. 284; Williams v. Page, 24 Beav. 654; 2 Thomp. Corp. (2d ed.), §§ 1215-1218; 8 Thomp. Corp. §§ 1176, 1215.

[77] The fact that a person has relatives on the board of directors of a corporation will not defeat his valid claim against the corporation. Rollins v. Shaver Wagon & C. Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. 427. See cases in preceding note; 2 Thomp. Corp. (2d ed.) §§ 1220, 1221.

[78] Ward v. Davidson, 89 Mo. 445, 1 S. W. 846; Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509; Cook v. Sherman, 20 Fed. 167, and note; Pollitz v. Wabash R. Co., 207 N. Y. 113, 100 N. E. 721; Goodin v. Cincinnati &c. Co., 18 Ohio St. 169; Smith v. Smith, 3 Des. Eq. (S. Car.) 557; Southern Kans. R. Co. v. Logul (Tex. Civ. App.), 139 S. W. 11.

him elf in a position which will render him unable to exercise his powers for the promotion of the corporate welfare.[79] Directors are under a strict obligation to exercise care and diligence to preserve the property and money of the company. They have no right to make gifts of corporate property,[80] nor to allow unjust or illegal claims to be enforced against the company.[81]

§ 316 (275). Directors as trustees—Illustrative cases.—As we have said in another place, directors are considered as trustees of the corporation and its shareholders, but not usually of third persons.[82] The scope and application of the general doctrine is better shown by reference to the adjudged cases than by general statements, and we shall refer to some of the many decisions of the court upon the subject. Directors may, in good faith, and for a fair, valuable consideration, sell corporate property to one of their number, but such a transaction will be closely scrutinized and if not entirely fair and free from fraud will be set aside.[83] A director cannot purchase property for the corporation, treat it as a purchase by himself and charge the corporation a profit.[84]

[79] Attaway v. Third Nat. Bank, 93 Mo. 485, 5 S. W. 16. Primarily the breach of duty by a director is a wrong inflicted upon the corporation, but a breach of duty may also be injurious to third persons; thus where a director sells his influence in such a way as to give one creditor of the corporation an advantage over its other creditors, his action is unlawful. Berryman v. Cincinnati &c. R. Co., 14 Bush. (Ky.) 755; Bliss v. Matteson, 45 N. Y. 22.

[80] St. Louis &c. Co. v. Partridge, 8 Mo. App. 580. See Williams v. Page, 24 Beav. 654; Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Brown v. De Young, 167 Ill. 549, 47 N. E. 863; McCullough v. Ford &c. Co., 213 Pa. St. 110, 62 Atl. 521.

[81] Lowndes v. Garnett &c. Co., 33 L. J. Ch. 418. See also Young v. Naval &c. Soc., 74 L. J. K. B. 302 (1905), 1 K. B. 687.

[82] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662; Landis v. Sea Isle &c. Co. (N. J. Eq.), 31 Atl. 755.

[83] Mish v. Main, 81 Md. 36, 31 Atl. 799. See also Millsap v. Chapman, 76 Miss. 942, 26 So. 369, 71 Am. St. 547, and note.

[84] Blair &c. Co. v. Walker, 50 Iowa 376; Averill v. Barber, 53 Hun 636, 6 N. Y. S. 255; Getty v. Devlin, 54 N. Y. 403; McElhenny's Appeal, 61 Pa. St. 188; Simons v. Vulcan Oil Co., 61 Pa. St. 202, 98 Am. Dec. 215; Rice's Appeal, 79 Pa. St. 168; Benson v. Heathorn, 1 Y. & C. 326; Great Luxembourg R. Co. v. Magnay, 25 Beav. 586. See generally European &c. R. Co. v.

The decisions authorize the conclusion that directors may engage in good faith in a competing business on their individual account,[85] and this doctrine, if kept within reasonable limits, we regard as sound, but, as we believe, a director cannot engage in a competing business if the necessary and natural effect of his engaging in that business is to impair his power to discharge his duty to the company of which he is a director, or to detract from his fidelity to that company. The doctrine of the cases referred to is one to be limited, not extended, and if it appears in such a case that the director is in any way using his official position to the injury of the company or its business, for the advancement of his own business or that of a rival of his company of which he is a director, a stockholder should be awarded relief, for it is certainly the duty of the director to do all that he reasonably can to promote the interests of the company of which he is such officer.[86] It has been adjudged that an order of a board of directors awarding compensation to one of their number is voidable where it required the vote of the director to make the order,[87] but we suppose it is competent to provide compensation where the services are rendered outside of the duties of the director and the order is adopted by a sufficient vote, exclusive of

Poor, 59 Maine 277; Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Stevens v. Rutland &c. R. Co., 29 Vt. 545; Ware v. Grand Junction &c. Co., 2 Russ. & M. 470.

[85] Barr v. Pittsburgh &c. Co., 51 Fed. 33. See also Barr v. Pittsburgh &c. Co., 40 Fed. 412; Lagarde v. Anniston &c. Co., 126 Ala. 496, 28 So. 199; Keokuk &c. Packet Co. v. Davidson, 95 Mo. 467, 8 S. W. 545; New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781.

[86] Perry v. Tuscaloosa &c. Co., 93 Ala. 364, 9 So. 217; Paine v. Lake Erie &c. Co., 31 Ind. 283; Union Bank v. Jones, 4 La. Ann. 236; Huffman &c. R. Co. v. Cumberland &c. Co., 16 Md. 456; Cumberland &c. Co. v. Parish, 42 Md. 598; Keokuk &c. Co. v. Davidson, 95 Mo. 467, 8 S. W. 545; Gallery v. National &c. Bank, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149; Fitzgerald v. Fitzgerald &c. Co., 44 Nebr. 463, 62 N. W. 899; Blake v. Buffalo &c. Co., 56 N. Y. 485; Cumberland &c. Co. v. Sherman, 30 Barb. (N. Y.) 533. See also Ritchie v. McMullen, 79 Fed. 522.

[87] Wichersham v. Crittenden, 106 Cal. 327, 39 Pac. 602. See also Thomas v. Brownville &c. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 37 L. ed. 1018.

that of the interested director. Contracts between directors that they should have a percentage upon all money secured by means of a bond of indemnity executed by them, providing against the future indebtedness of the company are voidable.[88] A director cannot rightfully enter into any engagement or contract which he knows is prejudicial to the corporation or its shareholders, since his duty requires of him that he shall exercise his powers for the promotion of the corporate interests,[89] but this general rule does not go to the extent of interdicting him for making an open, fair and honest contract with the corporation, although such a contract may yield him a personal benefit. A well considered case holds that the purchase of a railroad by one of the directors without the consent of the company will be set aside upon re-payment to the director of the money expended by him in making the purchase.[90] Directors cannot rightfully make unjust or unfair discrimination in favor of particular stockholders.[91] The cases generally assert that directors cannot buy claims against the corporation at less than their face, and recover the full value of the corporation,[92] but we think this rule is sub-

[88] Butler v. Cornwal Iron Co., 22 Conn. 335.

[89] Woodstock Iron Co. v. Richmond &c. Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819; citing Linder v. Carpenter, 62 Ill. 309; St. Louis &c. Railroad Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Pacific Railroad Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Fort Edward &c. Plank Road Co. v. Payne, 15 N. Y. 583; Holladay v. Patterson, 5 Ore. 177; Racine &c. Bank v. Ayres, 12 Wis. 570. It may not be improper to observe that a contract by which any person undertakes to do an act forbidden by public policy is voidable, and that the fact that persons who enter into such contracts are directors of a railroad company is not important where public policy is violated, but the position of director sometimes creates the public policy, for it is public policy not to permit corporate officers to make contracts which may tempt or influence them to betray their trusts.

[90] Covington &c. R. Co. v. Bowler, 9 Bush (Ky.) 468. See Bill v. Western Union Tel Co., 16 Fed. 14; Jones v. Arkansas &c. Co., 38 Ark. 17; Bent v. Priest, 10 Mo. App. 543; Dorris v. French, 4 Hun (N. Y.) 292.

[91] Chase v. Vanderbilt, 62 N. Y. 307.

[92] McDonald v. Haughton, 70 N. Car. 393; Brewster v. Stratman, 4 Mo. App. 41; Duncomb v. New York &c. R. Co., 84 N. Y. 190; Holladay v. Davis, 5 Ore. 40; Holla-

ject to exceptions, for if the purchase is openly, honestly and fairly made with the full knowledge of the corporation, we can see no reason why it may not be enforced, but if there be any concealment, fraud or deception, the director should not at the utmost be allowed to recover anything more than the amount actually paid for the claims.[93] Directors have no general right to loan the credit of the company, or to issue mere accommodation paper in the name of the company, where no consideration is yielded the company,[94] except in cases where the act of incorporation empowers them to do so, or, perhaps, where from long usage the power may be inferred. Contracts entered into by directors prejudicial to corporate interests, or for the sole purpose of enabling them to retain control of the corporate affairs, are voidable.[95] Directors cannot, of course, enter into combinations with other persons for the purpose of securing to such persons or themselves a gain, profit or advantage at the expense of the corporation.[96] It is a familiar rule, illustrated by cases much too

day v. Patterson, 5 Ore. 177. See also Kroegher v. Calivada &c. Co., 119 Fed. 641; Bonney v. Tilley, 109 Cal. 346, 42 Pac. 439; Ryan v. Leavenworth &c. R. Co., 21 Kans. 365.

[93] Analogous cases sustain the statement of the text. Smith v. Lansing, 22 N. Y. 520; Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550; Getty v. Devlin, 54 N. Y. 403; Ashust's Appeal, 60 Pa. St. 290; Seymour v. Spring Forest &c. Assn., 144 N. Y. 333, 39 N. E. 365, holds, and, as we think, correctly, that there are cases in which evidences of corporate indebtedness may be bought by directors. See also St. Louis &c. R. Co. v. Chenault, 36 Kans. 51, 12 Pac. 303; Coombs v. Barker, 31 Mont. 526, 79 Pac. 1; 2 Thomp. Corp. (2nd. ed.), § 1239.

[94] Hutchinson v. Sutton &c. Co., 57 Fed. 998.

[95] Northern &c. Co. v. Concord R. Co., 50 N. H. 166; Bliss v. Matteson, 45 N. Y. 22.

[96] Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492; Nelson v. Luling, 62 N. Y. 645. See generally Drury v. Cross, 7 Wall. (U. S.) 299, 19 L. ed. 40; Twin Lick &c. Co. v. Marbary, 91 U. S. 587, 23 L. ed. 328; Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. ed. 516; San Diego v. San Diego &c. R. Co., 44 Cal. 106; Andrews v. Pratt, 44 Cal. 309; Harts v. Brown, 77 Ill. 226; McMurtry v. Montgomery &c. Co., 86 Ky. 206, 5 S. W. 570; Fuller v. Dame, 18 Pick. (Mass.) 472; Boerum v. Schneck, 41 N. Y. 182; Hoyle v. Pittsburgh &c. Co., 54 N. Y. 314, 13 Am. Rep. 595; Duncomb v. New York &c. Co., 88 N. Y. 1; Stark Bank v. United States &c. Co., 34 Vt. 144; Cook v. Berlin &c. Mill Co., 43 Wis. 433.

numerous for citation, that all dealings between directors and the corporations are scrutinized with great care and avoided, if there be any undue advantage taken by the directors, or any concealment or deception, and this general rule applies to dealings between two corporations in cases where the directors of one are also directors of the other.[97]

§ 317 (276). **Directors—Dealings with corporation.**—Directors are not, under all circumstances, prohibited from dealing with the company of which they are the representatives. If there is entire good faith and no taint of fraud, a transaction with the company will generally be sustained.[98] Contracts made by a director with the company, which upon close scrutiny appear to be entirely fair, open and honest, will be upheld by the courts.[99] The weight of authority is that such contracts are not void, nor always even voidable,[1] although there is conflict of authority. It

[97] Paine v. Lake Erie &c. Co., 31 Ind. 283; Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 76; Abbot v. American &c. Co., 33 Barb. (N. Y.) 578. See also Wardell v. Union Pac. R. Co., 103 U. S. 651, 26 L. ed. 509; Bill v. Western Union Tel. Co., 16 Fed. 14; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am St. 81; Parker v. Nickerson, 112 Mass., 195; Pearson v. Concord R. Corp., 62 N. H. 537, 13 Am. St. 590; 2 Thomp. Corp. (2nd. ed.), § 1241.

[98] Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509; Michoud v. Girod, 4 How. (U. S.) 503, 11 L. ed. 1076; Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. ed. 339; Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917; Ryan v. Railroad Co., 21 Kans. 365; Van Cott v. Van Brunt, 82 N. Y. 535; Densmore Oil Co. v. Densmore, 64 Pa. St. 43. See Bristol &c. Co. v. Probasco, 64 Ind. 406; Greensboro &c. Co. v. Stratton, 120 Ind. 294, 22 N. E. 247; Ward v. Polk, 70 Ind. 309; Cheeny v. Lafayette &c. R. Co., 68 Ill. 570, 18 Am. Rep. 584; New Orleans &c. Co. v. Brown, 36 La. Ann. 138, 51 Am. Rep. 5; Santa Clara &c. Co. v. Meredith, 49 Md. 389, 33 Am. Rep. 264; Rogers v. Hastings R. Co., 22 Minn. 25; Shackelford v. New Orleans &c. R. Co., 37 Miss. 202; Chandler v. Monmouth Bank, 1 Green (N. J.) 255; Henry v. Rutland &c. R. Co., 27 Vt. 435. But contracts with a director must be entirely free from fraud. Parker v. Nickerson, 137 Mass. 487; Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917.

[99] European &c. R. Co. v. Poor, 59 Maine 277; Ashurst's Appeal, 60 Pa. St. 290; Stark Bank v. United States Pottery Co., 34 Vt. 144.

[1] Claflin v. South Carolina R. Co., 8 Fed. 118; Stewart v. St. Louis &c.

is held by some of the courts that, while executory, such contracts are voidable at the instance of the corporation,[2] or of a dissenting stockholder.[3] Contracts with directors may, as a rule, be set aside upon very slight grounds, at the suit of any one injured thereby.[4] Some of the cases hold that voidable contracts with a director may be ratified by acquiescence.[5] It is also held that if the director has done anything toward executing the contract, it cannot be avoided by the corporation without restora-

Co., 41 Fed. 736; Hallam v. Indianolo Hotel Co., 56 Iowa 178, 9 N. W. 111; Stratton v. Allen, 16 N. J. Eq. 229; Sims v. Street R. Co., 37 Ohio St. 556; Central &c. Railroad Co. v. Claghorn, 1 Speers' Eq. (S. Car.) 546; 2 Thomp. Corp. (2nd. ed.), §§ 1224, 1225, 8 Thomp. Corp. §§ 1224, 1227.

[2] Munson v. Syracuse &c. R. Co., 103 N. Y. 58, 18 N. E. 355; Aberdeen R. Co. v. Blakie, 1 Macq. 461.

[3] Wardell v. Railroad Co., 103 U. S. 651, 26 L. ed. 509; Little Rock &c. R. Co. v. Page, 35 Ark. 304; Ward v. Salem St. Railway, 108 Mass. 332; Flint &c. R. Co. v. Dewey, 14 Mich. 477; Duncomb v. New York &c. R. Co., 84 N. Y. 190; Houston &c. R. Co. v. Van Alstyne, 56 Tex. 439; York &c. R. Co. v. Hudson, 16 Beav. 485; 2 Thomp. Corp. (2nd. ed.), §§ 1226, 1227. Where there was no fraud a sale by a director of property to a corporation, which is approved by the board of directors and ratified by the stockholders, will not be held invalid simply because the sale was made for a sum greatly in excess of the cost of property to the director. Stewart v. St. Louis &c. R. Co., 41 Fed. 736. In the case cited the court said, speaking of the directors, that "When the sale to the company was made they did hold a position of trust, and were bound in their official action to faithfully and honestly execute their duties, and not to make a deal where there personal interest should be served at the expense of the company they represented."

[4] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 329, and numerous cases cited; 2 Thomp. Corp. (2nd. ed.), §§ 1225-1228. It is held that a purchase by a corporation will not be set aside because of the interest of one of the directors, where the complaining stockholder has suffered no damage. Hill v. Nisbet, 100 Ind. 341. A Contract made by the directors with two of their number, when only four were present, is invalid. Alling v. Wenzel, 27 Ill. App. 511.

[5] Kelley v. Newburyport &c. R. Co., 141 Mass. 496, 6 N. E. 745; Union Pac. R. Co. v. Credit Mobilier, 135 Mass. 367; Ashurst's Appeal, 60 Pa. St. 290. Generally a party who seeks to avoid a voidable contract must act with promptness. Seymour v. Spring Forest Cemetery Assn., 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859.

tion to him of what the corporation received under it.[6] Where they act in entire good faith, and the transaction is open and fair, directors may purchase corporate property.[7] It has been adjudged that they may even purchase the corporate indebtedness, and enforce a judicial sale of the property to themselves, if they have acted in good faith and given the stockholders a full opportunity to make advances to relieve the corporation from embarrassment, and they have refused to do so.[8] Where a director has necessarily expended money in good faith for the corporation, he is usually entitled to be reimbursed.[9] So a director may loan

[6] Duncomb v. New York &c. R. Co., 84 N. Y. 190, 88 N. Y. 1. If the officers, directors and stockholders consent to a contract between the corporation and a director and keep the property thus acquired, the contract will not be voidable merely because made with a director. Battelle v. Northwestern Cement & Concrete Pavement Co., 37 Minn. 89, 33 N. W. 327.

[7] Little Rock &c. R. Co. v. Page, 35 Ark. 304; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Ellis v. Boston &c. R. Co., 107 Mass. 1; Kitchen v. St. Louis &c. R. Co., 69 Mo. 224. See Hoyle v Plattsburgh &c. R. Co., 54 N. Y. 314, 13 Am. Rep. 595. A purchase by a director of a corporation without an order of the board of directors, of property of the corporation in satisfaction of his own debt is ratified if the corporation takes up cancels and retains the notes held by him. Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. 291, 28 Am. & Eng. Corp. Cas. 468. But in order that such a transaction may repel an assault by a stockholder or creditor prejudiced thereby it must be entirely free from fraud. Courts are reluctant to permit the purchase of corporate property by any of the corporate officers and scrutinize such transactions very carefully. Slade v. Van Vechten 11 Paige (N. Y.) 21; Munson v. Syracuse &c. Co., 103 N. Y. 50, 8 N. E. 355.

[8] Harts v. Brown, 77 Ill. 226. See also Patterson v. Portland Smelting Works, 35 Ore. 96, 56 Pac. 407. But he can neither buy nor sell against the wish of the corporation or the stockholders, excepting by judicial process in pursuance of a fair contract made with their approbation, since he is a trustee, and no trustee can purchase of himself nor sell to himself over the objections of his cestui que trust. Pearson v. Concord R. Co., 62 N. H. 537, 13 Am. St. 590, and numerous cases cited.

[9] Rogers v. Hastings, 22 Minn. 25; Missouri R. Co. v. Richards, 8 Kans. 101. Delivery of corporate stock and execution of a mortgage on corporate property by a board of directors, in payment of corporate indebtedness, is not rendered void by the fact that several directors became guarantors for further advances to the corporation after its

money to the corporation, where it is needed for its benefit, if he act fairly and openly, and may purchase the corporate property at a public sale, under a trust deed given to secure it.[10] Directors acting in good faith are in many cases entitled to the same rights as other creditors.[11] But in making purchases or sales for the corporation, they cannot directly or indirectly speculate, to the injury of the company, for their own advantage.[12] It is held that contracts with railroad directors, whereby they undertake, for a compensation given to themselves, to alter or establish their road, depots or works so as to promote private interests, are void, as contravening public policy.[13] Such cases belong to the class which equity writers characterize as cases of constructive fraud.

credit had been exhausted, and which were to be paid by the delivery of the stock. Taylor County v. Baltimore &c. R. Co., 35 Fed. 161.

[10] Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328. See also Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. ed. 516; Taylor County Court v. Baltimore &c. R. Co., 35 Fed. 161. But if he attempts to take an undue advantage, his mortgage cannot be enforced. Sutter St. R. Co. v. Baum, 66 Cal. 44, 4 Pac. 916. A director of a railroad may properly own its bonds and may enforce payment in case of default by foreclosure. Duncomb v. New York &c. R. Co., 84 N. Y. 190, 88 N. Y. 1; Harpending v. Munson, 91 N. Y. 650. An officer or agent of the corporation, capable of becoming its creditors, may enforce the liability of creditors notwithstanding his relation to the corporation. Hall v. Klinck, 25 S. Car. 348, 60 Am. Rep. 505.

[11] Claflin v. South Carolina R. Co., 8 Fed. (4 Hughes 12) 118. A stockholder, and even a director, may become a creditor of a corporation in absence of fraud. Borland v. Haven, 37 Fed. 394.

[12] Manufacturers' Sav. Bank v. Big Muddy Iron Co., 97 Mo. 38, 10 S. W. 865; Port v. Russell, 36 Ind. 60, 10 Am. Rep. 5; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; 2 Thomp. Corp. (2nd. ed.), §§ 1233, 1234.

[13] Union Pac. R. Co. v. Durant, 1 Cent. L. J. 581; Bestor v. Wathen, 60 Ill. 138; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369. It is the duty of a director to manage the corporate business for the profit of the stockholders, and he cannot so deal with its property as to make profit for himself. Schetter v. Southern Oregon Co., 19 Ore. 192, 24 Pac. 25; Hart v. Brockway, 57 Mich. 189, 23 N. W. 725; Pearson v. Concord R. Corp., 62 N. H. 537, 13 Am. St. 590.

§ 318 (277). **Directors—Termination of fiduciary relations.**—The fiduciary relation may, of course, be terminated by resignation, removal from office, or the like. It may also be terminated by operation of law. So, too, conditions may so change as to sever the relation and leave the director as free to act as if the relation had never existed.[14]

§ 319 (278). **Directors—Liability of—Generally.**—In considering the personal liability of directors, it is important to keep in mind the distinction, heretofore mentioned, between the duties of the directors to the corporation and its share holders, and their duties to third persons.[15] As to the corporation they are, as we have said, trustees, but as to third persons they are not trustees, simply because of their official relation to the corporation and its stock holders, although they may doubtless become such in particular instances.[16] Where there is a breach of duty in the discharge of duties owing to the corporation there is a breach of trust, but as to third persons a breach of duty is not always a breach of trust. From the doctrine that there is an essential difference between the duty to the corporation and the duty to third persons, consequences of importance result. It is obvious that there may be a liability to the corporation or stockholders, where there would be none to third persons and that the evidence required in the one class of cases is very different from that required in the other class. So, too, the duty in the one class of cases is

[14] The entire plant and assets of a corporation, having been sold under an assignment for the benefit of creditors, a stockholder, who was a director and the treasurer of the corporation, is no longer a trustee or in any fiduciary relation to the corporation, which will prevent him from taking an assignment to himself of corporate debts, which he has paid personally, and participating with the other creditors in the distribution of the fund. Hammond's Appeal, 123 Pa. St. 503, 16 Atl. 419.

[15] Ante, § 314. Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662. See, as to preferring themselves as creditors, Napanee Canning Co. v. Reid Murdock & Co., 159 Ind. 614, 64 N. E. 870, 59 L. R. A. 199, where the authorities on both sides are cited in the prevailing and in the dissenting opinions.

[16] Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514. See Loverin v. McLaughlin, 161 Ill. 417, 44 N. E. 99.

stricter than in the other, and the obligation to exercise good faith much higher. Some of the cases discriminate between officers to whom compensation is paid, and those who receive no pay for their services,[17] but where persons undertake to serve a business corporation, such as a railway company, it seems to us they are under an obligation to the corporation and stockholders, to exercise at least ordinary care and diligence, whether their services are or are not paid for by the corporation. It is no doubt true that in determining whether ordinary care and diligence has been exercised, it is proper to consider the time and attention that directors are, under the circumstances of the particular case, bound to give the corporate affairs, but this does not lead to the conclusion that the directors may be guilty of negligence, and, nevertheless, be exonerated from liability, for the failure to exercise ordinary care and diligence is negligence. Whether ordinary care and diligence has been exercised must usually, but not always, be a question of fact to be determined by the jury, under the instructions of the court.[18] It may be said, by the way, that it is only just and natural that officers who are paid for devoting

[17] First National Bank v. Reed, 36 Mich. 263; Pangborn v. Citizens &c. Assn., 35 N. J. Eq. 341; Austin v. Daniels, 4 Denio (N. Y.) 299; Commercial Bank v. Ten Eyck, 48 N. Y. 305; East New York &c. Co. v. Elmore, 5 Hun (N. Y.) 214.

[18] Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546, citing Scott v. De Payster, 1 Edw. Ch. 513, 543; Hodges v. New England &c. Co., 1 R. I. 312, 53 Am. Dec. 624; Liquidators &c. v. Douglas, 22 Sess. Cases (2nd. series) (Scotch) 447, 32 Scotch Jur. 212; Charitable Corporation v. Sutton, 2 Atk. 405; Litchfield v. White, 7 N. Y. 438, 57 Am. Dec. 534. It seems to us that there is an essential difference between cases where persons serve as directors of a charitable corporation and cases where they assume the duties of directors of a business corporation. In accepting the position of director of a business corporation men do so knowing that corporate affairs require time and attention as well as the exercise of reasonable business care and diligence, and they, therefore, impliedly, at least undertake to exercise that diligence and care. In regard to corporate affairs as well as in all other matters the question of negligence or no negligence must, in a very great measure, depend upon the facts of the particular case. First National Bank v. Ocean National Bank, 60 N. Y. 278, 19 Am. Rep. 181, and authorities cited. See also Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567; 2 Thomp. Corp. (2nd. ed.), § 1277.

their time and attention to the corporate affairs, should be held to a higher degree of care and diligence, than those who serve without compensation, or those who undertake to give only a part of their time and services to the corporation, but this does not authorize the conclusion that any corporate officer, whether paid or not paid for his services, may neglect the duties he has assumed, and yet not be held liable for the consequences of his negligence. The effect to be ascribed to the fact that no compensation is paid is that it is in all cases an important factor in determining whether ordinary diligence was exercised, and in many cases a controlling one.

§ 320 (279). Directors—Liability in matter of contract.—Substantially the same rules that apply to corporate officers and agents generally, respecting personal liability in matters of contract, govern cases where a personal liability is sought to be imposed upon the directors of a railroad company. The familiar general rule is that where an officer or agent enters into a contract for the corporation, in its name and by its authority, his principal alone is bound and he incurs no personal liability. If the agent exceeds his authority he may incur a personal liability. So, if an agent executes the contract in his own name he may be bound to the person with whom he contracts.[19] The general doctrine is that directors, so long as they act within the scope of their powers, bind the corporation and it alone; yet their acts done in excess of such powers may in some cases bind them personally.[20] As we have elsewhere said, directors are not liable for the consequences of mistakes which they may make, so long as they act in good faith and with reasonable care,[21] and keep within the

[19] Vincent v. Chapman, 10 Gill & J. (Md.) 279; Johnson v. Gibson, 78 Ind. 282; Mott v. Hicks, 1 Cowen (N. Y.) 513.

[20] Smith v. Poor, 3 Ware (U. S.) 148, Fed. Cas. No. 13093; Land Credit Co. v. Lord Fermoy, L. R. 8 Eq. 7. See also International Contract Co., In re, L. R. 6 Ch. App. 525; County Palatine Loan and Discount Co., In re, L. R. 9 Ch. App. 691.

[21] As where they are misled by counsel whom they have employed. Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Van Dyck v. McQuade, 86 N. Y. 38. The measure of care and diligence required of the directors of a corporation is generally such as a prudent man exer-

scope of their powers.[22] It is often said that the directors are liable for any loss resulting from their acts if they exceed or abuse their powers; but this is, perhaps, rather a broad statement of the rule and is not to be taken without some qualification.[23]

§ 321 (280). Directors—Errors of judgment.—Where directors act in good faith and with reasonable care and diligence, not going beyond the scope of their authority, they are not personally liable for losses that may occur although they may not have wisely exercised their discretion or may have erred in judgment. They are required to act in good faith and to exercise reasonable care and diligence, but their duty imposes upon them no higher or greater obligations. Mistake of judgment or bad business management is not of itself sufficient to create a personal liability.[24]

cises in his own affairs, but must be determined in each case in view of all the circumstances. Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56, 28 A. & E. Corp. Cas. 657. See also 2 Thomp. Corp. (2nd. ed.), §§ 1271-1273.

[22] Percy v. Millaudon, 8 Mart. N. S. (La.) 68; Dunn v. Kyle, 14 Bush. (Ky.) 134; Hodges v. New England Co., 3 R. I. 9; Vance v. Phœnix Ins. Co., 4 Lea (Tenn.) 385.

[23] National Exchange Bank v. Sibley, 71 Ga. 726; Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284; Morgan v. Skiddy, 62 N. Y. 319; Paddock v. Fletcher, 42 Vt. 389. Directors who vote for a resolution to illegally issue and negotiate notes of the corporation, incur a personal liability to the corporation where such notes come into the hands of bona fide purchasers. Metropolitan Elv. R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. 619. Directors of a company which has received the assets of another company and has assumed its debts, who misapply the assets of the old company, thereby render themselves individually liable to its creditors. Nat. Bank of Jefferson v. Texas Invest. Co., 74 Tex. 421, 12 S. W. 101.

[24] Godbold v. Branch Bank, 11 Ala. 191, 46 Am. Dec. 211; Percy v. Millaudon, 8 Mart. (N. S.) (La.) 68; Citizens' &c. Assn. v. Coriell, 34 N. J. Eq. 383; Hun v. Cary, 82 N. Y. 65, 37 Am. Rep. 546; Excelsior &c. Co. v. Lacey, 63 N. Y. 422; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Vance v. Phœnix &c. Co., 4 Lea (Tenn.) 385; Overend v. Gurney, L. R. 4 Ch. 701; Overend v. Gibb, L. R. 5 H. L. 480; Turquand v. Marshall, L. R. 4 Ch. 376; Charitable Corporation v. Sutton, 2 Atk. 400; 2 Thomp. Corp. (2nd. ed.), §§ 1271, 1272; 8 Thomp. Corp. § 1271.

§ 322 (281). **Directors—Liability for negligence.**—We have elsewhere said that directors are bound to exercise ordinary or reasonable care and diligence in the discharge of their duties; that the failure to do so is negligence, but that what shall be deemed negligence depends, as a rule, upon the facts of the particular case. At this place our purpose is to direct attention to some of the cases enforcing and applying the doctrines stated. A director is personally liable, in general, for any acts of the board of which he is a member constituting culpable negligence,[25] or amounting to a fraudulent breach of trust,[26] unless he can show that he sought to prevent such action, if present when the action was taken,[27] or that he labored to avert its injurious consequences after it came to his knowledge.[28] But this rule should have a reasonable application, and where a director is absent from a single meeting, for instance on account of illness, or the like he should not be held liable for such acts of the other directors unknown to him and which he could not have prevented even if present.[29]

[25] Beal v. Osborne, 72 Cal. 305, 13 Pac. 871; Myer v. Caperton, 87 Ky. 306, 8 S. W. 885, 12 Am. St. 488; Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Cady v. Sanford, 53 Vt. 632; Marshall v. Farmers' &c. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. 84, and note reviewing authorities 8 Thomp. Corp. §§ 1273, 1282. Directors of a corporation are personally liable for permitting the corporate funds or property to be wasted or lost by inexcusable negligence or inattention to the duties they assume in accepting the office of director. Horn Silver Min. Co. v. Ryan, 42 Minn. 196, 44 N. W. 56, 28 Am. & Eng. Corp. Cas. 657.

[26] Sims v. Street R. Co., 37 Ohio St. 556; Colquitt v. Howard, 11 Ga. 556; Smith v. Poor, 40 Maine 415, 63 Am. Dec. 672; Hazard v. Durant, 11 R. I. 195.

[27] Unless, being present through only part of the session, he had no knowledge of the facts. Land Credit Co. v. Fermoy, L. R. 5 Ch. 763.

[28] Metropolitan R. Co. v. Kneeland, 120 N. Y. 134, 24 N. E. 381, 8 L. R. A. 253, 17 Am. St. 619; Percy v. Millaudon, 3 La. 568; Black v. Delaware &c. Canal Co. 22 N. J. Eq. 130, 420; Shea v. Mabry, 1 Lea (Tenn.) 319.

[29] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662; Movius v. Lee, 30 Fed. 298; Murphy v. Penniman, 105 Md. 452, 66 Atl. 282, 121 Am. St. 583; In re Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684; Cargill v. Bower, 10 Ch. Div. 502, 47 L. J. Ch. 649; 2 Thomp. Corp. (2nd. ed.), §§ 1282-1284.

§ 323 (282). **Directors—Fraud on third persons.**—Directors who make false and fraudulent representations of fact, thereby causing loss to innocent third persons who act upon the faith of the truth of the representations, are personally liable to such persons.[30] It is essential to a recovery in such cases that it be proved by the plaintiff that the representations were false. But it is held, with good reason and upon authority, that it is not necessary that the plaintiff should show that the representations were made with actual intent to defraud.[31] The representations may be made in various forms. The form in which they are made is not regarded as material, for if they were made and did result in defrauding a right-doing third person he is entitled to recover. The question has arisen in many forms; thus, where the directors knowingly issued fraudulent stock or bonds, they were held to be individually liable to any purchaser or subsequent transferee in good faith and without notice of the fraudulent character of the stock or bonds.[32] So, the making of

[30] Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. ed. 82; Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Tate v. Bates, 118 N. Car. 287, 24 S. E. 482, 54 Am. St. 719; Prescott v. Haughey, 65 Fed. 653. In the last case cited, Baker, J., delivered a strong and well-reasoned opinion, in the course of which it was said: "The fraudulent representations charged in the complaint, if made under color of their office, were entirely outside of the official duties of the directors. Neither the law, nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent statements and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon such officers any authority to commit frauds of the character complained of. These directors have used their official position to enable them to perpetrate a fraud on the plaintiff entirely outside of the legitimate scope of their duties." The court discriminated between the case before it for judgment and that of Bailey v. Mosher, 63 Fed. 488. See also 8 Thomp. Corp. §§ 1301, 1303.

[31] Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. 592.

[32] Hornblower v. Crandall, 78 Mo. 581; National Exch. Bank v. Sibley, 71 Ga. 726; Bruff v. Mali, 36 N. Y. 200; Acts 16th Gen. Assem. Iowa, ch. 123, § 6, provides that if the directors of any railroad of three-feet gauge receiving taxes voted in aid thereof under the act shall vote to mortgage or incumber the road for more than $16,000 per mile, they, or those voting in the affirmative, shall be liable to each stockholder

false and fraudulent statements as to the value of the stock or condition of the business of the corporation, or other matters peculiarly within their knowledge,[33] will render the directors liable to the parties to whom they were made and who acted upon them for all damages which they sustain thereby. Actionable false and fraudulent representations may be made in a prospectus[34] or report[35] officially issued, and, as a general rule, all persons into whose hands such prospectus or statement may come, have a right to rely upon them and to hold the directors personally responsible for losses sustained by reason of acting upon a belief in their truth.[36] As a general rule only those directors who participated in the fraud are personally liable,[37] and to entitle a plaintiff to recover, such participation or at least knowledge and acquiescence therein must be proved,[38] since the court will not, in the absence of evidence, indulge the presumption that a director knows of the frauds of his associates. The authorities are numerous upon the general question and support the general statement of the opening sentence of this section.[39]

in an amount double the par value of his stock, if the stock is rendered less valuable thereby. Under this statute it was held that persons receiving shares for taxes voted and paid after a mortgage for more than $16,000 per mile had been executed and recorded could not recover against directors who voted the same. Walker v. Birchard, 82 Iowa 388, 48 N. W. 71.

[33] Seale v. Baker, 70 Tex. 283, 7 S. W. 742, 8 Am. St. 592, and note; Vreeland v. New Jersey &c. Co., 29 N. J. Eq. 188; Morgan v. Skiddy, 62 N. Y. 319. If the statements be as to matters of law and mere opinion, the directors are not bound. New Brunswick &c. R. Co. v. Conybear, 9 H. L. Cas. 711; Rashdall v. Ford, L. R. 2 Eq. 750; Morgan v. Skiddy, 62 N. Y. 319.

[34] Morgan v. Skiddy, 62 N. Y. 319; United Society v. Underwood, 9 Bush (Ky.) 609, 15 Am. Rep. 731.

[35] Salmon v. Richardson, 30 Conn. 360, 79 Am. Dec. 255; Warren v. Para &c. Co., 166 Mass. 97, 44 N. E. 112.

[36] Peek v. Gurney, L. R. 6 H. L. 377; Vreeland v. N. J. Stone Co., 29 N. J. Eq. 188. The rule stated would not apply if the persons into whose hands such instruments came knew that the statements were not true, or if they were guilty of such negligence as would, under the ordinary rules of law, prevent a recovery for a loss caused by fraudulent representations.

[37] Cargill v. Bower, L. R. 10 Ch. Div. 502.

[38] Arthur v. Griswold, 55 N. Y. 400.

[39] Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Salmon v. Richard-

In many of the states the directors are by statute made personally liable for corporate debts created beyond their subscribed capital stock,[40] and are also made liable for debts in case they declare and pay dividends unlawfully.[41] The making of a report as to the business and financial condition of a railroad corporation which is false in any material representation renders the officers signing it liable for all debts of the corporation contracted while they are such officers thereof in Arkansas, Texas and Nevada; and renders them liable to a penalty in Michigan; and making such a report is a misdemeanor in Nevada and Minnesota.[42]

son, 30 Conn. 360, 79 Am. Dec. 255; Delano v. Case, 121 Ill. 247, 12 N. E. 676, 2 Am. St. 81; United Society v. Underwood, 72 Ky. 609, 15 Am. Rep. 731; Graves v. Bank, 73 Ky. 23, 19 Am. Rep. 50; Cross v. Sackett, 6 Abb. Pr. (N. Y.) 247; Cazeaux v. Mali, 25 Barb. (N. Y.) 578; Morgan v. Skiddy, 62 N. Y. 319; Bartholomew v. Pentley, 15 Ohio 659, 45 Am. Dec. 596; Wallace v. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. 625; Marshall v. Bank, 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. 84; Clarke v. Dickson, 6 C. B. (N. S.) 452; Johnson v. Gorlett, 3 C. B. (N. S.) 569; Peek v. Deery, L. R. 37 Ch. Div. 541, 585. See generally Clark v. Edgar, 84 Mo. 106, 54 Am. Rep. 84; Nat. Exchange Bank v. Sibley, 71 Ga. 726; Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231; Wyandotte v. Corrigan, 35 Kans. 21, 10 Pac. 99; Peek v. Gurney, Law R. 6 H. L. 377.

[40] 8 Thomp. Corp. § 1342. Cal. Civ. Code, § 309, making directors of corporations individually liable for debts created beyond their subscribed capital stock, was held applicable to all the subscribed capital stocks, irrespective of the mode of disposition, and whether paid in or not. But the debts referred to did not include capital stock paid for corporate property. Moore v. Lent, 81 Cal. 502, 22 Pac. 875.

[41] 8 Thomp. Corp. § 1347.

[42] 8 Thomp. Corp. §§ 1325. See Niles v. Dodge, 70 Ind. 147; State v. Cox, 88 Ind. 254; Fairbanks &c. Co. v. Macleod, 8 Colo. App. 190, 45 Pac. 282; Lehman v. Knapp, 48 La. 1148, 20 So. 674. See generally Stone v. Kellogg, 62 Ill. App. 444; Rose v. Eclipse &c. Co., 60 Mo. App. 28; Solomon v. Bates, 118 N. Car. 311, 24 S. E. 478, 54 Am. St. 725. Greenville &c. Co. v. Reis, 54 Ohio 549, 44 N. E. 271. Rights of directors under statutes preferring claims of laborers. Consolidated &c. Co. v. Keystone &c. Co., 54 N. J. Eq. 309, 35 Atl. 157. As to who are proper parties where the right to the office of director is involved, see Dusenbury v. Looker, 110 Mich. 58, 67 N. W. 986.

CHAPTER XIII.

EXECUTIVE AND MINISTERIAL OFFICERS AND AGENTS.

Sec.
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§ 325 (283). **President—Generally.**—Railroad companies are generally required to elect a president[1] who is, ordinarily, the chief executive officer of the company.[2] It can hardly be said that the powers and duties of a president of a railway company are prescribed and defined by the general principles of law, for, as a rule, recourse must be had to the act of incorporation or to the

[1] The president must be chosen by the body to which the act of incorporation grants the right to elect. An election by the stockholders, where the charter requires the board of directors to elect, has been held a nullity. Walsenburg &c. Co. v. Moore, 5 Colo. App. 144, 38 Pac. 60.

[2] Provision is often made for the election of a vice president, but, as a rule he only acts in the absence of the president, although active, independent duties may be required of him, if the company so desires, and no provision of the charter forbids. Colman v. West Virginia &c. Co., 25 W. Va. 148; Richards v. Osceola, 79 Iowa 707, 45 N. W. 294; Chicago &c. Co. v. James, 22 Wis. 194; Chicago &c. Co. v. James, 24 Wis. 388.

corporate by-laws to ascertain what these powers and duties are. Some of the cases hold that he has no greater powers by virtue of his office than any other director except that he is the presiding officer at the meetings of the board of directors.[3] It seems to us, however, that the powers of the president are greater and more comprehensive than those of an individual director, for he may act for the company in ordinary business affairs, and this an individual director cannot do; but the president cannot, of course, effectively exercise powers which belong to the board of directors. We think it may be safely said that in ordinary routine business matters the president may act for the company unless his powers are so circumscribed and limited by the act of incorporation or the corporate by-laws as to exclude the operation of the general rules of law. We know that the authorities are in conflict upon this question, but we believe that the trend of modern authority is strongly in favor of the conclusion we have stated. Some of the decisions contain loose general statements that cannot justly be regarded as authoritative, but must be taken to be mere dicta. There is, however, a sharp conflict in the authorities which it is not possible to reconcile.[4] While the

[3] Dabney v. Stevens, 10 Abb. Pr. (N. S.) 39; Titus v. Cario &c. R. Co., 37 N. J. L. 98; Adriance v Roome, 52 Barb. (N. Y.) 399; Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202. See generally Bacon v. Mississippi &c. Co., 31 Miss. 116; Hodges v. Rutland &c. R. Co., 29 Vt. 220; Templen v. Chicago &c. Co., 73 Iowa 548, 35 N. W. 634, 34 Am. & Eng. R. Cas. 107; Chicago &c. R. Co. v. James, 22 Wis. 194. See also 2 Thomp. Corp. (2nd. ed.), §§ 1450-1456. And further to the effect that his power by mere virtue of the office and not as general manager is, at all events, very limited, see National State Bank v. Vigo Co. Nat. Bank, 151 Ind. 352, 40 N. E. 799, 50 Am. St. 330; Wainwright v. P. H. &c. Roots Co., 176 Ind. 682, 97 N. E. 8.

[4] Sustaining the doctrine of the text. Sherman &c. Co. v. Swigart, 43 Kans. 292, 23 Pac. 569, 19 Am. St. 137; Blen v. Bear River &c. Co., 20 Cal. 602, 81 Am. Dec. 132; Los Angeles &c. Co. v. Los Angeles, 106 Cal. 156, 39 Pac. 535; Hawley v. Gray Bros. &c. Co., 106 Cal. 337, 39 Pac. 609; Chicago &c. Co. v. Coleman, 18 Ill. 297, 68 Am. Dec. 544; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Ceeder v. Loud &c. Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. 134; Gray v. Waldron, 101 Mich. 612, 60 N. W. 288; Thomas v. City &c. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263; Oakes v. Cattarugus &c. Co.,

president of a railroad may, as we believe, act for the corporation in ordinary matters of routine business, he is merely an officer and not the corporation.[5] He cannot perform the duties of the board of directors, nor can he perform those conferred upon other corporate officers by the act of incorporation or the by-laws, neither can he effectively perform acts outside of the ordinary business affairs or transactions of the company.[6]

§ 326 (284). **President—Incidental powers of.**—As indicated in the preceding section our opinion is that the president of a railroad company possesses incidental powers of considerable scope in all cases, except, perhaps, in those where the act of incorporation or the by-laws so clearly and fully prescribe and define his powers as to exclude all implied power. The rule applied to charitable corporations cannot, it seems to us, be applied to railway

143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544; Washburn v. Nashville &c. Co., 3 Head (Tenn.) 638, 75 Am. Dec. 784; Richmond &c. R. Co. v. Snead, 19 Grat. (Va.) 354, 100 Am. Dec. 670. See also Jones &c. Co. v. Crary, 234 Ill. 28, 84 N. E. 651; Dexter Sav. Bank v. Friend, 90 Fed. 703. Contra, Lyndon &c. Co. v. Lyndon &c. Inst., 63 Vt. 581, 22 Atl. 575, 25 Am. St. 783; Brooklyn &c. Co. v. Slaughter, 33 Ind. 185; Mount Sterling &c. Co. v. Looney, 1 Metc. (Ky.) 550, 71 Am. Dec. 491; Wait v. Nashua &c. Assn., 66 N. H. 581, 23 Atl. 77, 14 L. R. A. 356, 49 Am. St. 630, 34 Cent. L. J. 119. A valuable article, rich in authority, by Judge Seymour D Thompson, in 39 Cent. L. J. 200, presents both sides of the question very fully, and so does 2 Thomp. Neg. (2nd. ed.), §§ 1450-1462. Copious notes will be found in Wait v. Nashua &c. Assn., 66 N. H. 581, 14 L. R. A. 356, 49 Am. St. 630, and in Templin v. Chicago &c. R. Co., 73 Iowa 548, 35 N. W. 634, 34 Am. & Eng. R. Cas. 107.

[5] Bi-Spool &c. Co. v. Acme &c. Co., 153 Mass. 404, 26 N. E. 991.

[6] Blen v. Bear River &c. Co., 20 Cal. 602, 81 Am. Dec. 132; Bliss v. Kaweah &c. Co., 65 Cal. 502, 4 Pac. 507; Siebe v. Joshua &c. Co., 86 Cal. 390, 25 Pac. 14; Castle v. Belfast &c. Co., 72 Maine 167; Leggett v. New Jersey &c. Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202; Crump v. United States &c. Co., 7 Grat. (Va.) 352, 56 Am. Dec. 116; Walworth County Bank v. Farmers' &c. Co., 14 Wis. 325. See also Yellow Jacket &c. Min. Co. v. Stevenson, 5 Nev. 224; Allentown First Nat. Bank v. Hoch, 89 Pa. St. 324, 33 Am. Rep. 769. The doctrine is carried very far in the case of Asher v. Sutton, 31 Kans. 286, 1 Pac. 535.

companies, so that the cases laying down the law as to the powers of the president of educational, literary, benevolent corporations, or the like, ought not to be unqualifiedly accepted as authoritatively declaring the law applicable to the presidents of railroad companies. Judges know ex officio that in the conduct and management of railway companies there are matters requiring daily attention and that of those matters disposition must be made promptly and effectively without calling together the board of directors for formal action. So, too, it is a matter of judicial knowledge that railroad companies are often consolidated, that interests of great magnitude are combined, that many miles of railroad are placed under one management, and that directors often reside far apart and far distant from the principal office. In view of these considerations, and others which might be suggested, it is but reasonable and natural to hold that in many respects the powers of the chief executive or ministerial officers of a railroad company are more comprehensive than those of a corporation of a different nature, such as a manufacturing, mining or banking company, although in other respects, as the borrowing of money, or the like, they may not be so comprehensive as those of a president of a corporation of that class. It is safe, at all events, to affirm that the president of a railroad company does possess implied or incidental powers, either as such or by virtue of usage, and that his powers extend beyond those expressly conferred upon him by the board of directors. He may do many acts without direct or express authority from the board of directors of the company.

§ 327 (285). **President—Implied powers.**—It is difficult in some cases to determine what powers the president possesses as incident to the office bestowed upon him, or as implied from the general nature of the authority conferred upon him by the company. A contract of an unusual character, as, for instance, a contract for the construction of the road, he has no implied power to make, since that is a contract of an extraordinary character, at least it is one beyond the range of ordinary corporate business.[7]

[7] Central &c. Co. v. Condon, 67 Fed. 84; Templin v. Chicago &c. R. Co., 73 Iowa 548, 35 N. W. 634; Griffith v. Chicago &c. R. Co., 74

He cannot rightfully sell all the personal property of the corporation, nor, perhaps, any very considerable part of it, unless authorized by the board of directors;[8] but we venture to affirm, notwithstanding some decisions to the contrary, that he may sell particular articles of personal property without express authority from the board, as, for example, a car or a locomotive. The president does not merely by virtue of his office, possess authority to dispose of all of the assets of the company, for such an act is one beyond the scope of his authority.[9] Some of the cases assert that the president cannot purchase property for the corporation,[10] but we think that he may within reasonable limits purchase property required for use in the ordinary course of the corporate business, but that the authority to purchase is a limited one. The president, under ordinary circumstances, has no implied power to release parties from liability to the corporation.[11] Authority to mortgage the corporate property cannot be implied, but must be conferred by the board of directors or by that branch of the corporate government in which power to authorize the execution of mortgages is lodged.[12] Unless otherwise pro-

Iowa 85, 36 N. W. 901; Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202. See Fitzgerald v. Fitzgerald &c. Co., 41 Nebr. 374, 62 N. W. 899.

[8] Walworth County Bank v. Farmers' &c. Co., 14 Wis. 325; Bliss v. Kaweah &c. Co., 65 Cal. 502, 4 Pac. 507; Fulton Bank v. New York &c. Co., 4 Paige (N. Y.) 127. See also Titus v. Cairo &c. R. Co., 37 N. J. L. 98; Asher v. Sutton, 31 Kans. 286, 1 Pac. 535. As suggested in the preceding section, we are inclined to think that cases such as those cited in this note cannot apply with full force to railroad companies.

[9] Titus v. Cairo &c. Co., 37 N. J. L. 98, 102. See McCullough v. Moss, 5 Denio (N. Y.) 567.

[10] Bliss v. Kaweah &c. Co., 65 Cal. 502, 4 Pac. 507; Blen v. Bear River &c. Co., 20 Cal. 602, 81 Am. Dec. 132. But it has been held that the president of a railroad company may borrow money for use in its business and execute a note therefor. Cotton States &c., Co. v. Florida R. Co., 69 Fla. 52, 67 So. 568. See also 8 Thomp. Corp. § 1477.

[11] Risley v. Indianapolis &c. R. Co., 1 Hun (N. Y.) 202; Soper v. Buffalo &c. Co., 19 Barb. (N. Y.) 310; Miller v. Rutland &c. R. Co., 36 Vt. 452.

[12] Luse v. Isthmus &c. R. Co., 6 Ore. 125, 25 Am. Rep. 506; England v. Dearborn, 141 Mass. 590, 6 N. E. 837. See generally Davis v. Rock Creek &c. Co., 55 Cal. 359, 36 Am. Rep. 40; Alta &c. Co. v. Alta

vided in the act of incorporation or by-laws, the president of a railroad company has a general supervision and authority over the subject of employing and discharging corporate agents and servants.[13] There is a conflict of authority upon the question as to whether he has the power to commence an action on behalf of the company;[14] but, for our part, we can see no sufficient reason why he may not do so in ordinary cases. He may employ counsel to defend an action or suit against the company.[15] He has no implied power to bind the company by consenting to the appointment of a receiver,[16] nor has he power to make an assignment of the corporate assets for the benefit of creditors.[17]

Mining Co., 78 Cal. 629, 21 Pac. 373; Jesup v. City Bank, 14 Wis. 331.

[13] Arapahoe &c. Co. v. Stevens, 13 Colo. 534, 22 Pac. 823.

[14] Recamier &c. Co. v. Seymour, 24 N. Y. St. 54, 5 N. Y. S. 648; Davis v. Memphis &c. R. Co., 22 Fed. 883; Wetherbee v. Fitch, 117 Ill. 67, 7 N. E. 513; Bailey v. Snyder, 61 Ill. App. 472; Bright v. Metairie &c. Assn., 33 La. Ann. 58; White v. Westport &c. Co., 1 Pick. (Mass.) 215, 11 Am. Dec. 168; Globe Works v. Wright, 106 Mass. 207; Ashuelot &c. Co. v. Marsh, 1 Cush. (Mass.) 507; Reno &c. Co. v. Leete, 17 Nev. 203, 30 Pac. 702; Potter v. New York &c. Co., 44 Hun (N. Y.) 367; Oakley v. Workingmen's &c. Soc., 2 Hilt. (N. Y.) 487; American &c. Co. v. Oakley, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; Colman v. West Virginia &c. Co., 25 W. Va. 148.

[15] Sarmiento v. Davis Boat &c. Co., 105 Mich. 300, 63 N. W. 205, 55 Am. St. 446; Wetherbee v. Fitch, 117 Ill. 67, 7 N. E. 513.

[16] Walters v. Anglo-Saxon &c. Co., 50 Fed. 316.

[17] Asher v. Sutton, 31 Kans. 286, 1 Pac. 535; Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592; Hallowell &c. Bank v. Hamlin, 14 Mass. 178; Luse v. Isthmus &c. R. Co., 6 Ore. 125, 25 Am. Rep. 506. The president of an ordinary private corporation may be authorized by the governing board to make an assignment. Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. 601. For cases declaring and enforcing the general doctrine as to the implied powers of a president of a corporation, see Smith v. Smith, 62 Ill. 493; Indianapolis &c. Co. v. St. Louis &c. R. Co., 26 Fed. 140; Crowly v. Genesee &c. Co., 55 Cal. 273; Bank of Healdsburg v. Bailhace, 65 Cal. 327, 4 Pac. 106; Greig v. Riordan, 99 Cal. 316, 33 Pac. 913; Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Sherman &c. Co. v. Swigart, 43 Kans. 292, 23 Pac. 569, 19 Am. St. 137, 2 Lewis Am. R. & Corp. 158; Northern Central &c. R. Co. v. Bastian, 15 Md. 494; Rhodes v. Webb, 24 Minn. 292; Duncomb v. New York &c. Co., 88 N. Y. 1, 13 Am. & Eng. R. Cas. 84; Jourdan v. Long

§ 328 (286). **President—Powers implied from grant of authority by the board of directors.**—It seems proper, in order to prevent a possible misunderstanding, that we should say, by way of explanation, that in discussing the incidental and implied powers of the president we have had reference only to the powers incident to the office bestowed upon him, and to those implied from the nature of the office itself. The board of directors may materially extend the powers of the president and invest him with authority much beyond that inherent in the office of president.[18] Where the directors rightfully invest the president with a principal power, he takes it with all the incidental powers essential to a proper exercise of the principal power conferred upon him.[19]

§ 329 (287). **President—Influence of usage.**—The usage of a railway company is an important factor in determining the power of its president. The president may often be invested with authority by corporate usage. It is not possible to lay down any definite rules upon this subject, but it may be safely said that long continued usage may confer authority upon the president much greater than that inherent in his office and essentially greater than that expressly conferred upon him by the board of directors or the stockholders of the corporation.[20]

Island R. Co., 115 N. Y. 380, 22 N. E. 153; Nichols v. Scranton &c. Co., 137 N. Y. 471, 33 N. E. 561; Oakes v. Cataraugus &c. Co., 143 N. Y. 430, 38 N. E. 461; Chicago &c. R. Co. v. James, 24 Wis. 388.

[18] Seely v. San Jose &c. Co., 59 Cal. 22; Hawley v. Gray Bros. &c. Co., 103 Cal. 337, 39 Pac. 609; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; Smith v. Smith, 62 Ill. 493, 496; Castle v. Belfast &c. Co., 72 Maine 167; State v. Heckart, 62 Mo. App. 427; Lee v. Pittsburgh &c. Co., 56 How. Prac. (N. Y.) 373; Lucky &c. Co. v. Abraham, 26 Ore. 282, 38 Pac. 65. See also McCormick v. Stockton &c. R. Co., 130 Cal. 100, 62 Pac. 267.

[19] Baker v. Cotter, 45 Maine 236; Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339; Irwin v. Bailey, 8 Biss. (U. S.) 523, Fed. Cas. No. 7079; Howland v. Myer, 3 N. Y. 290. But the implied power is only such as is necessary to effectuate the principal power. Second &c. R. Co. v. Mehrbach, 17 Jones & S. (N. Y.) 267.

[20] Minor v. Mechanics' Bank, 1 Pet. (U. S.) 46, 7 L. ed. 47; Mount Sterling &c. R. Co. v. Looney, 58 Ky. 550, 71 Am. Dec. 491; Northern Cent. R. Co. v. Bastian, 15 Md. 494; Merchants &c. Bank v. Citizens &c. Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. 453; Walker v. Detroit &c. Co., 47 Mich. 337, 11 N. W. 187.

§ 330 (288). **President—Apparent authority.**—The authority with which the corporation ostensibly invests its president is as to persons dealing in good faith and without notice of his actual authority, the authority which he possesses; but it is not his authority in cases where the person dealing with him has notice of his actual authority.[21] The question in such cases is as to the ostensible authority with which the president has been invested, not as to the authority actually conferred upon him. In most cases the question as to whether the president has been clothed with authority to perform the act upon which the claims or corporate liability is based is one of fact. Where the person dealing with the president has notice that the president is acting for himself, or knows that the business he is engaged in is not corporate business, the corporation is not bound.[22]

§ 331 (289). **President—Ratification of unauthorized acts.**—The acts of the president, like those of any other agent, although beyond the scope of his authority, may, of course, be ratified by the corporation.[23] There is, it is barely necessary to suggest, no

See generally Mining Co. v. Anglo-Californian Bank, 104 U. S. 194, 26 L. ed. 707; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. ed. 49; Bell v. Hanover &c. Bank, 57 Fed. 821; Western &c. Co. v. Bayne, 11 Hun (N. Y.) 166; Moyer v. East Shore &c. Co., 41 S. Car. 300, 19 S. E. 651, 25 L. R. A. 48, 44 Am. St. 709; 8 Thomp. Corp. § 1460.

[21] The rule upon this subject is substantially the same whether the agent of the corporation be the president or some other agent. Manhatton &c. Co. v. Forty-Second &c. R. Co., 139 N. Y. 146, 34 N. E. 776; Bank of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Fifth Ave. Bank v. Forty-second &c. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. 712.

[22] Stone v. Hayes, 3 Denio (N. Y.) 575; Moores v. Citizens' Nat. Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. ed. 385; Farrington v. South Boston R. Co., 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am St. 222; Bentley v. Columbia &c. Co., 17 N. Y. 421; Claflin v. Farmers' &c. Bank, 25 N. Y. 293; Wilson v. Metropolitan &c. R. Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. 625; Manhattan &c. Co. v. Forty-second &c. R. Co., 139 N. Y. 146, 151, 34 N. E. 776.

[23] Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Pixley v. Western Pac. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Pittsburgh &c. R. Co. v. Woolley, 12 Bush. (Ky.) 451; Southgate v. Atlantic &c. R. Co., 61 Mo. 89. When the president of a corporation executes, in its

doubt as to the general rule that unauthorized acts may be ratified, but it is not always easy to say what will be deemed a ratification.[24] Acts clearly and entirely beyond the corporate power cannot be ratified.

§ 332 (290). **President—Dealings with corporation.**—Essentially the same rules apply to transactions by the president with the corporation as those which govern transactions between the corporation and the directors. The president acts in a fiduciary capacity, and is bound to exercise the utmost good faith in dealing with the corporation. He may deal with it, but his course must be open, honest and fair or else the courts will set the transaction aside or hold him responsible in damages at the suit of one having a right to invoke judicial assistance.[25]

§ 333 (291). **President—Relation to shareholders.**—In our judgment the president is a trustee for the shareholders, although he may not be a trustee in the full sense of the term.[26] He un-

behalf and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, having full knowledge of his act, does not dissent within a reasonable time, it will be presumed to have ratified the contract. Pittsburgh &c. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157. See also as to presumption that president had authority to do act done by him within scope of corporate powers; Lloyd &c. Co. v. Matthews, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, and authorities on both sides reviewed in note.

[24] Jourdan v. Long Island &c. R. Co., 115 N. Y. 380, 22 N. E. 153; Alabama &c. Co. v. South &c. R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. 401; Chateau v. Allen, 70 Mo. 290; Gutta Percha &c. Co. v. Village of Ogalla, 40 Nebr. 775, 59 N. W. 513, 42 Am. St. 696; Dorenbecker v. Columbia C. L. Co., 21 Ore. 573, 28 Pac. 899, 28 Am. St. 766; Currie v. Bowman, 25 Ore. 364, 35 Pac. 848; Taylor v. Albermarle &c. Co., 105 N. Car. 484, 10 S. E. 897. For cases of such ratification without formal act see Leroy &c. R. Co. v. Sidell, 66 Fed. 27; Michigan &c. R. Co. v. Chicago &c. R. Co., 132 Mich. 324, 93 N. W 882; Texas &c. R. Co. v. Davis, 93 Tex. 378, 54 S. W. 381, 55 S. W. 562.

[25] Ante, § 317; Bristol v. Scranton, 57 Fed. 70, and cases cited; Krohn v. Williamson, 62 Fed. 869; Bristol v. Scranton, 63 Fed. 218; Bensiek v. Thomas, 66 Fed. 104; Hook v. Ayres, 80 Fed. 978; Baker v. Harpster, 42 Kans. 511, 22 Pac. 415. See also Lewis v. Hammersmith (Ind. App.), 81 N. E. 614.

[26] Board v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245.

questionably occupies fiduciary relations to the stockholders of the corporation. While the cases generally concede that a fiduciary relation exists between him and the shareholders, yet they discriminate between the relationship and that of one who is in the strict sense a trustee.[27] It has been held that as the powers of the president are so limited the same person may fill the office of president of two distinct corporations, and such identity does not of itself invalidate dealings between the two corporations,[28] but we suppose that this doctrine is to be taken with some qualification, for no officer can rightfully accept a position that requires of him acts adverse to the corporation he represents.

§ 334 (292). Treasurer—Generally.—The treasurer of a railway company is, as a rule, the officer who has custody of its funds, upon whom warrants are drawn, and by whom corporate funds are disbursed. The authority of the treasurer is generally prescribed by the charter or defined by the corporate by-laws. He necessarily possesses some incidental authority, but it is narrow in its scope. He has no general implied power to purchase property for the company, nor has he implied power to sell corporate property, neither has he implied power to borrow money on the credit of the corporation.[29] The corporation may enlarge the

[27] Allen v. Curtis, 26 Conn. 456; Smith v. Hurd, 53 Mass. 371, 46 Am. Dec. 690; Carpenter v. Danforth, 52 Barb. (N. Y.) 581. See generally Johnson v. Laflin, 5 Dill. (U. S.) 65, Fed. Cas. No. 7393; Perry v. Pearson, 135 Ill. 218, 25 N. E. 636; Heman v. Britton, 14 Mo. App. 121; Crowell v. Jackson, 53 N. J. L. 656, 23 Atl. 426; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; Gilbert's Case, L. R. 5 Ch. App. 559; Scott v. De Pyster, 1 Edw. Ch. 513. Several of the cases cited hold that the president may buy stock of the shareholder, and if he does not actually mislead the person with whom he deals the sale will be valid. If, however, there is a positive misrepresentation the transaction will be voidable. Fish v. Budlong, 10 R. I. 525; Prewett v. Trimble, 92 Ky. 176, 17 S. W. 356, 36 Am. St. 586.

[28] Leathers v. Janney, 41 La. Ann. 1120, 6 So. 884, 6 L. R. A. 661. See also Salem Iron Co. v. Lake Superior &c. Co., 112 Fed. 239. But compare McCourt v. Singers &c., 145 Fed. 103.

[29] Craft v. South Boston &c. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; Chemical National Bank v. Wagner, 93 Ky. 525, 20 S. W. 535, 40 Am. St. 206. See also Taylor v. Taylor, 74 Maine 582; Ste-

authority of the treasurer, and usage may so extend the scope of his authority as to carry it beyond that which is inherent in the office itself. By continued usage the powers of the treasurer may be enlarged, and he many bind the corporation by acts performed within the scope of the agency created or sanctioned by usage.[30] It has been held that drafts accepted by the treasurer are presumed to be properly accepted.[31] The treasurer, unless specially authorized, or unless authorized by usage, cannot bind a railway corporation by the acceptance of accommodation drafts. As we have said, the treasurer has no general authority to borrow money for the company, and it is held that even though he borrows money, which is used for the purposes of the corporation, the lender cannot recover it from the corporation, where it appears that it was used instead of other money which the treasurer had embezzled, and that the primary object in borrowing it was to conceal his default.[32] There is, it is obvious, an essential difference between the authority of the treasurer of a trading corporation in the habit of borrowing money for corporate use and the treasurer of a railroad company, and the authority of the treasurer of a trading corporation in this respect is broader and less limited than that of a railroad company.[33] The treasurer of a corporation has no power as such to confess judgment for it,[34] nor, as a rule, can he conduct litigation for the corporation. It is held, however, that he has authority to compromise a disputed claim which he is authorized to collect.[35]

vens v. Carp River &c. Co., 57 Mich. 427, 24 N. W. 160; Pelton v. Spider Lake &c. Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. 963; 2 Thomp. Corp. (2nd. ed.), §§ 1562-1565.

[30] Lester v. Webb, 1 Allen (Mass.) 34; Page v. Fall River &c. R. Co., 31 Fed. 257; Merchants' Bank v. State Bank, 19 L. ed. 1008, 10 Wall. (U. S.) 604. See also Sun Printing &c. Assn. v. Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. ed. 366.

[31] Credit Co. v. Howe &c. Co., 54 Conn. 357, 8 Atl. 472, 1 Am. St. 123. But we suppose that this presumption is at most a rebuttable one.

[32] Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641.

[33] Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641. See Merchants' &c. Bank v. Citizens' &c. Co., 159 Mass. 505, 34 N. E. 1083, 38 Am. St. 453.

[34] Stevens v. Carp River &c. Co., 57 Mich. 427, 24 N. W. 160.

[35] Gafford v. American &c. Co., 77 Iowa 736, 42 N. W. 550.

While the general rule is that the treasurer, by virtue of his office, has no authority to conduct litigation for the corporation, yet such authority may be implied in particular instances; thus, if a promissory note is placed in his hands for collection, he may cause suit to be brought upon it.[36] Unless the authority to execute accommodation paper is specially conferred upon the treasurer or is vested in him by usage, he cannot bind the corporation by the execution of such paper.[37] General authority to act for the corporation may, if not forbidden by the charter, be conferred on the treasurer, and where such authority is conferred his acts within its scope will bind the corporation.[38]

§ 335 (293). **Treasurer—Duties—Liabilities.**—The treasurer, it is obvious, occupies a fiduciary relation toward the corporation, and is prohibited from making use of his position to further his own interests. He cannot rightfully do any act adverse to the interests of the company. The rule stated is applied with much strictness by some of the courts. Thus, it is held that he has no authority to pay himself a claim he holds against it, unless the claim has been approved and its payment authorized by the corporation.[39] The authorities recognize his right to deal with the corporation, but they require that in all his dealings with the corporation he shall exercise the utmost good faith.

§ 336 (294). **Treasurer—Care of corporate funds.**—The treasurer is bound to exercise ordinary care, prudence and diligence in protecting and preserving the corporate funds placed in his charge. He is not absolutely responsible for the loss of corporate funds, but will be exonerated if it appears that he exercised rea-

[36] North Brookfield &c. Bank v. Flanders, 161 Mass. 335, 37 N. E. 307.

[37] Usher v. Raymond Skate Co., 163 Mass. 1, 39 N. E. 416.

[38] Parmelee v. Associated &c., 11 Misc. 363, 32 N. Y. S. 149. In Hotchkiss &c. Co. v. Union &c. Bank, 68 Fed. 76, it is held that notice to the treasurer, given while engaged in transacting business for the corporation, is notice to the principal.

[39] Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Peterborough R. Co. v. Wood, 61 N. H. 418; Aberdeen R. Co. v. Blakie, 1 Macq. 461. But compare St. Louis &c. R. Co. v. Chenault, 36 Kans. 51, 12 Pac. 303.

sonable care, prudence and diligence,[40] and if, without his fault or negligence, they are lost, stolen or destroyed, he cannot be held accountable,[41] but the loss falls upon his principal. This general rule applies to cases where the money is deposited for the company in a bank which the treasurer has reason to believe is sound, but which subsequently fails. It has been held that where a railroad company was notified by its treasurer of his expected absence, with a request that remittances be made to the firm of which he was a member, and remittances were made accordingly to the firm, and reports to stockholders made that funds were in the hands of such firm as "financial agents," the act of the treasurer in selecting the place of deposit was ratified, and he was absolved from liability in that regard;[42] but we suppose that in such a case it devolves upon the treasurer to show that he acted with reasonable prudence and in good faith.

§ 337 (295). Secretary.—The secretary of a railroad company has by virtue of his office very limited powers indeed, so far as concerns the conduct of the active business of the corporation. In the matter of making contracts he has, perhaps, some implied or incidental authority, but it is very narrowly circumscribed. He certainly has no general authority to make contracts for the company,[43] but contracts made by him may be so ratified as to bind the company.[44] He has no authority to bind the corporation by executing evidences of indebtedness;[45] nor, indeed, by

[40] New York &c. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110; Mowbray v. Antrim, 123 Ind. 24, 23 N. E. 858.

[41] Mowbray v. Antrim, 123 Ind. 24, 28, 23 N. E. 858; Wayne Pike Co. v. Hammons, 129 Ind. 368, 379, 27 N. E. 487. See generally as to liability of treasurer, 2 Thomp. Corp. (2nd. ed.), §§ 1570, 1571.

[42] New York &c. R. Co. v. Dixon, 114 N. Y. 80, 21 N. E. 110.

[43] Chicago v. Stein, 252 Ill. 409, 96 N. E. 886. Ann. Cas. 1912D, 294; Ross Oil &c. Co. v. Estham, 73 Kans. 464, 85 Pac. 531, 4 Elliott Cont. § 2891. See also Telegraph v. Lee, 125 Iowa 17, 98 N. W. 364; Blanding v. Davenport &c. Co., 88 Iowa 225, 55 N. W. 81.

[44] Nebraska &c. Co. v. Bell, 58 Fed. 326. See also Hess v. Sloane, 66 App. Div. 522, 73 N. Y. S. 313.

[45] Holden v. Phelps, 141 Mass. 456, 5 N. E. 815. See also Jewett v. West Somerville &c. Bank, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. 259; Gregory v. Lamb, 16 Nebr.

any ordinary business contracts. He may, of course, be invested by the board of directors with power to contract,[46] but in such a case the source of his power is the action of the board and not the office of secretary. Where the secretary has power to bind the company and he acts within the scope of his power, the same general rules as to the effect of admissions and declarations apply that prevail in other cases of agency.[47]

§ 338 (296). **Managing agents.**—There is a class of agents called "general managers," "superintendents," or the like, whose powers and authority are very broad and comprehensive. They are not in strictness corporate officers except where made so by the charter or by-laws; but their powers are really more extensive in many respects than those of some of the chief officers of the corporation. A general manager or superintendent cannot, of course, exercise the powers or functions devolved upon the directors or other officers of the corporation,[48] but in conducting the actual business of the corporation he exercises very broad and comprehensive authority. The name or designation bestowed upon a managing agent does not necessarily determine the scope of his authority, but, within limits, indicates in a general way the nature of his authority. As we have elsewhere said the scope of his authority is ordinarily a question of fact to be determined

205, 20 N. W. 248; 8 Thomp. Corp. § 1513. It was held in Moshannon &c. Co. v. Sloan, 109 Pa. St. 532, 7 Atl. 102, that the secretary has no authority to release a debtor, and see other cases on the general subject reviewed in note in Ann. Cas. 1912D, 296.

[46] Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638. See generally Merchants' &c. Bank v. Hervey &c. Co., 45 La. Ann. 1214, 14 So. 139; Nebraska &c. Co. v. Bell, 58 Fed. 326; Moore v. H. Gaus &c. Co., 113 Mo. 98, 20 S. W. 975; Famous Shoe &c. Co. v. Eagle &c. Works, 51 Mo. App. 66.

[47] Kraniger v. People's &c. Assn. 60 Minn. 94, 61 N. W. 904. See also note to Younce v. Broad River Lumber Co., in Ann. Cas. 1912C, 107.

[48] In the case of Evansville &c. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092, the court held that a superintendent of construction had no authority to open the road for the carriage of passengers, saying, "The board of directors and the established rules of the company alone could make the appellant a common carrier for hire and the appellee a passenger."

from the evidence in the particular case.[49] We think, however, that where a railroad company holds out an agent as general manager or superintendent, the courts may take judicial notice of the general scope of his authority, but that the precise nature of his authority must, as a general rule, be determined from the facts and circumstances of the case in which the question arises.[50]

§ 339 (297). **Superintendent.**—The actual authority of a superintendent or general manager of a railroad or one of its divisions depends in a great degree upon the provisions of the charter and by-laws and the resolutions passed by the board of directors relative to such employment. As between the company and persons having knowledge of the terms of his employment, he will, as a general rule, be held to have only such powers as have been thereby expressly or impliedly conferred upon him.[51] But as to persons having no notice of his actual authority the rule is otherwise, for as to such persons he will be deemed to have the authority evidenced by the indicia of authority with which the cor-

[49] Ante, § 248. Gamacho v. Hamilton Co., 73 N. Y. St. 457, 37 N. Y. S. 725.

[50] See generally Trephagen v. South Omaha, 69 Nebr. 577, 96 N. W. 248; Green Co. v. Blodgett, 55 Ill. App. 556, 159 Ill. 169, 42 N. E. 176, 50 Am. St. 146; St. Louis &c. R. Co. v. Grove, 39 Kans. 731, 18 Pac. 958; Ceeder v. Loud &c. Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. 134; Langan v. Great Western R. Co., 30 L. T. (N. S.) 173. The title itself seems to imply agency and control. American Inv. Co. v. Cable Co., 4 Ga. App. 106, 60 S. E. 1037. And where such manager is invested by the corporation with the actual management the corporation will usually be bound by his acts and contracts which are necessary or incident to the business of which he has such management without other evidence of his actual authority in the particular instance. See 8 Thomp. Corp. §§ 1575, 1576, 1579.

[51] A director of a corporation, contracting with another director of the corporation concerning the corporate property, who is also business manager with enumerated and limited powers, is chargeable with notice of any defect in the manager's authority to make said contract. Schetter v. Southern Oregon Co., 19 Ore. 192, 24 Pac. 25. See generally Walrath v. Champion &c. Co., 63 Fed. 552; Smith v. Co-operative &c. Assn., 12 Daly (N. Y.) 304.

poration has invested him.[52] Where the duties of the office have not been defined, but the superintendent is simply given general authority to manage the business of the corporation, he will ordinarily be held to have such powers as appertain to the office by usage of the company by which he is employed,[53] and other companies of a similar character.[54] But it is essential in order to make the corporation liable for the acts of a general superintendent or general manager that the acts be performed in transacting the business of the corporation.[55] The superintendent of a railroad company, clothed with general power and authority in regard to the management of trains, is held to be the immediate representative and executive officer of the corporation, and his negligent and improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the directors themselves in their official capacity.[56] In his

[52] 2 Thomp. Corp. (2nd. ed.), §§ 1576, 1579. We have considered in another connection the authority of managing agents, such as superintendents and the like. Ante, § 260. See generally Railway &c. Co. v. Lincoln &c. Bank, 82 Hun 8, 31 N. Y. S. 44; Merrill v. Hurley, 6 S. Dak. 592, 62 N. W. 958, 55 Am. St. 859; Brace v. Northern Pac. R. Co., 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135, and cases cited in note.

[53] Olcott v. Tioga &c. R. Co., 27 N. Y. 546, 84 Am. Dec. 298. See last note supra; also Raleigh &c. R. Co. v. Pullman, 122 Ga. 700, 50 S. E. 1008; Matson v. Alley, 141 Ill. 284, 31 N. E. 419; Madison &c. Co. v. Norwich &c. Society, 24 Ind. 457; American Tel. &c. Co. v. Green, 164 Ind. 349, 73 N. E. 707; Parrott v. Mexican C. R. Co., 207 Mass. 184, 93 N. E. 590, 34 L. R. A. (N. S.) 261; Sarmiento v. Davis &c. Co., 105 Mich. 300, 63 N. W. 205, 55 Am. St. 446; Ecker v. Chicago &c. Co., 8 Mo. App. 223, 1 Am. & Eng. R. Cas. 357; Barber v. Stromberg &c. Co., 81 Nebr. 517, 116 N. W. 157; Goodwin v. Union Screw Co., 34 N. H. 378; Mayall v. Boston &c. Co., 19 N. H. 122, 49 Am. Dec. 149; Wisconsin Oak Lumber Co. v. Laursen, 126 Wis. 484, 105 N. W. 906; 2 Thomp. Corp. (2nd. ed.), § 1576.

[54] Louisville &c. R. Co. v. McVay, 98 Ind. 391, 398, 49 Am. Rep. 770. See also 2 Thomp. Corp. (2nd. ed.), § 1576.

[55] Cosh Murray Co. v. Adair, 9 Wash. 686, 38 Pac. 749. And of his department or branch where he is limited to one. Dale v. Donaldson Lumber Co., 48 Ark. 188, 2 S. W. 703, 3 Am. St. 224; Union Pac. &c. R. Co. v. McCarty, 3 Colo. App. 530, 34 Pac. 767; 2 Thomp. Corp. (2nd. ed.), § 1577.

[56] Washburn v. Nashville &c. R. Co., 40 Tenn. 638, 75 Am. Dec. 784.

dealings with third persons a superintendent, like any other agent, will be held to have power to bind the corporation within the limits of his apparent authority. And it is held that a general manager should be presumed to have the general control and direction of all matters connected with the operation of the railroad which the term indicates until the contrary is shown.[57] Accordingly, a railroad company is, it has been held, liable for the service of an attorney retained by its general manager to attend to its legal business, unless the attorney knew or might have known by using ordinary diligence that the manager had no authority to employ him.[58] It was held in another case that a railroad superintendent may bind the company by issuing a circular offering a general, standing reward for the arrest of train wreckers, although no special authority to do so has been granted him by the directors.[59] A railroad company has power, for the protection of its property,[60] to offer a general, standing reward for the arrest of train wreckers, and it may well be held that a superintendent invested with the general authority pertaining to that position may bind the company by offering a reward for the detection of persons who injure or destroy the property of the company.[61] In one case the court presumed that the general superintendent had authority to contract for fencing the company's road;[62] in another, that he acted by the company's

[57] Sacalaris v. Eureka &c. R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737; Louisville &c. R. Co. v. McVay, 98 Ind. 391, 399, 49 Am. Rep. 770; Sax v. Detroit &c. R. Co., 125 Mich. 252, 84 N. W. 314, 315, 84 Am. St. 572, citing text. A promissory note, indorsed by a manager, must have been previously authorized or subsequently ratified as evinced by general course of business or resolution in order to render a business corporation liable upon it. Huntington v. Attrill, 118 N. Y. 365, 23 N. E. 544.

[58] St. Louis &c. R. Co. v. Grove, 39 Kans. 731, 18 Pac. 958. See also Ceeder v. Loud &c. Co., 86 Mich. 541, 49 N. W. 575, 24 Am. St. 134.

[59] Central R. & Bkg. Co. v. Cheatham, 85 Ala. 292, 4 So. 828, 7 Am. St. 48.

[60] Ricord v. Central Pacific R. Co., 15 Nev. 167; American Express Co. v. Patterson, 73 Ind. 430.

[61] Toledo &c. Co. v. Rodrigues, 47 Ill. 188, 95 Am. Dec. 484.

[62] New Albany &c. R. Co. v. Haskell, 11 Ind. 301. See also West v. Washington &c. R. Co., 49 Ore. 436, 90 Pac. 666 (power to sell land where railroad company had apparently put it under his control to dispose of).

authority in denying an owner the right to remove his property from the company's premises;[63] in another it was held that he has authority to withdraw a notice to terminate a lease of the company's property;[64] and in another case it was held that he may bind the company by his declarations relative to the purchase of fuel for the use of its locomotives.[65] We think the ruling in the case last cited is correct, because such a contract is one made in the course of the ordinary business of the company; but the authority to make such contracts may be specially conferred upon some other officer or agent, and in that event it could not be rightfully exercised by the superintendent. The decisions generally go upon the principle that the corporation cannot deny the general authority of one whom it holds out as a general agent. But a superintendent's or manager's authority usually extends only to the management of the ordinary business of the corporation, and it is accordingly held that a sale of the property of a railroad corporation by the superintendent, unauthorized by the directors, passes no title.[66] Necessarily the question as to whether the superintendent is held out as possessing the authority asserted must be a question of fact in most instances, so that no general rule can be laid down as to the extent of his authority; but it may be safely said that he has no implied authority to make unusual or extraordinary contracts.

§ 340 (298). Superintendent—General conclusion.—Decisions as to the authority of such officers, as managers and superintendents depend so much upon the circumstances of the particular cases and there is such a wide range in the duties which the su-

[63] Giles v. Taff Vale R. Co., 2 E. & B. 822.

[64] Patrick v. Richmond &c. R. Co., 93 N. Car. 422.

[65] Sacalaris v. Eureka &c. R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737.

[66] Bowen v. Mt. Washington R. Co., 62 N. H. 502. See also Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Green v. Hugo, 81 Tex. 452, 17 S. W. 79, 26 Am. St. 824. But compare West v. Washington &c. R. Co., 49 Ore. 436, 90 Pac. 666. Other cases showing when general manager or superintendent has power to bind the corporation in particular instances and when not are cited in 2 Thomp. Corp. (2nd. ed.), §§ 1581-1590, and in 8 Thomp. Corp. §§ 1580, 1581, 1583, et seq.

perintendents of different roads are required to perform, and in the powers which they are permitted to exercise, that no definite rule as to the precise extent of their authority can be safely stated. It is safe to say, however, that the authority of such an officer will be extended by implication to cover a very broad field where it is necessary to protect the interests of innocent parties dealing with him, but not in favor of persons having knowledge of the real extent of his powers and duties. The courts cannot, of course, invest him with authority, but they can adjudge what, under the facts of the particular case, is the authority conferred upon him by the company. The nature of the business of conducting and managing a railroad is a matter of which the courts take judicial notice in a general way, and if they do take judicial notice of such a matter they must of necessity take notice that some general ministerial agent is required who can actively supervise and manage the ordinary details of the operation of the road.[67] We do not, however, mean to be understood as saying that courts will take judicial notice of the scope of the superintendent's authority in a particular case or where it is asserted to embrace a subject not clearly within the general scope of the authority of that class of agents.

§ 341 (299). Intermediate agents.—In order to perform its duty to the public and properly conduct its corporate affairs it is necessary that a railroad company should have general implied power to appoint intermediate agents, and the courts recognize the existence of this power and hold railroad companies respon-

[67] Courts take judicial notice of the hazardous nature of the business of operating railway trains, and of the authority of a superintendent in relation to such matters. Union Pac. R. Co. v. Winterbotham, 52 Kans. 433, 34 Pac. 1052, 59 Am. & Eng. R. Cas. 75, citing Union Pac. Co. v. Beatty, 35 Kans. 265, 10 Pac. 845, 57 Am. Rep. 160, 26 Am. & Eng. R. Cas 84; Pacific Railroad Co. v. Thomas, 19 Kans. 256; Railroad Co. v. Beecher, 24 Kans. 228; Cincinnati &c. Railroad Co. v. Davis, 126 Ind. 99, 25 N. E. 878, 9 L. R. A. 503, 44 Am. & Eng. R. Cas. 459. See also Louisville &c. R. Co. v. McVay, 98 Ind. 391, 49 Am. Rep. 770; Sacalaris v. Eureka &c. R. Co., 18 Nev. 155, 1 Pac. 835, 51 Am. Rep. 737; Sax v. Detroit &c. R. Co., 125 Mich. 252, 84 N. W. 314, 84 Am. St. 572; 1 Elliott Ev. § 72.

sible for the acts of such agents when performed within the scope of their authority or within the line of their duty. It is only, however, to a very limited extent that the courts can judicially know the nature of the authority of such subordinate agents. In most cases the nature and extent of their authority is to be determined as a question of fact from the evidence in the particular case, but, as we believe, the courts may in some cases take judicial notice of the general and ordinary authority of subordinate agents. We have elsewhere referred to cases showing the nature of the authority of subordinate agents.[68]

§ 342 (300). Intermediate agents—Agents for one purpose not for another.—It may happen that a person may be a corporate agent for one purpose and yet not for another. Thus a foreman may be an agent for the purpose of hiring and discharging section men, but as to work on the track be a mere servant.[69] It is obvious that the person assuming to act as an agent is only an agent when performing the duties of an agent, and in performing other duties is a servant or employe, although he may be acting in all he does under a contract of employment. The acts of a servant or employe are in many respects essentially different from those of an agent, and this difference, as we shall hereafter show, leads to important results.

§ 343 (301). Intermediate agents and servants distinguished. —The adjudged cases distinguish between subordinate agents

[68] Ante, §§ 258-261. It has been held that a claim agent has no general authority to make a valid contract of employment with an injured employe as part of the settlement of a claim. Hornick v. Union Pac. R. Co., 85 Kans. 568, 118 Pac. 60. But the company may be bound by ratification. Klinch v. Chicago City R. Co., 262 Ill. 282, 104 N. E. 669. And circumstantial evidence may be sufficient to show authority of an agent to enter into a contract of such a character. Tinkle v. St. Louis &c. R. Co., 212 Mo. 445, 110 S. W. 1086.

[69] Justice v. Pennsylvania Co., 130 Ind. 321, 30 N. E. 303. We do not, at this place, enter upon a consideration of the vexed question of whether the authority to hire and discharge, constitutes the person clothed with that authority an agent for all purposes conected with his line of service under his contract of employment, but elsewhere consider that question. See Mealman v. Union Pac. R. Co., 37 Fed. 189, 2 L. R. A. 192, and notes.

and servants, and the distinction often becomes one of importance. It is very difficult, indeed it is impossible, in the present state of the authorities, to accurately discriminate between agents and servants. It is, perhaps, safe to say that when a duty personal to the master is intrusted to an employe, the employe is as to that duty an agent, although as to other duties he may be a servant; if, however, the duty is not one personal to the employer the relationship between employer and employe is ordinarily not that of principal and agent, but is that of master and servant. The employer may, of course, by custom and usage, confer authority upon a servant beyond that appertaining to such relation, but ordinarily a servant has no authority to make contracts for the master.

§ 344 (302). Conductors.—The authority of the conductor ordinarily extends to the control of the movements of his train, and to the immediate direction of the movements of the employes engaged in operating the train, and he is, to a great extent, the representative of the company in such dealings as it may be necessary for the passengers to have with it while en route. Consequently the company is liable to passengers, and, in some cases, to third persons if he fails to take proper precautions to guard against injury from any defects in cars, engines, or equipments, which are discoverable,[70] or permits employes to move the cars in such a manner as to cause an injury,[71] or is guilty of any improper or unfair conduct toward the passengers in his charge.[72] It is responsible for his acts done in the line of his employment, although they were done wilfully[73] and in direct

[70] Mad River &c. R. Co. v. Barber, 5 Ohio St. 541, 67 Am. Dec. 312. Ordinarily the conductor is, according to the weight of authority, a fellow servant of other employes engaged in the management and operation of trains.

[71] Rauch v. Lloyd, 31 Pa. St. 358, 72 Am. Dec. 747.

[72] As where he exacts illegal fare. Porter v. New York Central R. Co., 34 Barb. (N. Y.) 353. Or assaults a passenger. Ramsden v. Boston &c. R. Co., 104 Mass. 117, 6 Am. Rep. 200; Jeffersonville &c. R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Craker v. Chicago &c. R. Co., 36 Wis. 657, 17 Am. Rep. 504.

[73] Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Craker v. Chicago &c. R. Co., 36 Wis. 657, 17 Am. Rep. 504.

opposition to the instructions and orders of his employers.[74] His authority does not, ordinarily, extend to making contracts on behalf of the company, but there may be cases of urgent emergency where he may make a contract for the company. He is to administer the rules of the company rather than make contracts for it. It has been held that, acting under a general authority, he may, in his discretion, relax or apply these rules within reasonable bounds, according to circumstances,[75] but this doctrine, as it seems to us, is one to be cautiously applied and kept within strict limits, for there is certainly no general authority to alter or suspend the established rules and regulations of the company. The establishment or alteration of rules and regulations is not, ordinarily, within the authority of a conductor, since it is his duty to obey and carry into effect the rules and regulations of the company. As we have said, the conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties.[76] In order that contracts made by him shall be obligatory upon the company they must be made to enable him to perform the duties required of him and must not relate to collateral matters nor be outside of the line of the duty assigned to him. Thus, he may, where other provision has not been made, employ mechanics to repair a break of the cars or machinery which must be repaired before the train can proceed to its destination, and may engage men and teams

[74] Porter v. New York Central R. Co., 34 Barb. (N. Y.) 353.

[75] O'Donnell v. Allegheny Valley R. Co., 59 Pa. St. 239, 98 Am. Dec. 336. See also on the general subject, Carroll v. New York &c. R. Co., 1 Duer (N. Y.) 571; New York &c. R. Co. v. Winter, 143 U. S. 60, 70, 12 Sup. Ct. 356, 36 L. ed. 71; Thompson v. Truesdale, 61 Minn. 129, 63 N. W. 259, 52 Am. St. 579; Vedder v. Fellows, 20 N. Y. 126.

[76] Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Goff v. Toledo &c. Co., 28 Ill. App. 529. In Wright v. Glenns Falls &c. R. Co., 24 App. Div. 617, 48 N. Y. S. 1026, it is held that a street car conductor may bind the company by his statement of the rate of fare made by a prospective passenger before taking passage so as to entitle the passenger to recover when ejected for not paying a higher rate. See post, §§ 2417, 2486.

to render the roadway or bridges secure for the passage of his train, when weakened or partially swept away by unforeseen causes; but in such cases the authority to contract does not exist unless there is an urgent necessity for immediate action. It is the necessity which confers authority, not simply the position of conductor.[77] Doubtless he may, in case of the sudden death or disability of the engineer, engage a competent engineer to take the train to a point where another engineer in the employ of the company can be obtained, if such employment be an urgent necessity and required to avoid disaster or serious injury to the company. It has been held that the conductor has authority, when the regular brakeman is sick or absent, and the proper and safe management of the train so requires, to supply the place of the sick or absent brakeman, and render the substitute so employed an employe of the company for the time being,[78] but we suppose this doctrine can only apply in very rare cases, for, as a general rule, a conductor has no authority to employ agents or servants for the company. The authority of the conductor to enter into contracts for the company is created by the necessity for the exercise of such authority, and as soon as the emergency

[77] St. Louis &c. R. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418, 423, 424 (quoting text); Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752. See ante, § 259. As a general rule he has no authority to employ agents or servants. Yazoo &c. R. Co. v. Stansberry, 97 Miss. 831, 53 So. 389, 390 (citing text).

[78] Sloan v. Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Georgia Pacific R. Co. v. Propst, 83 Ala. 518, 3 So. 764, 85 Ala. 203, 4 So. 711, 90 Ala. 1, 7 So. 635. On the second appeal of this case it was held that evidence that the plaintiff, a night watchman, was riding to his home on the train, when, one of the brakemen being sick, the conductor asked plaintiff to make coupling for him, did not show such a necessity as conferred upon the conductor an authority to employ the brakeman, nor did it show any employment at all, either with or without authority. We suppose that the right to employ a brakeman exists only in cases of urgent necessity, for the authority to employ agents or servants is no part of a conductor's general authority. If there is no emergency there is no authority to employ servants, and it is only in very rare and exceedingly clear cases that such authority can exist. Church v. Chicago &c. Co., 50 Minn. 218, 52 N. W. 647; Jewell v. Grand Trunk Railway, 55 N. H. 84.

is past the authority usually terminates.[79] In one of the decided cases it seems to be held that a conductor may bind the company by a contract to carry a passenger to a particular place on the line of the road,[80] and if the case is to be understood as so deciding we think it must be regarded as unsound; if, however, it is to be regarded as deciding that the place was one at which the conductor was authorized to stop the train if he so elected, then we think that the decision correctly declares the law. In our judgment a conductor has no authority to stop trains at places not provided for by the rules or time schedules of the company, unless a discretion as to stopping is vested in him. The safety of the public, as well as the interests of the railroad company, requires that stops should be made only at places authorized by the company. The conductor has no general authority to designate the places where the trains shall stop, and he cannot bind the company by a contract to stop at a certain place unless he is authorized to stop at that place by the rules, regulations or custom of the company. We have at this place merely outlined the authority and duties of a conductor as we have treated of his duties and powers with regard to passengers in the discussion of the subject of the duties and liabilities of a railroad company as a carrier of passengers.[81]

§ 345 (303). **Station agents.**—It is held that the courts cannot take judicial notice of the powers of a station agent,[82] but we suppose they may in a very general way take notice of the authority of such an agent. They certainly do take notice that he has no authority to change the rules of the company as to the

[79] Louisville &c. R. Co. v. Smith, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320, and authorities cited. Ante, § 260, note 2.

[80] Hull v. East Line &c. R. Co., 66 Tex. 619, 28 Am. & Eng. R. Cas. 221. But see St. Louis &c. R. Co. v. Jones, 96 Ark. 558, 132 S. W. 636, 37 L. R. A. (N. S.) 418; Ohio &c. R. Co. v. Hatton, 60 Ind. 12.

[81] Judicial notice has been taken in a general way as to the ordinary authority of a conductor. Condran v. Chicago &c. R. Co., 67 Fed. 522, 523; 1 Elliott Ev. § 72.

[82] Wood v. Chicago &c. R. Co., 59 Iowa 196, 13 N. W. 99. But see Brown v. Minneapolis &c. R. Co., 31 Minn. 553, 18 N. W. 834.

places where trains shall stop to discharge passengers.[83] Proof of his general authority to make contracts for the shipment of freight over the line of a railroad is sufficient evidence from which to infer his authority to contract with reference to all the necessary and ordinary details of the business.[84] His admissions and declarations, made within the scope of his authority, are, of course, binding upon the company, like those of any other agent; but it is held to be error in an action for a penalty for delay in shipping local freight to admit the declarations of a station agent whose agency is unconnected with the through freight business, to the effect that the company during a certain season used most of its cars in transporting through freight.[85] His general authority being established, it has been held that he will be held to possess authority to bind the company by a contract to furnish cars by a certain day,[86] or to carry the freight to its destination

[83] White v. Evansville &c. R. Co., 133 Ind. 480, 33 N. E. 273.

[84] Blodgett v. Abbot, 72 Wis. 516, 40 N. W. 491, 7 Am. St. 873; Wood v. Chicago &c. R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861. See generally Illinois &c. Co. v. Jonte, 13 Ill. App. 424; Merchants &c. Co. v. Joesting, 89 Ill. 152; Brown v. Louisville &c. Co., 36 Ill. App. 140; Squire v. New York &c. Co., 98 Mass. 239; Mayall v. Boston &c. Railroad, 19 N. H. 122, 49 Am. Dec. 149; Congar v. Galena &c. R. Co., 17 Wis. 477; London &c. R. Co. v. Bartlett, 7 H. & N. 400; Lewis v. Great Western &c. Co., 5 H. & N. 867. And where he has authority to sell tickets he may be held to have implied authority to furnish reasonable information and make representations within the line and scope of his duty. Louisville &c. R. Co. v. Scott, 141 Ky. 538, 133 S. W. 800, 34 L. R. A. (N. S.) 206; Louisville &c. R. Co., v. Spurling, 160 Ky. 819, 170 S. W. 192. It is held in the province of Ontario that a station agent is an "officer" within the meaning of a statute providing that "any of the officers" of a body corporate may be examined touching the matters in question in an action, at least where the action is based upon a contract executed by such station agent on behalf of the company. Ramsay v. Midland R. Co. (Ont.), 16 Am. & Eng. R. Cas. 594. It is held in Marsh v. Chicago &c. Co., 79 Iowa 332, 44 N. W. 562, that an agent having authority to make special rates may agree to give a rebate.

[85] Branch v. Wilmington &c. R. Co., 88 N. Car. 573.

[86] Wood v. Chicago &c. R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Easton v. Dudley, 78 Tex. 236, 14 S. W. 583. See also Stoner v. Chicago &c. R. Co., 109 Iowa 551, 80 N. W. 569; Gulf &c. R. Co. v. Irvine (Tex. Civ. App.), 73 S.

and deliver it within any reasonable time agreed upon[87] or to deliver goods at an unusual place upon its own line.[88] But in the absence of a custom authorizing it, an undertaking by a station agent at the request of the consignee after a car has reached its destination to deliver it at another place or to another person has been held to be nothing more than a personal accommodation on the part of the agent, not rendering the company liable.[89] Where he is given charge of the depot building and station grounds it has been held that he may make reasonable rules for the regulation of persons having business to transact with the company, and may exclude persons who refuse to conform to such regulations, and others who come to the station for purposes of their own not connected with the company's business.[90] And station agents will, in general, be held to have such additional powers as may be conferred upon them, either expressly or by implication from the usual course of business. A station agent may bind his principal within the limits of his apparent authority, even though that authority is restricted by secret instructions, which are unknown to the other contracting party.[91] The court will not, how-

W. 540. But not to furnish cars at another station. Gulf &c. R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829; Voorhees v. Chicago &c. R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823. Provided the shipper has no actual knowledge of a defect in the agent's authority which prevents him from making such a contract that shall bind the company. Harrison v. Missouri Pac. R. Co., 74 Mo. 364, 41 Am. Rep. 318.

[87] Deming v. Grand Trunk R. Co., 48 N. H. 455, 2 Am. Rep. 267. See also Harrell v. Wilmington &c. R. Co., 106 N. Car. 258, 11 S. E. 286.

[88] Southern Express Co. v McVeigh, 20 Grat. (Va.) 264; Phillips v. North Carolina R. Co., 78 N. Car. 294; Mann v. Birchard, 40 Vt. 326, 94 Am. Dec. 398; Webber v. Great Western R. Co., 3 H. & C. 771.

[89] Melbourne v. Louisville &c. R. Co., 88 Ala. 443, 6 So. 762.

[90] Commonwealth v. Power, 7 Metc. (Mass.) 596, 41 Am. Dec. 465.

[91] Wood v. Chicago &c. R. Co., 68 Iowa 491, 27 N. W. 473, 56 Am. Rep. 861; Pruitt v. Hannibal &c. R. Co., 62 Mo. 527, where it is held that notice of restrictions upon the agent's authority must be conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. See also Lake Shore &c. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Newport News &c. R. Co. v. Mercer, 96 Ky. 475, 29 S. W. 301; Harrison v. Kansas City &c. R. Co., 50 Mo. App. 332; Brooke v. New

ever, presume that the agent had authority to bind the company by contract for carriage beyond its own line, [92] since a common carrier is not required to deliver goods at a point beyond its line.[93] Where a station agent signed receipts furnished in blank by a shipper, by the terms of which the corporation undertook to forward and deliver the goods to the order of the consignee at points on a connecting line, but it appeared that he acted without special authority and without the knowledge of the corpora-

York &c. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Southern Express Co. v. Womack, 1 Heisk. (Tenn.) 256; International &c. R. Co. v. True, 23 Tex. Civ. App. 523, 57 S. W. 977; Johnson v. Central Vt. R. Co., 56 Vt. 707, 19 Am. & Eng. R. Cas. 169. In Illinois Cent. R. Co. v. Bryant, 70 Miss. 665, 12 So. 592, it is held that where it has been the custom for a station agent to receive notice of the assignment of the wages of employes, notice to such agent is notice to the company. See Memphis &c. Co. v. Koch, 28 Kans. 565, 9 Am. & Eng. R. Cas. 429. As to when notice to station agent is notice to the company, see Merrill v. American &c. Co., 62 N. H. 514; Great Western &c. Co. v. Wheeler, 20 Mich. 419; Wells v. American &c. Co., 44 Wis. 342.

[92] Hoffman v. Cumberland &c. R. Co., 85 Md. 391, 37 Atl. 214; Grover & Baker &c. Co. v. Missouri Pacific R. Co., 70 Mo. 672, 35 Am. Rep. 444; Marmonstein v. Pennsylvania R. Co., 68 N. Y. St. 172, 34 N. Y. S. 97; Coates v. Chicago &c. R. Co., 8 S. Dak. 173, 65 N. W. 1067; Cummins v. Dayton &c. R. Co., (Ind. Super. Ct., Marion Co.) 9 Am. & Eng. R. Cas. 36.

[93] Burroughs v. Norwich &c. Co., 100 Mass. 26; People v. Chicago &c. R. Co., 55 Ill. 95, 8 Am. Rep. 631; Erie R. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Pittsburgh &c. R. Co. v. Morton, 61 Ind. 539, 574, 28 Am. Rep. 682; Cobb v. Iowa Central R. Co., 38 Iowa 601; Grover & Baker &c. Co. v. Missouri Pac. R. Co., 70 Mo. 672, 35 Am. Rep. 444; Wait v. Albany &c. Co., 5 Lans. (N. Y.) 475, Piedmont Mfg. Co. v. Columbia &c. R. Co., 19 S. Car. 353; Oxlade v. North Eastern R. Co., 15 C. B. (N. S.) 680. See generally as to authority of agents authorized to make contracts respecting transportation of passengers and goods, Houston &c. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642; Mulligan v. Northern &c. R. Co., 4 Dak. 315, 29 N. W. 659; Michigan &c. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Angle v. Mississippi &c. R. Co., 18 Iowa 555; Missouri Pac. Co. v. Finley, 38 Kans. 550, 16 Pac. 951; Medbury v. New York &c. Co., 26 Barb. (N. Y.) 564; Riley v. New York &c. R. Co., 34 Hun (N. Y.) 97; Borden v. Richmond &c. Co., 113 N. Car. 570, 18 S. E. 392, 37 Am. St. 632.

tion in so doing, and that the agent had been furnished with blank forms of receipts by the company, by which it was provided that in case of loss or damage of the goods the corporation only should be responsible in whose actual custody the goods should be at the time, the company was held not liable for a loss occurring on a connecting line.[94] But the authority of a station agent to make contracts for the carriage of goods over connecting lines may be shown by evidence that such was the usual course of business,[95] since the company is bound by the acts of its agents which it has permitted for a length of time without objection. There is no doubt of the authority of a railroad company to enter into a valid contract of this character.[96] A local

[94] Burroughs v. Norwich &c. R. Co., 100 Mass. 26, 1 Am. Rep. 78. See also Chicago &c. R. Co. v. Ingrahma, 114 Ark. 506, 170 S. W. 232.

[95] Grover & Baker &c. Co. v. Missouri Pac. R. Co., 70 Mo. 672. See also Faulkner v. Chicago &c. R. Co., 99 Mo. App. 421, 73 S. W. 927; Gulf &c. R. Co. v. Cole, 8 Tex. Civ. App. 635, 28 S. W. 391; Bigelow v. Chicago &c. R. Co., 104 Wis. 109, 88 N. W. 95. Where a local agent of a railroad company was authorized to make a special contract for transporting a lot of corn from Illinois to Boston, but had no authority to contract for the return of a part of the freight charged, it was held that the company should not be allowed, after having availed itself of the benefits of the contract, to repudiate an agreement for the return of freight charges which he had introduced into the contract. Toledo &c. R. Co. v. Elliott, 76 Ill. 67. Where it is shown that a station agent was in the habit of receiving goods for carriage over connecting lines, and was in possession of the company's stamp to be used upon receipts, which he issued for such goods, and that the company took possession of the goods and caused them to be shipped, with, at least, a presumptive knowledge of the terms of the receipt given, the agent will be presumed to have authority to contract for the shipment of goods over a connecting line. Hansen v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791.

[96] Ohio &c. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Wheeler v. San Francisco &c. R. Co., 31 Cal. 46, 89 Am. Dec. 147; Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Feital v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Stewart v. Erie &c. Trans. Co., 17 Minn. 372; Nashua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339; Milnor v. New York &c. R. Co., 53 N. Y. 363; Cincinnati R. Co. v. Pontius, 19 Ohio St. 221; Baltimore &c. R. Co. v. Brown, 54 Pa. St. 77; Morse v. Brainerd, 41 Vt. 550; Candee v. Pennsylvania R. Co., 21 Wis. 582, 94 Am. Dec. 566; Wilby v. West Cornwall R. Co., 2

station agent has no authority, generally, to contract to furnish cars to shippers at stations other than that at which he is stationed,[97] since his authority, real or apparent, extends only to the control of the company's business at his own station.[98] He has no such authority over the company's trains as will enable him to make a binding contract for the carriage of freight on a passenger train.[99] It is no part of his duties to assign seats to passengers upon a train, hence it has been held that the company is not bound by directions given by a station agent to a passenger to ride in a dangerous place outside the car.[1] He cannot make a binding contract with the company on his own behalf without giving the company an opportunity to ratify or disaffirm it after being put in possession of the fact of his interest.[2] So, he cannot bind the company by a contract for the services of an assistant to perform a part of the duties of his office without express authority, since such a contract, by lessening the duties

Hurl. & N. 703. See also Berger &c. Co. v. Chicago &c. R. Co., 159 Wis. 256, 150 N. W. 496, 499 (citing text). And general freight agents have been held presumed to have this power. Burtis v. Buffalo &c. Co., 24 N. Y. 274; Farmers &c. Co. v. Northern Pac. R. Co., 120 Fed. 873. And see generally as to powers such agents may be presumed to have, Fremont &c. R. Co. v. New York &c. R. Co., 66 Nebr. 159, 92 N. W. 131; St. Louis &c. R. Co. v. Elgin &c. Co., 175 Ill. 557, 51 N. E. 911, 67 Am. St. 238; Baker v. Chicago &c. R. Co., 91 Minn. 118, 97 N. W. 650; Missouri &c. R. Co. v. Wells, 24 Tex. Civ. App. 304, 58 S. W. 842. But see Converse v. Norwich &c. Trans. Co., 33 Conn. 166.

97 Missouri Pac. R. Co. v. Stults, 61 Kans. 752, 3 Pac. 522; Gulf &c. R. Co. v. Hodge, 10 Tex. Civ. App. 543, 30 S. W. 829.

98 Voorhees v. Chicago &c. R. Co., 71 Iowa 735, 30 N. W. 29, 60 Am. Rep. 823.

99 Elkins v. Boston &c. R. Co., 3 Fost (N. H.) 275.

1 Little Rock &c. R. Co. v. Miles, 40 Ark. 298, 48 Am. Rep. 10.

2 Pegram v. Charlotte &c. R. Co., 84 N. Car. 696, 37 Am. Rep. 639, where the station agent negotiated for an excursion train to be run for his benefit to a Fourth of July selebration, and the court held that, his interests in the matter being adverse to those of the company, he was bound, by reason of his fiduciary relation toward the company, to disclose all material facts which would influence it in making the contract, including the fact that it was made for his own benefit, and his failure to do so would prevent him from enforcing the contract.

devolving upon him, would indirectly benefit the agent himself.[3] Upon the same principle, the railroad company cannot be held liable for the failure of its station agent to perform duties which he undertakes in pursuance of his employment by a third person as an agent for the purchase and shipment of goods. The law does not favor double agencies.[4] If he ships his own goods at a higher rate than is allowed by law, he cannot maintain an action to recover the overcharges paid, since he himself acted as the instrument by which the wrong was done and was, therefore, a party to the wrong of which he complains.[5] Where the station agent performs an act that is beyond the power of the railroad corporation itself, the corporation is not necessarily bound thereby. It has even been held (erroneously, as we think) where a station agent caused the arrest of a shipper for refusing to pay the return charges for a horse that the company was not liable to an action for false imprisonment, since the company had no authority to arrest for non-payment of charges for carriage, and could not be held to have conferred such authority upon the agent.[6] While the railroad company is, ordinarily, liable to third persons for the fraudulent conduct of the station agent within the line of his employment, it is not, ordinarily, so liable to persons having knowledge of the fraud. Accordingly, if a station agent issues a bill of lading for goods not placed in his possession and delivers it to a person acting in collusion with him, the railroad is not bound. It is held by many of the courts that as a bill of lading is not a negotiable instrument a fraudulent bill is void even in the hands of an innocent third person who has

[3] Willis v. Toledo &c. R. Co., 72 Mich. 160, 40 N. W. 205.

[4] Summer v. Charlotte &c. R. Co., 78 N. Car. 289. See also Mulligan v. Northern Pac. R. Co., 4 Dak. 315, 29 N. W. 659; Coleman v. Richer, 2 El. & Bl. 750, 75 E. C. L. 750.

[5] Steever v. Illinois Central R. Co., 62 Iowa 371, 17 N. W. 595, construing Acts 1874, ch. 68.

[6] Poulton v. London &c. R. Co., L. R. 2 Q. B. 534. But see Gulf R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. 743, where the general manager made an arrest not authorized by the charter, and the company was held liable. And if the agent had authority to make arrests under any circumstances, the company may be held liable where he used his power without justification. Goff v. Great Northern R. Co., 30 L. Jour. Q. B. 148.

been induced to advance money upon the faith of it.[7] But a number of courts hold the railroad company liable in such a case, upon the ground that it is the natural and necessary expectation of a carrier issuing bills of lading that they will pass freely from one to another and advances be made upon their faith, that the carrier has no right to believe, and never does believe, that their effect is limited to the person to whom they are first and directly issued,[8] and that it is estopped to deny the facts set out in a bill

[7] Freidlander v. Texas &c. R. Co., 130 U. S. 416, 9 Sup. Ct. 570, 32 L. ed. 991, in which Fuller, C. J., speaking for the court, says: "The law can punish roguery, but cannot always protect the purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victims." Stone v. Wabash &c. R. Co., 9 Brad. (Ill.) 48; Baltimore &c. R. Co. v. Wilkins, 44 Md. 11, 22 Am. Rep. 26. See Grant v. Norway, 2 Eng. L. & Eq. 337; Lake Shore &c. Co. v. Foster, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319; Fellows v. Steamer R. W. Powell, 16 La. Ann. 316, 79 Am. Dec. 581; National Bank v. Chicago &c. R. Co., 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. 566; Louisiana Nat. Bank v. Laveille, 52 Mo. 380; Sioux City &c. R. Co. v. First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488; Dean v. King, 22 Ohio St. 118. In Bank of N. Y. &c. v. American &c. Co., 153 N. Y. 559, 38 N. E. 713, it is held that a by-law of a corporation authorizing an officer to sign warehouse receipts does not confer upon him authority to sign a receipt for his own property.

[8] Bank of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440; Armour v. Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Wichita Savings Bank v. Atchison &c. R. Co., 20 Kans. 519. In this latter case the court says: "The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to the railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading and without further inquiry the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to purchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and

of lading issued by its accredited agent to the injury of one who has been misled thereby.[9] There is some reason for the doctrine

ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments to the markets. A mode of doing business so beneficial to so many classes ought to receive the favoring recognition of the courts to aid its continuance." See also Brooke v. New York &c. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; Dean v. Driggs, 137 N. Y. 274, 33 N. E. 326, 19 L. R. A. 302, 33 Am. St. 721.

[9] Brooke v. New York &c. R. Co., 108 Pa. St. 529, 1 Atl. 206, 56 Am. Rep. 235; St. Louis &c. R. Co. v. Larned, 103 Ill. 293; Coventry v. Great Eastern R. Co., L. R. 11 Q. B. Div. 776. Sioux City &c. R. Co. v. First Nat. Bank, 10 Nebr. 556, 7 N. W. 311, 35 Am. Rep. 488, where the leading cases holding the contrary are very fully reviewed. In this case, Maxwell, C. J., speaking for the court, says: "All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills, it will not do to say that the agent had authority to issue bills of lading duly signed, only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and when duly issued they are not the bills of the agent, but of the railroad company. The representation, therefore, thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one who, in good faith relying thereon, sees fit to make advances on the same. If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that in good faith, relying thereon, purchased or advanced money on the same? * * * The case presents every element necessary to constitute an estoppel in pais, a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon, by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in Grant v. Norway, and the cases following

declared in the cases last referred to, for the act of the station agent in such cases in issuing the bill of lading must cause loss either to his employer or to some third person, and as the employer "trusted most it must suffer most." The maxim that, "where one of two innocent persons must suffer loss by the fraud of a third person, he who put it in the power of the third to commit the fraud must bear the loss" seems applicable to such cases. Analogous cases—those where warehouse receipts were issued—give some support to the decisions under immediate mention.[10] But the weight of authority is to the effect that the company is not bound where no goods were received.[11]

it." See also Thomas v. Atlantic Coast Line R. Co., 85 S. Car. 537, 64 S. E. 220, 67 S. E. 908, 34 L. R. A. (N. S.) 1177, and cases there cited in note.

[10] Cowdrey v. Vanderburgh, 101 U. S. 572, 25 L. ed. 923; McNeil v. Hill, 1 Wool. (U. S. C. C.) 96 Fed. Cas. No. 8914; Planters' &c. Co. v. Merchants' &c. Bank, 78 Ga. 574, 3 S. E. 327; Preston v. Witherspoon, 109 Ind. 457, 9 N. E. 585, 58 Am. Rep. 417; Babcock v. People's Bank, 118 Ind. 212, 20 N. E. 732; Whitlock v. Hay, 58 N. Y. 484; Stewart v. Phœnix Ins. Co., 9 Lea (Tenn.) 104.

[11] See post, §§ 2136, 2139. See also 4 Elliott Cont. § 3157.

CHAPTER XIV.

DIVIDENDS.

Sec.
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§ 350 (304). **Rights of stockholders—Dividends.**—A stockholder has no strictly legal right to the property or undistributed profits of the corporation;[1] he has merely a right to participate, to a certain extent, in the management of the company and to share in the distribution of whatever property may remain after payment of its debts upon dissolution,[2] together with the further right, which constitutes the principal inducement to become a shareholder, of sharing in the distribution, which is made at longer or shorter intervals of time in all prosperous companies, of the

[1] Commercial Fire Ins. Co. v. Board, 99 Ala. 1, 14 So. 490, 42 Am. St. 17; Goodwin v. Hardy, 57 Maine 143; Granger v. Bassett, 98 Mass. 462; Lockhart v. Van Alstyne, 31 Mich. 76, 78, 18 Am. Rep. 156; Jones v. Terre Haute R. Co., 57 N. Y. 196; Burroughs v. North Carolina R. Co., 67 N. Car. 376, 12 Am. Rep. 611.

[2] Burrall v. Bushwick R. Co., 75 N. Y. 211, 216.

profits arising from the business which the corporation is organized to transact.[3] When a corporate profit has been ascertained, declared, ordered and set aside by the proper corporate authorities to be paid to the stockholders on demand or at a fixed time, it is termed a dividend.[4] A resolution ascertaining the amount of the corporate profits, and declaring them payable to the stockholders, is a declaration of a dividend, even though it leaves the time of payment to be fixed afterward by the directors.[5]

§ 351 (305). **When dividend belongs to stockholder—Assignment.**—The dividend belongs to the holder of the shares at the time it is declared,[6] and so soon as it is due it becomes his abso-

[3] Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, 331, Fed. Cas. No. 4926; Plimpton v. Bigelow, 93 N. Y. 592, 599.

[4] Mobile &c. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793; Alsop v. De Koven, 107 Ill. App. 190; Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449; Chaffee v. Rutland R. Co., 55 Vt. 110; Webb v. Earle, L. R. 20 Eq. 556; "A dividend is that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation and to become the property of the shareholders distributively." 2 Thomp. Corp. § 2126, citing King v. Patterson &c. R. Co., 29 N. J. L. 82. See also 5 Thomp. Corp. (2nd. ed.), § 5271.

[5] March v. Eastern R. Co., 43 N. H. 515; Foote, Appellant, 22 Pick. (Mass.) 299; King v. Paterson &c. R. Co., 29 N. J. L. 82, 504; Simpson v. Moore, 30 Barb. (N. Y.) 637; Earp's Appeal, 28 Pa. St. 368; De Gendre v. Kent, L. R. 4 Eq. Cas. 283. See also Northwestern Marble Co. v. Carlson, 116 Minn. 438, 133 N. W. 1014, Ann. Cas. 1913B, 552. But where the time of payment is not fixed, it has been held that a bill in equity is the appropriate and only remedy. Scott v. Eagle &c. Co., 7 Paige (N. Y.) 198; Pratt v. Pratt, Read & Co., 33 Conn. 446.

[6] Wright v. Tuckett, 1 Johns. & H. (Eng. Ch.) 266; Central R. &c. Co. v. Papot, 59 Ga. 342; Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732; Baltimore City Pass. R. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402; note in 45 L. R. A. 392; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157, 178; Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. 771. All dividends declared previous to the death of the stock-

lute property.[7] If the dividend be made payable on a day subsequent to that on which it is declared, the stockholder may, between the time it is declared and the time it becomes payable, assign and transfer either the stock[8] or the dividend[9] without affecting his title to the other, although a devise of the dividends without qualification has been held to carry with it the stocks themselves.[10] The fact that a dividend was earned before a transferee purchased his stock will not affect his title to dividends declared after such purchase.[11] He is entitled to all dividends declared

holder, and remaining unpaid, go to his administrator, even though not yet payable. Kernochan, In re, 104 N. Y. 618, 11 N. E. 149; De Gendre v. Kent, L. R. 4 Eq. 283; 5 Thomp. Corp. (2nd. ed.), § 5330.

[7] Germain v. Lake Shore &c. R. Co., 91 N. Y. 483; Keppel v. Petersburg R. Co., Chase's Dec. (U. S.) 167, Fed. Cas. No. 7222; King v. Paterson &c. R. Co., 29 N. J. L. 82 and 504; Scott v. Central R. Co., 52 Barb. (N. Y.) 45. Where, however, the fact that a dividend has been voted by directors is not made public or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded. Ford v. East Hampton Rubber-Thread Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. 462. A potential right to a dividend is not a debt until the dividend is declared. Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; London &c. Co., Re, L. R. 5 Eq. 519; Stevens v. South Devon &c. R. Co., 9 Hare 313. It then becomes a debt due from the corporation. Wheller v. Northwestern &c. Co., 39 Fed. 347. See also Northwestern Marble &c. Co. v. Carlson, 116 Minn. 438, 133 N. W. 1014, Ann. Cas. 1913B, 552.

[8] Wright v. Tuckett, 1 Johns. & H. (Eng. Ch.) 266; Wheeler v. Northwestern &c. Co., 39 Fed. 347; Hill v. Newichawanick Co., 71 N. Y. 593 Contra Burroughs v. North Carolina R. Co., 67 N. Car. 376, 12 Am. Rep 611 Ohio City v. Cleveland &c. R Co., 6 Ohio St. 489. In Kennedy v. First Nat. Bank, 115 N. Car. 223 20 S. E. 375, it was held that where a widow, to whom dividends were bequeathed during her life or widowhood, with remainder over to her daughter, consented to the transfer of the certificate of stock to the daughter, she waived all claim to the dividend.

[9] Brundage v. Brundage, 60 N. Y. 544; Curry v. Woodward, 44 Ala. 305; Black v. Homersham, L. R. 4, Exch. Div. 24 See also Cook v. Monroe, 45 Nebr. 349, 63 N. W. 800, 11 Nat. Corp. R. 5.

[10] Collier v. Collier, 3 Ohio St. 369.

[11] Central R. &c. Co. v. Papot, 59 Ga. 342; Ryan v. Leavanworth &c. Co., 21 Kans. 365, 403; March v. Eastern R. Co., 43 N. H. 515; Jermain v. Lake Shore &c. R. Co., 91 N. Y. 483. See also Nickals v. New York &c. R. Co., 15 Fed. 575.

while he owns it.[12] A sale of shares of stock, including all dividends due or to become due thereafter, has also been held to include a stock dividend.[13]

§ 352 (306). **To whom dividends should be paid.**—The general rule is that in cases of periodical payments due at intervals, and not falling due from day to day, there can be no apportionment.[14] Owning an option to purchase stock does not entitle the vendee to dividends declared before he has closed the bargain and while he still has the right to either purchase or refuse the stock,[15] although an absolute purchase of stock to be delivered at the seller's option will entitle the purchaser to all dividends declared after entering into the original contract of purchase.[16] And where an offer to sell shares is accepted before revocation, it has been held that the acceptor may claim all dividends declared after the date of the offer,[17] for the bargain is presumed to have been made with reference to the value of the shares at the time the offer was made. The corporation may generally pay the dividend to the person in whose name the stock is registered upon the books of the company[18] without injury,[19] and it will be pro-

[12] Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 637, 22 L. ed. 840; Goodwin v. Hardy, 57 Maine 143; March v. Eastern R. Co., 43 N. H. 515; Jones v. Terre Haute &c. R. Co., 57 N. Y. 196. If he acquires it by devise he takes all dividends declared after the death of his testator. Phelps v. Farmers' &c. Bank, 26 Conn. 269. See note in 45 L. R. A. 393.

[13] Rose v. Barclay, 191 Pa. St. 594, 43 Atl. 385, 45 L. R. A. 392, and note.

[14] Clapp v. Astor, 2 Edw. Ch. (N. Y.) 379. See note in 45 L. R. A. 396.

[15] Bright v. Lord, 51 Ind. 272, 19 Am. Rep. 732.

[16] Currie v. White, 45 N. Y. 822; Black v. Homersham, L. R. 4 Exch. Div. 24. See also Phinizy v. Murray, 83 Ga. 747, 10 S. E. 358, 6 L. R. A. 426, 20 Am. St. 342.

[17] Harris v. Stevens, 7 N. H. 454. But see Hopper v. Sage, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. 771.

[18] Brisbane v. Delaware &c. R. Co., 94 N. Y. 204; Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412; Cook v. Monroe, 45 Nebr. 349, 63 N. W. 800, 11 Nat. Corp. R. 5; Cleveland &c. R. Co. v. Robbins, 35 Ohio St. 483.

[19] Jones v. Terre Haute &c. R. Co., 29 Barb. (N. Y.) 353; Northrop v. Newton &c. Tpk. Co., 3 Conn. 544

tected even though he has transferred the shares.[20] But where the corporation has due notice of a transfer, it should pay the money only to the transferee,[21] and it seems that it may properly do so, even though he has not yet been registered as a stockholder.[22] If a stockholder dies, his administrator is the proper party to receive dividends on his stock,[23] for dividends declared before, though payable after the owner's death, belong to the estate, even as against the devisees of the stock.[24] His heirs, it is said, can only claim the dividends after they have procured the shares to be transferred to themselves.[25] Where the corporation closed its transfer books some days before the declaration of a dividend, parties who applied for and where refused registry while the books remained closed were held entitled to the dividend when declared.[26] If the corporation should pay a dividend

[20] Cleveland &c. R. Co. v. Robbins, 35 Ohio St. 483; Bell v. Lafferty, 1 Penny. (Pa.) 454.

[21] Jones v. Terre Haute &c. R. Co., 57 N. Y. 196, 205; Timberlake v. Shipper &c. Co., 72 Miss. 323, 16 So. 530; note in 45 L. R. A. 397; Robinson v. National Bank, 95 N. Y. 637, where the corporation had improperly refused to register a transfer.

[22] See Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412. It has also been held that a pledgee has a right to dividends declared during the pendency of the pledge, although not transferred on the corporate books. Brady v. Irby, 101 Ark. 573, 142 S. W. 1124, Ann. Cas. 1913E, 1054. In the note to this case as last reported other authorities are also cited to the effect that, in the absence of contract to the contrary the pledgee is entitled to dividends declared during such time.

[23] Brisbane v. Delaware &c. R. Co., 94 N. Y. 204.

[24] De Gendre v. Kent, L. R. 4 Eq. 283; Kernochen, Re, 104 N. Y. 618, 11 N. E. 149.

[25] State v. New Orleans &c. R. Co., 30 La. Ann. 308.

[26] Jones v. Terre Haute &c. R. Co., 57 N. Y. 196, 205; Robinson v. National Bank, 95 N. Y. 637. Where the corporation is authorized by statute or by charter to close its books under such circumstances, the holding would, perhaps, be different. If the corporation refuses to transfer stock to a purchaser upon application regularly made, it has been held that he may maintain a suit against it for a dividend due on his stock, without first compelling a transfer of stock to him by proceeding in equity. Hill v. Atoka &c. Co. (Mo. Sup.), 21 S. W. 508. This case was afterward reversed, however, by the court in banc, upon other grounds. The decision reversing it is found in 124 Mo. 153, 25 S. W. 926.

to a person as a stockholder, although he may have wrongfully held the stock, one claiming to be the real owner of the stock, but not an admitted stockholder, cannot establish his right thereto in the first instance, it seems, by an action against the stockholder to recover such dividend, as for money had and received. His action to recover the dividend could only be maintained against the corporation, if it could be maintained at all, and he cannot follow the assets into the hands of others without first establishing his rights as a creditor of the corporation.[27]

§ 353 (307). Rights of life tenant and remainderman—Apportionment of dividends.—An ordinary cash dividend declared during the existence of the life tenancy goes, presumptively at least, to the life tenant,[28] but where stock is held in trust for a life tenant with remainder over, the rule has been laid down that all dividends declared from profits earned during the tenancy belong to the life tenant,[29] while extraordinary dividends amounting only to a distribution of a portion of the invested capital,[30] or a distribution of profits earned or accumulated before the tenancy

[27] Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392, distinguishing LeRoy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657, and Le Blanc, In re, 75 N. Y. 598. See however Cook v. Monroe, 45 Neb. 349, 63 N. W. 800, 11 Nat. Corp. Rep. 5.

[28] Richardson v. Richardson, 75 Maine 570, 46 Am. Rep. 428; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Bates v. MacKinley, 31 Beav. 280; 2 Thomp. Corp. §§ 2193, 2201. See also "The rule in Minot's Case," by Judge Corliss, in 33 Alb. L. Jour. 106; De Koven v. Alsop, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930.

[29] Earp's Appeal, 28 Pa. St. 368; Biddle's Appeal, 99 Pa. St. 278; Oliver's Estate, 136 Pa. St. 43, 20 Atl. 527, 9 L. R. A. 421, 20 Am. St. 894. If the last preceding dividend was made at a regular and reasonable time, before a cash dividend declared after the life estate arose, it will be given to the life tenant, regardless of the time when it was earned. Richardson v. Richardson, 75 Maine 570, 46 Am. Rep. 428; Jermain v. Lake Shore &c. R. Co., 91 N. Y. 483; Barclay v. Wainwright, 14 Ves. 66. See also note in 35 L. R. A. (N. S.) 563, and 50 L. R. A. (N. S.) 510;

[30] Vinton's Appeal, 99 Pa. St. 434, 44 Am. Rep. 116; Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687; Gifford v. Thompson, 115 Mass. 478; Wheeler v. Perry, 18 N. H. 307.

arose,[31] belong to the remainderman. This rule is followed, either in whole or in part, in the greater number of the states, of the American union,[32] and can be objected to, it is said, only because of the difficulty in applying it in particular cases.[33] In Massa-

[31] Pennsylvania Co. v. Dovey, 64 Pa. St. 260; Moss's Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; Smith's Estate, 140 Pa. St. 344, 21 Atl. 438, 23 Am. St. 237.

[32] Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; De Koven v. Alsop, 205 Ill. 309, 68 N. E. 930, 63 L. R. A. 587; Hite v. Hite, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. 189; Hite v. Hite, 2 Ry. & Corp. L. J. (Ky.) 568; Gilkey v. Paine, 80 Maine 319, 14 Atl. 205; Peirce v. Burrough, 58 N. H. 302; Van Doren v. Olden, 19 N. J. Eq. 176, 97 Am. Dec. 650; Kernochan, In re, 104 N. Y. 618, 11 N. E. 149; Smith's Estate, 140 Pa. St. 344, 21 Atl. 438, 23 Am. St. 237; Cobb v. Fant, 36 S. Car. 1, 14 S. E. 959. The rule seems to be somewhat unsettled in New York. Compare Goldsmith v. Swift, 25 Hun (N. Y.) 201; Warren, In re, 33 N. Y. St. 584, 11 N. Y. S. 787; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646; Simpson v. Moore, 30 Barb. (N. Y.) 637; Riggs v. Cragg, 89 N. Y. 479; Kernochan, In re, 104 N. Y. 618, 11 N. E. 149. See also McLouth v. Hunt, 154 N. Y. 179, 48 N. E. 548, 39 L. R. A. 230; Lowry v. Farmers' &c. Co., 172 N. Y. 137, 64 N. E. 796. Compare Osborne, In re, 209 N. Y. 450, 103 N. E. 723, 50 L. R. A. (N. S.) 510, and cases cited, Ann. Cas. 1915A, 298n. And see for other authorities supporting this rule and making some distinctions, Poole v. Union Trust Co., 191 Mich. 162, 157 N. W. 430, Ann. Cas. 1918E, 622, and cases cited in opinion and note. Authorities on both sides are also reviewed in notes in Ann. Cas. 1912B, 1216, and 1915A, 298.

[33] Earp's Appeal, 28 Pa. St. 368. In 33 Alb. L. Jour. 427, Judge Corliss lays down the following rules upon this subject: "1. If the dividend is made up of profits, the dividend goes to the life tenant, irrespective of the form in which it is declared. 2. The life tenant is entitled to all dividends, whether in cash or in stock, declared during the existence of his interest, whether they consist of profits which have accrued subsequently to the vesting of the life estate, or in part of earnings of the corporation which had accumulated at the time of the devolution upon the life tenant of his interest in the property. 3. That in so far as any dividend consists of money, derived from an increase in the value of the corporation property, or is derived from any source other than the net earnings of the company, the life tenant can claim no interest therein. 4. That not only is it beyond the power of the corporation to bind the life tenant by dividing net earnings in the form of capital stock, but the life tenant can always show the true nature and source of the dividend, in spite of any act of declaration to the con-

chusetts,[34] Georgia,[35] Rhode Island,[36] and the District of Columbia,[37] the courts look only to the declaring the dividend, to ascertain who is entitled to it, but hold, in general, that a dividend payable in money shall be regarded as income, and given to the life tenant, while a dividend payable in stock shall be regarded as capital and given to the remainderman,[38] since it is thought unwise to attempt to ascertain how the corporation came by the funds out of which either cash or stock dividends are declared,[39] and since a stock dividend does not, as a rule, increase the interest of the shareholders in the property of a corporation, but merely dilutes their shares and is only a new evidence of their interests.[40] For this reason it is held that such a dividend generally constitutes capital rather than income, and goes to the remainderman.[41] It has also been held that new shares of preferred stock issued in double the amount of the old shares, but at

trary; and that, on the other hand, the remainderman may prove that a dividend which apparently belongs to the life tenant is in fact the property of the remainderman."

[34] Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705; Daland v. Williams, 101 Mass. 571; New England Trust Co. v. Eaton, 140 Mass. 532, 4 N. E. 69, 54 Am. Rep. 493. But see Davis v. Jackson, 152 Mass. 58 25 N. E. 21, 23 Am. St. 801.

[35] Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720, construing Code Ga. § 2256.

[36] Parker v. Mason, 8 R. I. 427; Petition of Brown, 14 R. I. 371, 51 Am. Rep. 397; Newport Trust Co. v. Van Rensselaer, 32 R. I. 231, 78 Atl. 1009, 35 L. R. A. (N. S.) 563. The state of the law in the different jurisdictions is shown with citation of recent cases in the note to the above case as last reported. See also notes in 12 L. R. A. (N. S.) 768, 50 L. R. A. (N. S.) 510.

[37] Gibbons v. Mahon, 4 Mackey (D. C.) 130, 54 Am. Rep. 262.

[38] Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705. See also De Koven v. Alsop, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930.

[39] Boston &c. R. Co. v. Commonwealth, 100 Mass. 399.

[40] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525.

[41] Terry v. Eagle Lock Co., 47 Conn. 141; Spooner v. Phillips, 62 Conn. 62, 24 Atl. 524, 16 L. R. A 461, and note; Millen v. Guerrard, 67 Ga. 292; Greene v. Smith, 17 R. I. 28, 19 Atl. 1081; De Koven v. Alsop, 205 Ill. 309, 63 L. R. A. 587, 68 N. E. 930. See also notes in 12 L. R. A. (N. S.) 768; 35 L. R. A. (N. S.) 563, and 50 L. R. A. (N. S.) 510, for a review of the conflicting cases and statement of the rule in each jurisdiction.

one-half the rate of interest, in compromise of claims of the holders for back and unpaid dividends, constitute capital and not income as between the life tenant and remainderman.[42] A strict adherence to this rule would so clearly be productive of hardship and injustice that some modifications have been engrafted upon it in Massachusetts, where it was first announced, and it is held that the court will take into consideration the whole character of the property and the transaction, with due regard to all the facts preceding, attending, and resulting from the declaration of the dividend, in order to determine whether the dividend rightfully belongs to the owner of the stock or to the owner of the income.[43] Accordingly, it is held that a dividend payable in stock purchased with the surplus earnings of the corporation belongs absolutely to the life tenant,[44] and that a cash dividend of forty per cent., for the payment of which no fund is provided, but which is declared to be receivable in payment for shares of stock issued under a power to increase the capital stock, is virtually a stock dividend, and must go to the remainderman,[45] as must also the compensation paid to the corporation for a part of its real estate taken by right of eminent domain, and distributed to the stockholders as a cash dividend.[46] In England, the courts originally followed the rule that regular cash dividends belong to the life tenant as income, while extraordinary dividends, or bonuses, belong to the remainderman,[47] but the tendency at the present time seems to be to hold the action of the corporation conclusive, so that, if it declares even an extraordinary dividend during the existence of the life tenancy, it goes to the life tenant, and if it treats the earnings as capital they will not go to the life tenant.[48] A bonus, however, which is paid from profits that

[42] Mills v. Britton, 64 Conn. 4 29 Atl. 231, 24 L. R. A. 536.

[43] Daland v. Williams, 101 Mass. 571; Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121.

[44] Leland v. Hayden, 102 Mass. 542.

[45] Daland v. Williams, 101 Mass. 571.

[46] Heard v. Eldredge, 109 Mass. 258, 12 Am. Rep. 687.

[47] Brander v. Brander, 4 Ves. 800; Paris v. Paris, 10 Ves. Jr. 185; Irving v. Houston, 4 Paton Scotch, H. L. 521; Murray v. Glasse, 17 Jur. 816.

[48] Bouch v. Sproule, L. R. 12 App. Cas. 385, 397; Barton's Trust, In re, L. R. 5 Eq. 238; Price v. Anderson, 15 Sim. 473; Ellis v. Barfield, 64 L. T. R. 625. But see Sugden v. Alsbury, 63 L. T. R. 576.

have been fraudulently retained to the prejudice of the rights of the life tenant, will be given to him as income deferred.[49] The rules to which we have referred are those announced by the courts in their endeavor to accomplish justice in the absence of any statute authorizing an apportionment, and in the absence of any clearly expressed intention on the part of the grantor or testator. Where the intent of the grantor or testator is clearly apparent, it will control, and the courts will be guided by it.[50] In case the life tenant dies before a dividend is declared, the general rule is that it cannot be apportioned, but belongs wholly to the remainderman.[51] But in England[52] and in several states in this country,[53] dividends are made apportionable by statute, while in one or two states there is a tendency to hold dividends apportionable at common law.[54] The worth or value of a privilege accorded to shareholders of taking new shares upon an increase of the capital stock, belongs to the remainderman,[55] but the in-

[49] Maclaren v. Stainton, L. R. 11 Eq. 382; Dale v. Hayes, 40 L. J. Ch. 244; Edmondson v. Crosthwaite, 34 Beav. 30.

[50] Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057 34 L. ed. 525; Millen v. Guerrard, 67 Ga. 284, 44 Am. Rep. 720; Reed v. Head, 6 Allen (Mass.) 174; Clarkson v. Clarkson, 18 Barb. (N. Y.) 646; Thomson's Appeal, 89 Pa. St. 36; Bushee v. Freeborn, 11 R. I. 149; Bouch, In re, L. R. 29 Ch. Div. 635. See also Soehnlein v. Soehnlein, 146 Wis. 330, 131 N. W. 739.

[51] Granger v. Bassett, 98 Mass. 462; Quinn v. Madigan, 65 N. H. 8, 17 Atl. 976; Brundage v. Brundage, 60 N. Y. 544, 551; King v. Follett, 3 Vt. 385; Pearly v. Smith, 3 Atk. 260 (1745); Scholefield v. Redfern, 2 Drew. & Sm. 173. But compare Johnson v. Bridgewater &c. Co., 14 Gray (Mass.) 274.

[52] 33, 34 Vict. Ch. 35, § 2; Beavan v. Beavan, 53 L. T. R. 245.

[53] See 5 Thomp. Corp. (2nd. ed.), § 5414, et seq.; 6 Fletcher's Ency. Corp., § 3711, et seq.; note in 12 L. R. A. (N. S.) 768, et seq.

[54] Rutledge, Ex parte, 1 Harper's Eq. (S. Car.) 65, 14 Am. Dec. 696; Wilson's Appeal, 108 Pa. St. 344. See also Smith's Estate, 140 Pa. St. 344, 21 Atl. 438, 23 Am. St. 237.

[55] Brinley v. Grou, 50 Conn. 66, 47 Am. Rep. 618; Hite v. Hite, 93 Ky. 257, 20 S. W. 878, 19 L. R. A. 173, 40 Am. St. 189; Atkins v. Albree, 94 Mass. 359; Goldsmith v. Swift, 25 Hun (N. Y.) 201; Kernochan, In re, 104 N. Y. 618, 11 N. E. 149; Biddle's Appeal, 99 Pa. St. 278; Sanders v. Bromley, 55 L. T. R. (N. S.) 145. But see Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585.

come from the money received upon the sale of such a privilege, or from the stock which is taken by the trustee under such a privilege for the benefit of the trust, belongs, it seems, to the life tenant.[56]

§ 354 (308). **Duties of life tenant—Transfers.**—The calls which are made during the continuance of his estate must, generally, be paid by the life tenant,[57] who must also keep down taxes on the stock.[58] He is not entitled to have the stock transferred to him on the corporate books,[59] and the corporation may be held liable to the remainderman for enabling the life tenant to dispose of the shares to his injury.[60] But the life tenant may hold the administrator permitting a transfer[61] or the corporation making it[62] (where it has notice of the trust) liable for his interests in shares transferred in fraud of his rights.

§ 355 (309). **Dividend is not property of the corporation—Rights of creditors and stockholders.**—From the time a dividend becomes due it ceases to be a part of the property of the corporation.[63] The creditors of the corporation cannot claim it in prefer-

[56] Moss's Appeal, 83 Pa. St. 264, 24 Am. Rep. 164. There is more or less difference of opinion in different jurisdictions as to nearly every proposition stated in this section, but we have cited the leading cases and referred to notes in which those in each jurisdiction are reviewed to such an extent that the law in each jurisdiction may be found. The subject is also elaborately treated in 5 Thomp. Corp. (2nd. ed.), § 5389, et seq.

[57] Box's Trusts, In re, 9 L. T. (N. S.) 372. But the testator's estate is liable for a call which becomes due the day after his death. Emery v. Wason, 107 Mass. 507.

[58] Citizens' Mut. Ins. Co. v. Lott, 45 Ala. 185; Webb v. Burlington, 28 Vt. 188.

[59] Collier v. Collier, 3 Ohio St. 369; State v. Robinson, 57 Md. 486; Hyatt v. Allen, 56 N. Y. 553, 15 Am. Rep. 449.

[60] Caulkins v. Memphis &c. Co., 85 Tenn. 683, 4 S. W. 287, 4 Am. St. 786.

[61] Keeney v. Globe Mill Co., 39 Conn. 145.

[62] Stewart v. Firemen's Ins. Co., 53 Md. 564.

[63] But until the dividend is declared, corporate profits belong to the corporation and may be seized by its creditors. Curry v. Woodward, 44 Ala. 305; Rand v. Hubbell, 115 Mass. 461, 474, 15 Am. Rep. 221.

ence to the stockholder,[64] even though the corporation may have become insolvent after the money was in good faith set apart with which to pay it, but before it was actually paid.[65] Where, however, a sufficient surplus is on hand with which to pay the dividend at the time it is declared, but before it is due this surplus is swept away by fraud of one of the officers, or by other unforeseen circumstances, it has been held that the corporation may be restrained from paying dividends out of its other funds.[66] And where no specific fund is set apart for the payment of dividends, a shareholder who has not claimed or received his money before the corporation becomes insolvent, has, it seems, but a claim against the corporation, to be enforced like those of other creditors.[67] A specific fund deposited in bank for the payment of dividends which have been lawfully declared, cannot be reclaimed by the corporation or by a receiver,[68] but can be used only for that purpose, though it will be and remain at the risk of the corporation until a reasonable time after notice is given to the stockholder.[69] If the bank fails after such a reasonable time has elapsed, the loss will fall upon the stockholder.[70]

§ 356 (310). **Dividend is irrevocable—Actions concerning.**—A dividend once legally declared cannot be revoked,[71] unless, per-

[64] Van Dycke v. McQuade, 86 N. Y. 38; New Hampshire Sav. Bank v. Richey, 121 Fed. 956.

[65] As where a great fire rendered an insurance company insolvent. Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657.

[66] Fawcett v. Laurie, 1 Drew. & Sm. 192.

[67] Lowne v. American Fire Ins. Co., 6 Paige (N. Y.) 482; Curry v. Woodward, 44 Ala. 305.

[68] Le Blanc, Matter of, 14 Hun (N. Y.) 8; Beers v. Bridgeport Spring Co., 42 Conn. 17. The stockholder may follow the fund.

[69] King v. Paterson &c. R. Co., 29 N. J. L. 82, 504.

[70] King v. Paterson &c. R. Co., 29 N. J. L. 82, 504.

[71] Beers v. Bridgeport Spring Co., 42 Conn. 17. See also Armant v. New Orleans &c. R. Co., 41 La. Ann. 1020, 7 So. 35. But it has been held that where dividends have been improperly and unlawfully paid they may be reclaimed. Lexington &c. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Slayden v. Seip, 25 Mo. App. 439, 446. See also McKusick v. Seymour &c. Co., 48 Minn. 172, 50 N. W. 1116. The right to reclaim a dividend paid by an insolvent corporation passes to its assignee if the terms of the assignment are sufficiently comprehensive.

haps, where no fund has been set apart, and the declaration is rescinded before it is made public, and before the time fixed for the payment of the dividend.[72] It becomes a debt due from the corporation which may be enforced by action at law,[73] like any other debt. But only the owner of the stock can maintain an action for this cause. Mere possession of the certificate, or even a special property therein, is not always enough.[74] Such an action should, ordinarily, be brought against the corporation as such, and not against the corporate officers,[75] and should be preceded by a demand for payment.[76] But a stockholder cannot, as a rule at least, sue for profits until a dividend has been declared,[77] even though the dividends have been guaranteed to the corporation by an-

Main v. Mills, 6 Biss. (U. S.) 98, Fed. Cas. No. 8974; Lexington &c. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165.

[72] Ford v. Easthampton &c. Co., 158 Mass. 84, 32 N. E. 1036, 20 L. R. A. 65, 35 Am. St. 462.

[73] Coey v. Belfast &c. R. Co., Ir. Rep. 2 C. L. 112; Keppel v. Petersburg R. Co., Chase's Dec. (U. S.) 167, Fed. Cas. 7722; Southwestern &c. R. Co. v. Martin, 57 Ark. 355, 21 S. W. 465; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; King v. Paterson &c. R. Co., 29 N. J. L. 504; Jones v. Terre Haute &c. R. Co., 57 N. Y. 196; Ohio City v. Cleveland &c. R. Co., 6 Ohio St. 489; West Chester &c. R. Co. v. Jackson, 77 Pa. St. 321; Dalton v. Midland Counties R. Co., 13 C. B. 474. See also Northwestern Marble &c. Co. v. Carlson, 116 Minn 438, 133 N. W. 1014, Ann. Cas. 1913B, 552n. But see Fawcett v. Laurie, 1 Drew. & Sm. 192, as to the case of a loss of all the profits after the dividend is declared and before it is paid.

[74] Dow v. Gould &c. Minn. Co., 31 Cal. 629. See also Berford v. New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. S. 836.

[75] French v. Fuller, 23 Pick. (Mass.) 108; Smith v. Poor, 40 Maine 415, 63 Am. Dec. 672. But where the treasurer retained dividends under claim that he was owner of the shares, an action against him individually was sustained. Williams v. Fullerton, 20 Vt. 346. But see Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392.

[76] State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Bank of Louisville v. Gray, 84 Ky. 565; King v. Paterson &c. R. Co., 29 N. J. L. 504; Scott v. Central R. &c. Co., 52 Barb. (N. Y.) 45, where a letter of inquiry was held insufficient demand. The suit has been held a sufficient demand of itself. Keppell v. Petersburg R. Co., Chase's Dec. (U. S.) 167, Fed Cas. No. 7722; Robinson v. National Bank, 95 N. Y. 637.

[77] Beveridge v. New York &c. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. See also note in Ann. Cas. 1913B, 553.

other corporation which has leased the road.[78] The mere fact that profits may have arisen from the transaction of the corporate business gives him no absolute right to an immediate distribution thereof in the way of dividends.[79] If suits be brought by different parties to recover the same dividend, the corporation may require them to interplead.[80] The corporation, it has been held, cannot defend against a suit for such a dividend, on the ground that it had no legal authority to declare a dividend, where dividends have been paid to a majority of the stockholders and are retained by them.[81] But where the corporation has a lien on the shares for a debt due it from the stockholder, it may set up the debt by way of set-off or counter-claim.[82]

[78] Flagg v. Manhattan R. Co., 10 Fed. 413, 21 Am. Law Reg. (U. S.) 775, 10 Blatchf. 142; Beveridge v. New York &c. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Harkness v. Manhattan R. Co., 54 N. Y. Super. Ct. 174. And it has been held that an agreement to pay a shareholder a certain specified dividend each year is ultra vires and cannot be enforced. Elevator Co. v. Memphis &c. R. Co., 85 Tenn. 703, 4 Am. St. 798. But see Taft v. Hartford &c. R. Co., 8 R. I. 310, 5 Am. Rep. 575, and ante, §§ 95, 96.

[79] Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Phelps v. Farmers' &c. Bank, 26 Conn. 369; Minot v. Paine, 99 Mass. 101, 96 Am. Dec. 705. See also Gordon v. Richmond &c. R. Co., 78 Va. 501.

[80] Salisbury Mills v. Townsend, 109 Mass. 115.

[81] Stoddard v. Shetucket Foundry Co., 34 Conn. 542. And where the minutes of the meeting at which the dividend was alleged to have been declared showed that a resolution declaring the dividend was offered and seconded, but failed to show its adoption, it was held competent to prove that the dividend was really declared by proof that each officer of the company had acted on the assumption that the resolution had been adopted, and that, in accordance therewith, every stockholder, with the exception of plaintiff, had received his pro rata share of the dividend. Southwestern &c. R. Co. v. Martin, 57 Ark. 355, 21 S. W. 465.

[82] King v. Paterson &c. R. Co., 29 N. J. L. 504. It is held that a lien upon dividends may still exist after the lien upon shares is taken away by statute. Hagar v. Union Nat. Bank, 63 Maine 509. It is held that no such lien can be claimed upon dividends due the estate of a deceased shareholder. Merchants Bank v. Shouse, 102 Pa. St. 488; Brent v. Bank &c., 2 Cranch C. C. (U. S.) 517, Fed. Cas. No. 1834. Nor can a set-off be claimed where the shares have been assigned, with the knowledge of the corporation, before the declaration of the dividend. Gemmell v. Davis, 75 Md. 546, 23 Atl. 1032, 32 Am. St. 412.

§ 357 (311). Demand—Necessity and effect of.—Interest can only be recovered from the time of a demand and refusal to pay the dividend after it has been declared and becomes due,[83] and the statute of limitation may only run from that time.[84] So, it has been held in Louisiana that prescription will not run against a person who is ignorant of his right to dividends, except from the date when he learns of his supposed claim and makes a demand, since dividends are payable only on demand, and cannot be said to be due until demanded.[85] A demand is sufficient if made upon the bank or person through whom the dividend is payable.[86]

§ 358 (312). Declaration of dividend discretionary with directors.—In general, the determination of the question whether a dividend shall be declared rests in the discretion of the directors,[87]

[83] Keppels v. Petersburg R. Co., Chases' Dec. (U. S.) 167, Fed. Cas. No. 7722; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363, 387; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157, 187; Philadelphia &c. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128. A different rule is applied to dividends on preferred stock not paid when due. See Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157. And it has been said that in New York interest is not dependent on demand. Prouty v. Michigan Southern &c. R. Co., 1 Hun (N. Y.) 655, 657; Adams v. Port Plain Bank, 36 N. Y. 255.

[84] State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Philadelphia &c. R. Co. v. Cowell, 28 Pa. St. 329, 70 Am. Dec. 128. See also Terre Haute &c. R. Co. v. Indiana, 194 U. S. 579, 24 Sup. Ct. 767, 48 L. ed. 1124; 5 Thomp. Corp. (2nd. ed.), §§ 5374, 5375.

[85] Armant v. New Orleans &c. R. Co., 41 La. Ann. 1020, 7 So. 35. This was a case in which a company, on reorganization was granted a new charter providing that dividends not claimed within three years should be forfeited, and an old stockholder who did not know of his rights nor of the reorganization was held not to be affected by this provision, until, being apprised of his rights and liabilities, he asserted his claim to dividends by making a demand.

[86] King v. Paterson &c. R. Co., 29 N. J. L. 504.

[87] Howell v. Chicago &c. Co., 51 Barb. (N. Y.) 378; Ely v. Sprague, Clarke Ch. (N. Y.) 351; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Barnard v. Vermont &c. R. Co., 7 Allen (Mass.) 512; Field v. Lamson &c. Co., 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136; Hunter v. Roberts, 83 Mich. 63, 47 N. W. 131, 9 R. & Corp. L. J. 90, 31 Am. & Eng. Corp. Cas. 349; Mc-

and they may invest the profits to properly extend or develop the business,[88] or to provide for the payment of future indebtedness, subject only to the rule that they must act in good faith and within the limits of the corporate powers.[89] Under an English statute, however, directors are required to report the condition of the company to the stockholders and to be guided by their determination as to when a dividend shall be declared.[90] Some authorities hold that the company should increase its capital before extending its business, and that the directors, by taking its earnings for the latter purpose, commit a gross violation of duty; and that in case the earnings have been so used by them they should increase the capital stock

Lean v. Pittsburgh &c. Co., 159 Pa. St. 112, 28 Atl. 211; Chaffee v. Rutland R. Co., 55 Vt. 110; Browne v. Monmouthshire R. &c. Co., 13 Beav. 32; 5 Thomp. Corp. (2nd. ed.), § 5290, et seq. The discretion of the directors in controlling the policy of the corporation as to payment of cash dividends, if honestly exercised, will not be interfered with by the courts. Zellerbach v. Allenberg, 99 Cal. 57, 33 Pac. 786; Excelsior &c. Co. v. Pierce, 90 Cal. 131, 27 Pac. 44. But this discretion may be limited by law or contract. Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162. Compare American Wire Nail Co. v. Gedge, 96 Ky. 513, 29 S. W. 353.

[88] Pratt v. Pratt, 33 Conn. 446; Durfee v. Old Colony &c. R. Co., 5 Allen (Mass.) 230. Where a dividend has been declared and partly paid, the corporation cannot defeat the payment of the rest by investing the remainder of the profits in permanent improvements. Beers v. Bridgeport Spring Co., 42 Conn. 17; Miller v. Illinois Central R. Co., 24 Barb. (N. Y.) 312. But it has been held that a dividend may be declared for a fiscal year subsequent to that in which the profits were earned. Mills v. Northern R. Co., L. R. 5 Ch. App. Cas. 621.

[89] Karnes v. Rochester &c. R. Co., 4 Abb. Pr. (N. Y.) N. S. 107, the court saying: "The court cannot undertake to say judicially that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue." Belfast &c. R. Co. v. Belfast, 77 Maine 445; Lord v. Brooks, 52 N. H. 72; March v. Eastern R. Co., 43 N. H. 515. This rule is adhered to very strictly where holders of common stock seek to have a dividend declared, but where holders of preferred stock seek to enforce their rights, the courts sometimes depart very far from this rule in their efforts to assist them.

[90] Vic. Ch. 16, § 120. See however Bond v. Barrow &c. Co., (1902) 1 Ch. 353, 9 Manson 69, 71 L. J. Ch. 246.

and issue a stock dividend,[91] or borrow as much money as has been used in improvements to replace the profits which have been improperly diverted.

§ 359 (313). **Power to borrow money or declare stock dividend.**—It has been held that the company, where it has used profits for improvements, may lawfully borrow an equivalent sum of money with which to pay a dividend,[92] or it may, when it has authority to increase its capital stock, declare a stock dividend.[93] The corporation may, in general, it is said, borrow money to pay a dividend when a fair estimate of its assets and liabilities shows an excess of assets equal to the amount of the proposed dividend,[94] since the profits of the corporation for the purpose of declaring a dividend may fairly be estimated to consist in the excess of its cash and other property on hand over its liabilities.[95]

§ 360 (314). **Remedies for abuse of discretion.**—The usual remedy for an abuse of discretion in using the profits and failing

[91] Hoole v. Great Western R. Co., L. R. 3 Ch. App. Cas. 262.

[92] Mills v. Northern R. &c. Co., L. R. 5 Ch. App. 621. See also Great Western Min. &c. Co. v. Harris, 128 Fed. 321; Excelsior Water &c. Co. v. Pierce, 90 Cal. 131, 277 Pac. 44.

[93] Ohio City v. Cleveland &c. R. Co., 6 Ohio St. 489; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Boston &c. R. Co. v. Commonwealth, 100 Mass. 399; Williams v. Western Union Tel. Co., 93 N. Y. 162; Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378; Commonwealth v. Pittsburgh &c. R. Co., 74 Pa. St. 83; Rose v. Barclay, 191 Pa. St. 594, 43 Atl. 385, 45 L. R. A. 392; Gordon v. Richmond &c. R. Co., 78 Va. 501; 5 Thomp. Corp. (2nd. ed.), §§ 5273-5276. Such a dividend, it is said, may be revoked at any time before certificates are issued. Terry v. Eagle Lock Co., 47 Conn. 141. In England such a dividend is said to be ultra vires, and in some of the states it is prohibited by constitutional provision. Hoole v. Great Western R. Co., L. R. 3 Ch. App. 262.

[94] Stringer's Case, L. R. 4 Ch. 475, 20 L. T. (N. S.) 591. But as a general rule it seems that a corporation cannot borrow money with which to pay dividends. Davis v. Flagstaff &c. Min. Co., 2 Utah 74.

[95] Hubbard v. Weare, 79 Iowa 678, 44 N. W. 915; Miller v. Bradish, 69 Iowa 278. See also Goodnow v. American &c. Paper Co., 73 N. J. Eq. 692, 69 Atl. 1014; Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 112 Am. St. 607, 3 L. R. A. (N. S.) 1034, and note.

to declare dividends is by electing other directors,[96] and it is said that a court will take into account the fact that not only this course, but also that of disposing of his shares, is open to an aggrieved shareholder.[97] But still a court of equity will exercise a supervisory power in this matter, and may, at the instance of any shareholder, compel the proper authorities to declare and pay the dividend, in cases where there is a clear abuse of power in refusing to do so.[98] This power is most often invoked by the holders of preferred shares, when the action of the directors threatens to rob them of their preference. Thus, in a comparatively recent case,[99] it appeared that by the terms of the subscription contract the holders of preferred stock in the defendant company were entitled to a dividend from net profits each year during which they were earned, but not to cumulative dividends, and that the arrearages of one year were not payable out of the earnings of subsequent years. It was held that an attempt on the part of the directors to accumulate money for the payment of the funded indebtedness, by refusing to pay any

[96] Jermain v. Lake Shore &c. R. Co., 91 N. Y. 483; Barnard v. Vermont &c. R. Co., 7 Allen (Mass.) 512; Karnes v. Rochester &c. R. Co., 4 Abb. Pr. N. S. (N. Y.) 107; Chaffee v. Rutland &c. R. Co., 55 Vt. 110; Brown v. Monmouthshire &c. R. Co., 13 Beav. 32, 15 Jur. 475.

[97] Barry v. Merchants' Exchange Co., 1 Sandf. Ch. (N. Y.) 280.

[98] Crichton v. Webb Press Co., 113 La. Ann. 167, 36 So. 926, 67 L. R. A. 76; Brown v. Buffalo &c. R. Co., 27 Hun (N. Y.) 342; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Hiscock v. Lacy, 9 Misc. 578, 30 N. Y. S. 860; Stevens v. South Devon R. Co., 9 Hare 313; 5 Thomp. Corp. (2nd. ed.), § 5295. But not where the stockholder waits until after the corporation has become insolvent before bringing his suit. Scott v. Eagle Fire Ins. Co., 7 Paige (N. Y.) 198. And it is held in Massachusetts that no equitable relief can be granted against a foreign corporation having neither offices nor place of business in that state for a failure to declare and pay dividends according to the stipulations of their certificates of stock. Williston v. Michigan Southern &c. R. Co., 13 Allen (Mass.) 400. In determining the question the object of the corporation and the condition of its affairs will be considered. Fougeray v. Cord, 50 N. J. Eq. 185, 24 Atl. 499. Ordinarily, however, the directors cannot be compelled, by mandamus to pay a dividend. People v. Central &c. Co., 41 Mich. 166.

[99] Hazeltine v. Belfast &c. R. Co., 79 Maine 411, 1 Am. St. 330.

dividends on preferred stock through a long term of years, after which the income from the road might be expected to be great enough to pay to the holders of common stock the same dividends that holders of preferred stock would be entitled to receive, was unjustifiable and a violation by the directors of their legal duty, and the court ordered the payment of a dividend to the preferred shareholders out of the income for the current year, after the corporate expenses and interest on the funded debt had been paid.[1] But it is held that one who is not a stockholder cannot obtain a decree compelling the corporation to declare and pay such dividends as shall appear upon an accounting to have been earned.[2]

§ 361 (315). **Limitations upon authority to declare a dividend —Suits to reclaim.**—There are also many limitations upon the legal authority of the directors to declare a dividend. In Virginia, it is held that directors who have failed to declare dividends at the time fixed by the charter cannot declare one for each of a number of years and so reduce the size of the dividends.[3] A valid dividend can in no case be declared and paid as against creditors when the corporation is insolvent,[4] but can only be lawfully declared when sufficient net profits have been earned to pay it. And if payment of the dividend will consume any portion of the capital stock of the company, such dividend

[1] Nickals v. New York &c. R. Co., 15 Fed. 575; Richardson v. Vermont &c. R. Co., 44 Vt. 613; West Chester &c. R. Co. v. Jackson, 77 Pa. St. 321; and compare Williston v. Michigan Southern R. Co., 13 Allen (Mass.) 400; Belfast &c. R. Co. v. Belfast, 77 Maine 445.

[2] Berford v. New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. S. 836. And a stockholder must usually first make proper application to the directors. Meeder v. Buffalo Bill's Wild West Co., 132 Fed. 280.

[3] Gordon v. Richmond &c. R. Co., 78 Va. 501. In this case the common shareholders claimed the right to have such dvidends paid to them as would equal the dividends received by the preferred shareholders for a series of twelve years past, before any further payments were made to the preferred shareholders.

[4] Dividends paid when the company is insolvent may be recovered back from the stockholders. Osgood v. Laytin, 3 Keyes (N. Y.) 521; Slayden v. Seip &c. Co., 25 Mo. App. 439. See also Taylor v. Commonwealth, 119 Ky. 731, 25 Ky. L. 374, 75 S. W. 244; 5 Thomp. Corp. (2nd. ed.), § 5383.

may be held fraudulent and void,[5] and, if paid, so much of the capital as was consumed in the payment may be recovered back[6] usually by suit in equity[7] brought by any corporate creditor who holds a judgment against the corporation upon which an execution has been returned unsatisfied.[8] So, a receiver may recover money paid as a dividend while the company was insolvent.[9] And it has been held that the directors themselves may reclaim dividends which have been illegally declared under a misapprehension of the right to declare them, and which have been paid to the shareholders.[10] The stockholder is bound to take notice of the condition of the corporation,[11] and it has been held that his private property may be reached in such an action

[5] Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 233; Carpenter v. New York &c. R. Co., 5 Abb. Pr. (N. Y.) 277; Pittsburgh &c. R. Co. v. County of Allegheny, 63 Pa. St. 126; Chaffee v. Rutland &c. R. Co., 55 Vt. 110. But see Verner v. General &c. Trust, (L. R. 1894), 2 Ch. 239.

[6] Railroad Company v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136, 35 L. ed. 936; Johnson v. Laflin, 5 Dill (U. S.) 65, 85, note, Fed. Cas. No. 7393; McKusick v. Seymour &c. Co., 48 Minn. 172, 50 N. W. 1116; Heman v. Britton, 88 Mo. 549; Hastings v. Drew, 76 N. Y. 9; Story's Eq. Juris. (13th ed.), § 1252. The corporation should be made a party to the bill. First Nat. Bank v. Smith, 6 Fed. 215.

[7] The creditor should file a bill in the nature of a creditor's bill in favor of himself and all other creditors that may choose to come in and share the expense of the suit. Hastings v. Drew, 76 N. Y. 9; Bank of St. Mary's v. St. John, 25 Ala. 566. First Nat. Bank v. Smith, 6 Fed. 215;

[8] See 4 Thomp. Corp. (2nd. ed.), § 4951, and 5 Thomp. Corp. (2nd. ed.), § 5361. But creditors of an insolvent corporation cannot, ordinarily, require the stock holders to surrender dividends paid by it when it was solvent. Reid v. Eatonton Co., 40 Ga. 98, 2 Am. Rep. 563; Main v. Mills, 6 Biss. (U. S.) 98, Fed. Cas. No. 8974; Mercantile &c. Co., In re, L. R. 4 Ch. 475. But a corporate creditor may be estopped. Lawrence v. Greenup, 97 Fed. 906.

[9] Osgood v. Layton, 3 Keyes (N. Y.) 521; 5 Thomp. Corp. (2nd. ed.), § 5360. Compare Van Duyck v. McQuade, 86 N. Y. 45.

[10] Lexington &c. Co. v. Page, 56 Ky. 412, 66 Am. Dec. 165. This decision, however, seems questionable.

[11] Peterson v. Illinois &c. Co., 6 Bradw. (Ill.) 257; Bank of St. Mary's v. St. John, 25 Ala. 566; Clapp v. Peterson, 104 Ill. 26; Osgood v. Laytin, 48 Barb. (N. Y.) 463.

by the creditors,[12] even though he was in reality ignorant of the fact that payment of his dividend would impair the capital stock. The statute of limitations will run from the time the dividend is declared in favor of a shareholder who receives such a dividend in good faith and without actual notice.[13] If compelled to pay more than his equitable proportion of such a debt, the stockholder may enforce contribution by his associates;[14] and a stockholder who became possessed of his shares after such a dividend was paid cannot ordinarily be held liable in such a suit.[15] It has also been held that he is not liable to corporate creditors for a dividend received by him in good faith while the corporation was solvent.[16]

§ 362 (316). Dividends should be paid out of the profits— The rule is often stated as requiring all dividends to be paid out of the net profits of the company, and this rule is generally correct when net profits are interpreted to mean that portion of the income which remains after the deduction of all proper charges and outlays,[17] which would include interest, and the

[12] Bartholomew v. Bently, 15 Ohio 659, 45 Am. Dec. 596. As to the stockholder's liability in a proceeding by creditor's bills to reach dividends paid after the corporation was insolvent or in contemplation of insolvency, see Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Pacific R. Co. v. Cutting, 27 Fed. 638; Lexington &c. Ins. Co. v. Page, 56 Ky. 412, 66 Am. Dec. 165; Heman v. Britton, 88 Mo. 549; Hastings v. Drew, 76 N. Y. 9.

[13] Lexington &c. Ins. Co. v. Page, 56 Ky. 412, 66 Am. Dec. 165.

[14] Bartlett v. Drew, 57 N. Y. 587.

[15] Hurlbut v. Taylor, 62 Wis. 607.

[16] Great Western &c. Co. v. Harris, 128 Fed. 321.

[17] St. John v. Erie R. Co., 22 Wall. (U. S.) 136, 22 L. ed. 743; Miller v. Bradish, 69 Iowa 278, 28 N. W. 594. See also New York &c. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. ed. 363. But there is much confusion in the authorities upon the general subject and some conflict among the decisions as to what are profits within the rule and how they are to be determined. For a full consideration and review of authorities, see 5 Thomp. Corp. (2nd. ed.), §§ 5305-5311. The net profits have been held to be the income remaining after the payment of operating expenses, and before the payment of interest. Corry v. Londonderry &c. R. Co., 29 Beav. 263. But it is doubted if interest on debentures can be charged to capital, and the fund for the payment of dividends thereby in-

like.[18] But the corporation need not be absolutely free from debt before paying dividends;[19] indeed, a contrary rule would prevent almost every railroad in the country from paying dividends.[20] The debts which the company is authorized to carry while paying dividends are funded debts, and others of that class. Debts owing to contractors, and money due to bankers and others for advances made to aid in building the road, must usually be defrayed before dividends are declared,[21] though these debts may, in the discretion of the directors, be converted into funded indebtedness where this is practicable.[22] But it has been held that dividends must ordinarily be paid only out of earnings,[23] and, unless the contrary is provided by charter or by statute, so, as a general rule, must interest upon stock when it is allowed.[24] Consequently, it has been held unlawful for a company which has not yet earned any income to declare a dividend upon its ordinary stock out of a sum of money paid to it as penalty and interest by the contractors, upon a failure to complete the company's lines according to agreement.[25] An absolute agreement to pay interest upon stock, where it is not expressly authorized by statute, has been held void,[26] although

creased. Bloxam v. Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337, 344, 350.

[18] See Mobile &c. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793. Except in cases where a portion of the capital is distributed upon a reduction of capital stock. See Strong v. Brooklyn &c. R. Co., 93 N. Y. 426. Where capital stock is impaired and reduced, a dividend cannot ordinarily be declared even out of net earnings; 5 Thomp. Corp. (2nd. ed.), § 5312.

[19] Mills v. Northern &c. R. Co., L. R. 5 Ch. App. Cas. 621.

[20] Belfast &c. R. Co. v. Belfast, 77 Maine 445; Hazeltine v. Belfast &c. R. Co., 79 Maine 411, 1 Am. St. 330; Miller v. Bradish, 69 Iowa 278, 28 N. W. 594.

[21] See Bond v. Barrow &c. Co., (1902) 1 Ch. 353, 9 Manson 69, 71 L. J. Ch. 246.

[22] Belfast &c. R. Co. v. Belfast, 77 Maine 445, 23 Am. & E. R. Cas. 736, 740.

[23] Bloxham v. Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337.

[24] Macdougall v. Jersey &c. Co., 2 Hem. & M. 528; Salisbury v. Metropolitan R. Co., 38 L. J. Ch. 249.

[25] Bloxham v. Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337. But see Alcoy &c. R. Co. v. Greenhill, 79 L. T. 257.

[26] McLaughlin v. Detroit &c. R. Co., 8 Mich. 100; Troy &c. R. Co. v. Tibbitts, 18 Barb. (N. Y.) 297; Painsville &c. R. Co. v. King, 17 Ohio St. 534; Pittsburgh &c. R. Co. v. Allegheny County, 63 Pa. St. 126.

it is perfectly competent in this country for a railroad company to contract that it will, whenever the surplus earnings shall enable it to do so out of such earnings, pay interest on the stock subscriptions for the time the road is building and until it is ready for operation.[27]

§ 363 (317). **Enjoying payment of dividends.**—An injunction will not ordinarily issue at the instance of corporate creditors to restrain acts tending to decrease the corporate assets where it is not shown that the remaining assets will be insufficient to meet the corporate liabilities.[28] And another company claiming the right of distress for non-payment of toll charges cannot obtain an injunction to restrain the payment of dividends.[29] The fact that there is not cash actually on hand or at the banker's to pay the proposed dividend in full,[30] or that certain immaterial errors in calculations are contained in an account honestly made out and published in good faith,[31] is not sufficient to justify the granting of an injunction. And it has been held that a court of equity will not restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public.[32] An injuncion will not be granted, it seems, to restrain payment of a dividend already declared without a stronger showing than is required to restrain the declaration of the dividend,[33] though the fact that dividends

See also National Salt Co. v. Ingraham, 122 Fed. 40. But see ante, § 101.

[27] Evansville &c. R. Co. v. Evansville, 15 Ind. 395; Cunningham v. Vermont &c. R. Co., 12 Gray (Mass.) 411; McLaughlin v. Detroit &c. R. Co., 8 Mich. 100; Ohio City v. Cleveland &c. R. Co., 6 Ohio St. 489; Richardson v. Vermont &c. R. Co., 44 Vt. 613.

[28] Mills v. Northern &c. R. Co., L. R. 5 Ch. 621; Lee v. Neuchatel &c. Co., 58 L. T. R. 553. But see Williams v. Boice, 38 N. J. Eq. 364. There are cases, however, in which a creditor may enjoin directors from paying a dividend. Mobile &c. R. Co. v. Tennessee, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. ed. 793; Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563.

[29] South Yorkshire R. Co. v. Great Northern R. Co., 9 Ex. 55.

[30] Stringer's Case, L. R. 4 Ch. 475.

[31] Yool v. Great Western R. Co., 20 L. T. R. (N. S.) 74.

[32] Browne v. Monmouthshire R. &c. Co., 13 Beav. 32; Stevens v. South Devon R. Co., 9 Hare 313.

[33] Carpenter v. New York &c. R. Co., 5 Abb. Pr. (N. Y.) 277; Car-

have been declared is by no means conclusive of the fact that they must be paid. It is generally held that the court will not, in a suit brought by a single shareholder, to which the other shareholders are not made parties, restrain the payment of dividends which have been regularly declared, since it cannot, in their absence, interfere with the legal right which the stockholders have acquired to such dividends.[34] But a stockholder may file a bill on behalf of himself and others to enjoin the threatened declaration of a dividend out of the capital stock.[35] It must be shown that a fraud is being perpetrated upon citizens of the state in which the suit is brought, before its courts will enjoin the declaration of a dividend by a corporation of another state.[36] But it has been held that the court will not refuse to restrain the corporation from paying a dividend to the common share holders to the injury of resident holders of preferred shares upon which dividends have not been paid, even though the defendant corporation has its domicile in another state.[37]

lisle v. Southeastern R. Co., 1 Macn. & G. 689.

[34] Fawcet v. Laurie, 1 Drew. & Sm. 192; Carlisle v. Southeastern R. Co., 1 Macn. & G. 689; Carpenter v. New York &c. R. Co., 5 Abb. Pr. 277. But see Marquand v. Federal Steel Co., 95 Fed. 725.

[35] Carpenter v. New York &c. R. Co., 5 Abb. Pr. (N. Y.) 277; Painsville &c. R. Co. v. King, 17 Ohio St. 534; Carlisle v. Southeastern R. Co., 1 Macn. & G. 689, 14 Jur. 515; Fawcet v. Laurie, 1 Drew. & Sm. 192; McDougall v. Jersey &c. Co., 2 Hem. & M. 528; Bloxam v. Metropolitan R. Co., L. R. 3 Ch. 337; Salisbury v. Metropolitan R. Co., 38 L. J. Ch. 249. See also March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732. But the bill must show that injury will result from the illegal act. Chaffee v. Rutland R. Co., 55 Vt. 110; Carlisle v. Southeastern R. Co., 1 Macn. & G. 689, 14 Jur. 515; 5 Thomp. Corp. (2nd. ed.), § 5364. An injunction has also been granted to restrain the payment of a dividend out of earnings necessary to repair the road. Davidson v. Gillies, 1 Am. & Eng. R. Cas. 595, note. See also Dent v. London &c. Co., L. R. 16 Ch. Div. 344, 1 Am. & Eng. R. Cas. 592.

[36] Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378. See also Williston v. Michigan Southern &c. R. Co., 13 Allen (Mass.) 400; Berford v. New York &c. Co., 56 N. Y. Super. Ct. 236, 4 N. Y. S. 836.

[37] Prouty v. Michigan Southern &c. R. Co., 1 Hun (N. Y.) 655. But see Williston v. Michigan Southern &c. R. Co., 13 Allen (Mass.) 400.

§ 364 (318). **Personal liability of directors.**—In addition to their liability as stockholders, the directors have been held personally liable to refund dividends paid out of the capital stock,[38] at least where they have acted wilfully and knowingly,[39] and they have been denied recourse upon the stockholders who took the dividends in good faith.[40] It has been said that, "Where directors order dividends to be paid where no profits have been made, without expressly saying so, a gross fraud is practiced, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy, for which they are liable to be prosecuted and punished."[41] But the better rule would seem to be that they are not liable beyond their liability as stockholders, where they have acted in good faith,[42] or, if they are held liable, they may, perhaps, recover what they have paid in an action against the stockholders.[43] A suit to enforce this liability has been held to be properly brought by a non-participating stockholder.[44] But a stockholder seeking to hold the directors personally liable for damages which he has sustained by reason of their fraud and mismanagement, should bring his suit in a court of equity.[45] At law, in the absence of special statute, the directors are usually responsible only to the

[38] Gratz v. Redd, 4 B. Mon. (Ky.) 178, 194; Hill v. Frazier, 22 Pa. St. 320. See also Evans v. Coventry, 25 L. J. Ch. 489, 8 DeGex, M. & G. 835; National Funds &c. Co., In re, L. R. 10 Ch. Div. 118.

[39] Burnes v. Pennell, 2 H. L. Cas. 497, 513.

[40] Exchange Banking Co., In re, L. R. 21 Ch. Div. 519.

[41] Lord Campbell in Burnes v. Pennell, 2 H. L. Cas. 497, 513.

[42] Excelsior Pet. Co. v. Lacey, 63 N. Y. 422.

[43] Salisbury v. Metropolitan R. Co., 22 L. T. R. (N. S.) 839.

[44] Salisbury v. Metropolitan R. Co., 22 L. T. R. (N. S.) 839. In Lexington &c. R. Co. v. Bridges, 46 Ky. 556, 559, 46 Am. Dec. 528, it is suggested that such a suit would be more properly brought by the stockholders, or by the corporation, and the court doubts if the directors can be held liable to the corporate creditors, but it may well be doubted if the stockholders retaining their dividends could have any standing in a court of equity to prosecute such a suit, and the creditors would seem to have the strongest claim in equity to some remedy for an impairment of the fund upon the faith of which the debts are created.

[45] Smith v. Hurd, 12 Metc. (Mass.) 371; Sears v. Hotchkiss, 25 Conn. 171; Bishop v. Houghton, 1 E. D. Smith (N. Y.) 566.

corporation.[46] It is, however, provided by statute in many of the states that the directors declaring and paying any dividend which impairs the capital stock shall be individually liable for the corporate debts,[47] or for some other stated penalty, such as double damages, fine or imprisonment. It has been held that where recovery is had from a director as a wrong-doer under such a statute,[48] he can have no right of subrogation as against the corporation.[49] And a claim based on such a statute[50] against a director who has acted in good faith, may, it seems, be barred by laches.[51]

§ 365 (319). **Dividends payable in scrip.**—Dividends are frequently made payable in "scrip" or certificates which confer upon the holder certain rights, which are set out in the certificates themselves. This plan is adopted when the profits of the company are in the shape of property which has yet to be sold, or when the profits are being used in making improvements to be represented by a stock dividend, which is to be declared at some time in the future. The certificates are made redeemable in money, stock, bonds, or property, either at a fixed time or at the option of the corporation[52] or of the holder,[53] and, being negotiable, enable the stockholders who wish to do so, to realize at once upon the dividend. Sometimes these certificates so far partake of the nature of certificates of stock as to entitle the holder to

[46] Smith v. Poor, 40 Maine 415; Allen v. Curtis, 26 Conn. 456, 65 Am. Dec. 557; Evans v. Brandon, 53 Tex. 56. And, of course, a stockholder who has received a dividend wrongfully and illegally declared will not be allowed to maintain an action for his own benefit, from the directors who illegally declared it, on the theory of a breach of trust. Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 24 Am. St. 625.

[47] See Companies' Act of 1862 (Eng.), § 165.

[48] Pennsylvania Act of 7th of April, 1849, § 9.

[49] Hill v. Frazier, 22 Pa. St. 320.

[50] Companies' Act of 1862 (Eng.), § 165.

[51] Mammouth Copperopolis &c., In re, 50 L. J. Ch. 11.

[52] Brown v. Lehigh &c. Co., 49 Pa. St. 270; 4 Thomp. Corp. (2nd. ed.), § 3439; 5 Thomp. Corp. (2nd. ed.), § 5277.

[53] Chaffee v. Rutland R. Co., 55 Vt. 110; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Brundage v. Brundage, 1 Th. & C. (N. Y.) 82, affirmed, 60 N. Y. 544.

dividends.[54] But the issue of such certificates is not a distribution of the surplus from which the corporation expects to pay them, and does not transfer the title to that surplus to the holders of certificates.[55] The company may, however, distribute the property of which its surplus income consists among its stockholders in the form of a dividend, where it is susceptible of a ratable distribution;[56] or it may declare a dividend payable in bonds which represent earnings used for the improvement of the road.[57]

§ 366 (320). Stock dividends.—If the earnings of the company have been devoted to the purchase of shares of stock made under legislative authority, the shares so purchased may be distributed to the stockholders in the form of a stock dividend,[58] unless such dividends are prohibited by statute. A stock dividend has been defined as "the issue by a corporation, as a dividend, of new shares which have been paid up by the transfer from the surplus or profit and loss account to the account representing capital stock of a sum equal to their par value."[59] The effect of such

[54] Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 22 L. ed. 840; Robinson's Trust, In re, 218 Pa. St. 481, 67 Atl. 775. They usually carry no voting power. Commonwealth v. Union &c. Co., 192 Pa. St. 507, 43 Atl. 1010.

[55] People v. Board of Assessors, 76 N. Y. 202, 16 Hun (N. Y.) 196; Bailey v. Railroad Co., 22 Wall. (U. S.) 604, 22 L. ed. 840; Commonwealth v. Pittsburgh &c. R. Co., 74 Pa. St. 83.

[56] Scott v. Central R. &c. Co., 52 Barb. (N. Y.) 45, where the dividends were paid in Confederate money. See also Merchant v. Western &c. Assn., 56 Minn. 327, 56 N. W. 327; Williams v. Western Union Tel. Co., 93 N. Y. 162.

[57] Wood v. Lary, 47 Hun (N. Y.) 550; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363.

[58] Commonwealth v. Boston &c. R. Co., 142 Mass. 146, 7 N. E. 716. See generally on the right to purchase its own shares, note to Hall v. Henderson, 126 Ala. 449, 28 So. 531, 61 L. R. A. 621; Porter v. Plymouth Gold Min. Co., 29 Mont. 347, 74 Pac. 938, 101 Am. St. 569, and note. But the stockholders have no right to claim a pro rata share of such stock until it is ordered to be divided among them. Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585; St. John v. Erie R. Co., 10 Blatch. (U. S.) 271, Fed. Cas. No. 12226; Bradley v. Holdsworth, 3 M. & W. 422.

[59] "Stock Dividends and Their Restraint," 7 Am. Bar Assn. 268;

a dividend is, it seems, simply to change the form of the investment of the stockholders by increasing the number of shares and thereby diminishing the value of each without affecting the solvency of the corporation or altering the aggregate value of the shares or interests of the stockholders.[60] It may, therefore, be made not only where old shares have been purchased by the corporation, but also where the corporation is authorized to increase its stock and issue new shares and a surplus has been earned, so that the new stock represents and has back of it so much additional capital or property which the directors might have distributed among the stockholders or retained for future use.[61] Insomuch as the stock dividend consisting of new shares virtually takes the place of a cash dividend, each shareholder is, ordinarily, entitled to share therein to the same extent as if it were paid in cash, and all should, therefore, be given an equal opportunity to take their proportionate shares of the new stock in the first instance.[62] But it is said that stockholders in railroads and other corporations, whose powers and duties are defined by statute, have no right to claim shares of new stock, upon any terms in preference to others desiring to become own-

note to Gordon v. Richmond &c. R. Co., 78 Va. 501, 22 Am. & Eng. R. Cas. 33, 48.

[60] Williams v. Western Union Tel. Co., 93 N. Y. 162; Gibbons v. Mahan, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525; Towne v. Eisner, 245 U. S. 418, 62, L. ed. 372, 38 Sup. Ct. 158, L. R. A. 1918 D, 254; Terry v. Eagle Lock Co., 47 Conn. 141; De Koven v. Alsop, 205 Ill. 309, 63 L. R. A. 587; Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378.

[61] Kenton Furnace &c. Co. v. McAlpin, 5 Fed. 737; Rand v. Hubbell, 115 Mass 461, 15 Am. Rep. 121; Commonwealth v. Pittsburgh &c. R. Co., 74 Pa. St. 83. See also Farwell v. Great Western Tel. Co., 161 Ill. 522, 44 N. E. 891; 5 Thomp. Corp. (2nd ed.), §§ 5273, 5274.

[62] De Koven v. Alsop, 205 Ill. 309, 63 L. R. A. 587; Jones v. Morrison, 31 Minn. 140, 16 N. W. 854; Jones v. Terre Haute &c. R. Co., 57 N. Y. 196; Dousman v. Wisconsin &c. R. Co., 40 Wis. 418. See also note, 12 L. R. A. (N. S.) 969. It has been held that the corporation may give the stockholders the privilege of taking new stock, when the capital stock is increased, at par, or less than par, although it may be worth more. Moss's Appeal, 83 Pa. St. 264, 24 Am. Rep. 164; Wiltbank's Appeal, 64 Pa. St. 256, 3 Am. Rep. 585. As to the rights of holders of preferred stock, see Gordon v. Richmond &c. R. Co., 78 Va. 501, 22 Am. & Eng. R. Cas. 33; Phillips v. Eastern R. Co., 138 Mass. 122.

ers of such stock, unless this privilege is expressly conferred upon them in some manner equivalent to a declaration of a dividend.[63] In our opinion, however, there is no good reason for distinguishing between railroad companies and other corporations whose stockholders have been held to have the first right to take the new shares, unless there is something requiring it in the charter, statute, or by-laws of the particular corporation.[64] And when the capital stock of a company has been lawfully reduced, the property thus deducted from the capital may be distributed as a dividend.[65] Where no special provision is made to the contrary, a dividend is presumed to be payable in cash, and in lawful or current money.[66] And a company cannot show that a dividend was payable only in bank bills passing at a discount, if it has not distinctly said so in the resolution declaring it.[67]

§ 367 (321). Dividends payable without discrimination.—A dividend must be payable equally to all stockholders of the same class, and the directors cannot discriminate either as to the proportional size of the dividends[68] or as to the manner or time of

[63] Miller v. Illinois Cent. R. Co., 24 Barb. (N. Y.) 312; Curry v. Scott, 54 Pa. St. 270; Ohio Ins. Co. v. Nunemacher, 15 Ind. 294. But see note, 12 L. R. A. (N. S.) 969.

[64] Eidman v. Bowman, 58 Ill. 444, 11 Am. Rep. 90; Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; Reese v. Bank of Montgomery Co., 31 Pa. St. 78, 72 Am. Dec. 726; Cunningham's Appeal, 108 Pa. St. 546; State, Page v. Smith, 48 Vt. 266; note in 12 L. R. A. (N. S.) 969; 1 Rorer Rail. 208.

[65] Strong v. Brooklyn &c. R. Co., 93 N. Y. 426, 435; Parker v. Mason, 8 R. I. 427. But as elsewhere shown, this cannot ordinarily be done lawfully as against creditors. See ante, § 102.

[66] Ehle v. Chittenango Bank, 24 N. Y. 548; Scott v. Central R. &c. Co., 52 Barb. (N. Y.) 45, where the income of the corporation was confederate money only, but the legal effect of the resolution was held to be that the dividends were payable in lawful money of the United States. A stockholder cannot ordinarily be compelled to accept a stock dividend instead of cash; Hoole v. Great Western R. Co., L. R. 3 Ch. 262, 17 L. J. (N. S.) 453; Williams v. Western Union Tel. Co., 9 Abb. N. Cas. (N. Y.) 419.

[67] Ehle v. Chittenango Bank, 24 N. Y. 548, where the dividend was declared to be payable in "New York state currency."

[68] Ryder v. Alton &c. R. Co., 13 Ill. 516; Hale v. Republican River

payment,[69] or as to the medium of payment, as by paying a part of the stockholders in gold and forcing the others to accept depreciated paper at its face value,[70] because a portion of the stock is unpaid,[71] or because certain stockholders own a greater number of shares than others,[72] or because the stock held by part of the stockholders was issued after that held by others, even though it was not issued until after the dividend was earned, provided it was issued before the dividend was declared.[73] The stockholders may prevent or restrain an unequal or unfair distribution of the profits of the company by bill in equity,[74] or they may, perhaps, sue at law as for a breach of the implied contract to distribute the profits ratably.[75] In the case of law-

Bridge Co., 8 Kans. 466; State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; March v. Eastern R. Co., 43 N. H. 515; Jackson v. Newark Plank Road Co., 31 N. J. L. 277; Howell v. Chicago &c. R. Co., 51 Barb. (N. Y.) 378; Painesville &c. R. Co. v. King, 17 Ohio St. 534; Atlantic &c. Tel. Co. v. Commonwealth, 3 Brewst. (Pa.) 366; Harrison v. Mexican R. Co., L. R. 19 Eq. 358; Coey v. Belfast &c. R. Co. (I. R.), 2 C. L. 112; 5 Thomp. Corp. (2nd ed.), § 5289. But see, as to preferred stockholders entitled to a fixed sum per annum, Fidelity Trust Co. v. Lehigh &c. R. Co., 215 Pa. St. 610, 64 Atl. 829; Gardner &c. Bank v. Taber-Prang &c. Co., 189 Mass. 363, 75 N. E. 705.

[69] State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Jones v. Terre Haute &c. R. Co., 57 N. Y. 196.

[70] State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Keppel v. Petersburgh &c. R. Co., Chase's Dec. (U. S.) 167, Fed. Cas. No. 7722.

[71] Oakbank &c. Co. v. Crum, L. R. 8 App. Cas. 65; Reese v. Bank &c., 31 Pa. St. 78, 72 Am. Dec. 726. But the dividend so declared may generally be applied by the corporation toward extinguishing the shareholder's indebtedness for his stock. King v. Paterson &c. R. Co., 29 N. J. L. 504. This it may be so applied by agreement, see Kenton &c. Co. v. McAlpin, 5 Fed. 737.

[72] State v. Baltimore &c. R. Co., 6 Gill (Md.) 363; Jones v. Terre Haute &c. R. C., 57 N. Y. 196.

[73] Jones v. Terre Haute R. Co., 57 N. Y. 196; Phelps v. Farmers' &c. Bank, 26 Conn. 269; Jermain v. Lake Shore &c. R. Co., 91 N. Y. 483.

[74] Luling v. Atlantic &c. Ins. Co., 45 Barb. (N. Y.) 510; Cratty v. Peoria &c. Assn., 219 Ill. 516, 76 N. E. 707. In case of a fraudulent overissue of stock, payment of dividends may be enjoined until it is ascertained who are the true holders of genuine stock. Underwood v. New York &c. R. Co., 17 How. Prac. (N. Y.) 537. See also Burnes v. Pennell, 2 H. L. Cas. 497; Painesville &c. R. R. Co. v. King, 17 Ohio St. 534.

[75] Such an action was sustained

ful preferred stock, however, the matter depends upon contract which may give the holders a preference over common stockholders and the holders of one issue may even be given a preference over the holders of another.[76]

in New Jersey. Jackson v. Newark Plank-Road Co., 31 N. J. L. 277. See also Hill v. Mining Co. (Mo.), 21 S. W. 508.

[76] See generally as to this and as to when preferred stockholders are entitled to cumulative dividends and to preference as to capital as well as dividends, the notes in 27 L. R. A. 143, 3 L. R. A. (N. S.) 1034, 21 L. R. A. (N. S.) 228, 24 L. R. A. (N. S.) 1078, 39 L. R. A. (N. S.) 1007, 6 A. L. R. 802-835; also 5 Thomp. Corp. (2nd. ed.), § 5345, et seq. And the directors may have no such discretion to refuse to declare a dividend as in the case of common stockholders. Burk v. Ottawa Gas &c. Co., 87 Kans. 6, 123 Pac. 857, Ann. Cas. 1913D, 773, and other cases cited in note.

CHAPTER XV.

CONSOLIDATION.

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§ 370 (322). **Consolidation must be authorized by legislature.** —In the absence of legislative authority a railroad company cannot consolidate with another company so as to form a single corporation,[1] although the legislature may, by a subsequent act,

[1] Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Chicago Title &c. Co. v. Doyle, 259 Ill. 489, 102 N. E. 790, 47 L. R. A. (N. S.) 1066; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Aspinwall v. Ohio &c. R. Co., 20 Ind. 492, 83 Am. Dec. 329; Green-

render valid an unauthorized consolidation.[2] Most of the states, however, now make provision for the consolidation of railroad companies owning roads which form a continuous or connecting line,[3] while some of the states permit consolidation wherever the two consolidating roads connect to form a continuous line by means of an intervening railroad, and others do not require any connection at all between existing roads as a prerequisite

ville &c. Co. v. Planters' &c. Co., 70 Miss. 669, 13 So. 879, 35 Am. St. 681; Black v. Delaware &c. Canal Co., 24 N. J. Eq. 455; Riker &c. Co. v. United Drug Co., 79 N. J. Eq. 580, 82 Atl. 930, Ann. Cas. 1913A, 1190 (where many other cases are cited in note); Blatchford v. Ross, 5 Abb. Pr. (N. S.) 434, 54 Barb. (N. Y.) 42; New York &c. Canal Co. v. Fulton Bank, 7 Wend. (N. Y.) 412; Knapp v. Supreme Commandery &c., 121 Tenn. 212, 118 S. W. 390; Slate v. Rutland R. &c. Co., 85 Vt. 91, 81 Atl. 252 (not even a de facto consolidated corporation can result unless consolidation is authorized by statute); note to Wood v. City of Seattle (Wash.), 52 L. R. A. 369, 370; Charlton v. Newcastle &c. R. Co., 5 Jur. (N. S.) 1096. See also Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. ed. 773; Kavanagh v. Omaha L. Assn., 84 Fed. 295; American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 42 N. E. 153; Pingree v. Mich. Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 643, 53 L. R. A. 274 (citing text); Gulf &c. R. Co. v. Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. 788. But if one company is given power to consolidate with any other it may choose, the company it selects is thereby authorized to unite with it in the consolidation. Prospect Park, &c. R. Co., In re, 67 N. Y. 371.

[2] Louisville Trust Co. v. Louisville &c. R. Co., 75 Fed. 433; Bishop v. Brainerd, 28 Conn. 289; Mead v. New York &c. R. Co., 45 Conn. 199; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621; McCauley v. Columbus &c. R. Co., 83 Ill. 348; American L. &c. T. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 42 N. E. 153; Fisher v. Evansville &c. R. Co., 7 Ind. 407, 413. But a general law authorizing railroad corporations to consolidate their roads, which is prospective in its language and terms, will not be construed to have a retrospective operation. Hatcher v. Toledo &c. R. Co., 62 Ill. 477. Informal consolidation has been held validated by subsequent legislation. Mead v. New York &c. R. Co., 45 Conn. 199; McCauley v. Columbus &c. R. Co., 83 Ill. 348, 352.

[3] Two or more railroad corporations, whose roads form a continuous line, may enter into an arrangement for operating both roads as one and thus become jointly liable for debts incurred in borrowing money to be used in furtherance of the business of such line. Chicago &c. R. Co. v. Ayres, 140 Ill. 644, 30 N. E. 687.

to a valid consolidation of their lines.[4] This general authority, however, is subject to the provisions of the constitutions[5] and laws[6] of many of the states, which forbid the consolidation of companies owning or operating parallel and competing lines.[7] In addition to the powers conferred by such general statute, authority to consolidate is sometimes given in the company's charter,[8] or is contained in a special act of the legislature in states

[4] The statutes of many of the states also authorize consolidation when the roads cross or intersect each other.

[5] See note, 52 L. R. A. 373, 374, for a reference to constitutional provisions and decisions.

[6] See note, 52 L. R. A. 376. A railroad need not necessarily be parallel to or connected with another road in order to be a "competing road" within the statute forbidding the consolidation of competing roads. East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690. See also Commonwealth v. Louisville &c. R. Co., 144 Ky. 324, 138 S. W. 291, Ann. Cas. 1913A, 633, and cases there cited in note. The Missouri statute, which prohibits any railroad company within the state from owning, operating, or managing any other parallel or competing railroad within the state, applies only where both the roads are situated within the state, and where the competition is of some practical importance, such as is liable to affect rates. Kimball v. Atchison &c. R. Co., 46 Fed. 888.

[7] In West Virginia and Maryland the consolidation of such companies is forbidden without the consent of the legislature, and in Florida the consent of the railroad commission is required. Many other states also forbid the consolidation of parallel and competing lines. References to the constitution and statutes will be found in the notes, 45 L. R. A. 271-275, and 52 L. R. A. 373, 376. As to what are and what are not competing lines, see Kimball v. Atchison &c. R. Co., 46 Fed. 888; Leavenworth v. Chicago &c. R. Co., 25 Fed. 219; Illinois &c. Trust Co., v. St. Louis &c. R. Co., 217 Ill. 504, 75 N. E. 562, and authorities cited in preceding note; Currier v. Concord &c. R. Co., 48 N. H. 321; People v. O'Brien, 111 N. Y. 1, 18 N E. 692, 2 L. R. A. 255, 7 Am. S. 684. See also Fields v. Holland, 158 Ky. 544, 165 S. W. 699; Commonwealth v. Louisville &c. R. Co., 144 Ky. 324, 138 S. W. 291, Ann. Cas. 1913A, 633 and cases there reviewed. Provision against consolidation of parallel or competing lines of railroad have been held not to apply to local street railways. Vermer v. Chicago City R. Co., 258 Ill. 523, 101 N. E. 949; State v. Lincoln Trac. Co., 90 Nebr. 535, 134 N. W. 278.

[8] Nugent v. Supervisors, 19 Wall. (U. S.) 241, 22 L. ed. 83; Archer v. Terre Haute &c. R. Co., 102 Ill. 493. See also Bonnet v. First Nat. Bank, 24 Tex. Civ. App. 613, 60 S. W. 325.

where special acts are not forbidden by the constitution.[9] A state has a right to prescribe the conditions upon which a consolidation may be had under its laws, and a statute requiring the payment of a fee upon filing an agreement of consolidation is not unconstitutional or invalid as imposing a tax on interstate commerce.[10]

§ 371 (322a). What is sufficient authority.—The power of a state to authorize the consolidation of corporations of its own creation in a proper case is unquestioned, in the absence of some constitutional limitation.[11] And it has been held that a consolidation of street railway lines, apparently demanded by the public interests, when authorized by law, is not in violation of a provision of the constitution prohibiting monopolies, trusts and combinations for the purpose of fixing prices or limiting production or regulating transportation of any product or commodity.[12] But the authority to consolidate must be clearly

[9] Rev. Stat. Ill. 1917 ch. 114, §§ 196, 197; Fisher v. Evansville &c. R. Co., 7 Ind. 407; Black v. Delaware &c. Canal Co., 24 N. J. Eq. 455. Power given by statute to one railroad to consolidate with another has been held to authorize any other to join with it. Prospect Park &c. R. Co., In the Matter of, 67 N. Y. 371; Mitchell v. Deeds, 49 Ill. 416, 95 Am. Dec. 621. A law prohibiting a particular railroad company from consolidating with any parallel or competing line does not violate any contract or other right invested in another railroad company, authorized generally by a former statute to consolidate with any connecting company, the company prohibited not yet being in existence at the time of passage of the prohibitory statute and there being at that time no contract authorizing such consolidation of the two roads. East Line &c. R. Co. v. Rushing, 69 Tex. 306.

[10] Ashley v. Ryan, 153 U. S. 436, 14 Sup. Ct. 865, 38 L. ed. 773, affirming 49 Ohio St. 504, 31 N. E. 721. As to whether the power is exhausted by one consolidation, see Taylor v. Atlantic &c. R. Co., 57 How. Prac. (N. Y.) 26; Continental Trust Co. v. Toledo &c. R. Co., 82 Fed. 642, to the effect that it is not, and Morril v. Smith County, 89 Tex. 529, 36 S. W. 56, to the contrary.

[11] Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874.

[12] Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369. As to whether street railroads are included in the general acts for the consolidation or railroads, see Washington Street &c. R. Co., In re, 115 N. Y. 442, 22 N. E. 356; Hestonville &c. R. Co. v. Philadelphia, 89 Pa. St. 210; Millvale v. Evergreen

given and cannot, ordinarily, be implied.[13] Thus a prohibition of the consolidation of parallel and competing lines does not impliedly authorize the consolidation of lines which are neither parallel nor competing.[14] So, authority to consolidate with another line cannot be inferred from the power to merely "unite or connect" therewith, as this is held to mean only a physical union or mechanical connection of the tracks.[15] It is also the rule that both of the consolidating companies must be competent, or, in other words, that mere general authority granted to one of them to consolidate is not sufficient unless the particular consolidation is authorized or both companies have authority to make such a consolidation.[16]

&c. R. Co., 131 Pa. St. 1, 18 Atl. 993, 7 L. R. A. 369, holding that they are.

[13] Earle v. Seattle &c. R. Co., 56 Fed. 909; Central R. Co. v. Collins, 40 Ga. 582; American Loan &c. Co. v. Minnesota &c. R. Co., 157 Ill. 641, 42 N. E. 153. See Greenville &c. Co. v. Planters' &c. Co., 70 Miss. 669, 13 So. 879; Colgate v. United States Leather Co., 75 N. J. Eq. 229, 72 Atl. 126, 19 Ann. Cas. 1262; Erste Sokolower &c. v. First United &c. Verein, 32 Misc. 269, 66 N. Y. S. 356; Commonwealth v. Pennsylvania &c. R. Co., 17 Phila. (Pa.) 609; Lauman v. Lebanon Valley &c. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

[14] East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690.

[15] Louisville &c. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849. It is also held in this case that the constitution may forbid the consolidation of parallel or competing roads; that a grant of authority to purchase and hold any branch road constructed by another company or to receive the cars of other roads and agree on terms does not authorize either a consolidation or purchase of parallel and competing roads and that acquiescence by the state in several purchases of branch roads parallel to some of the companies own branches cannot be treated as a binding contemporaneous construction of the charter so as to authorize consolidation with a parallel and competing road connecting the principal termini of the company.

[16] St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 748; Louisville &c. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849; East Line &c. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834. See also Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Camden &c. R. Co. v. May's Landing &c. Co., 48 N. J. L. 530, 7 Atl. 523. But compare New York &c. R. Co. v. New

§ 372 (323). **Statutory mode must be pursued—Collateral attack.**—Enabling statutes and laws providing for consolidation are construed to authorize a consolidation only in cases where the companies seeking to combine come fairly within the terms of the statute. And a statute which provides for the consolidation of companies owning lines that have been so constructed as to admit the passage of cars over such lines of road continuously without break of gauge or interruption, does not authorize the consolidation of companies whose roads cannot be so combined as to form substantially a single line of road.[17] But statutes authorizing the consolidation of connecting or continuous lines do not always require that one should connect with the other at its terminus.[18] It has been held that the organization of a railroad company with the view of ultimately consolidating upon equitable terms and in accordance with the provisions of an existing statute with another already in existence, is not contrary to public policy, and a railroad corporation organized for such purpose may, with a view to accomplishing

York &c. R. Co., 52 Conn. 274; Prospect Park &c. R. Co., In re, 67 N. Y. 377.

[17] State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164; Central R. &c. Co. v. Macon, 43 Ga. 646; East Line &c. R. Co. v. State, 74 Tex. 434, 12 S. W. 090; State v. Vanderbilt, 37 Ohio St. 590. In the latter case the court says: "That the mere physical ability to pass cars from one road to the other satisfies the statute is a construction of it which is wholly inadmissible, for the provision requiring such connection would be without meaning. In imposing that restriction upon consolidation, the legislature intended, not merely that the physical fact should exist, but that such consolidation should only be made for the very purpose of passing freight and passengers over both lines, or some material parts thereof—not necessarily in a direct or straight line, but continuously." The court cannot know judicially that roads sought to be consolidated would, if completed, form a continuous line. Georgia Pacific R. Co. v. Gaines, 88 Ala. 377, 7 So. 382.

[18] Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755; Wallace v. Long Island R. Co., 12 Hun (N. Y.) 460. See also Union Trust Co. v. Illinois Mid. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Humphreys v. St. Louis &c. R. Co., 37 Fed. 730; Buck v. Seymour, 46 Conn. 156; Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Mayor &c. v. Baltimore &c. R. Co. 21 Md. 50.

such consolidation and carrying out the object for which it was created, purchase the stock of such other road.[19] Where the statute provides for the mode of consolidation, that mode must be substantially, if not strictly, pursued,[20] although the courts will usually presume in favor of the validity of a consolidation in the absence of evidence to the contrary,[21] and will not permit

[19] Hill v. Nisbet, 100 Ind. 341. It was held by the supreme court of Michigan that a certain statute of that state authorized a railroad company to purchase the stock of another company for the purpose of acquiring its road-bed and right of way. Dewey v. Toledo &c. R. Co., 91 Mich. 351, 51 N. W. 1063. See ante, § 110, note 97, where the provisions of the statute are quoted. See also Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225. As to consolidation of uncompleted roads, see Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359; Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047. But compare Clarke v. Omaha &c. R. Co., 4 Nebr. 459.

[20] Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 643, 53 L. R. A. 274 (quoting text); Peninsular R. Co. v. Tharp, 28 Mich. 506; Mansfield &c. R. Co. v. Drinker, 30 Mich. 124; Rodgers v. Wells, 44 Mich. 411; Commonwealth v. Atlantic &c. R. Co., 53 Pa. St. 9. See also State v. Chicago &c. R. Co., 145 Ind. 229, 43 N. E. 226; State v. Vanderbilt, 37 Ohio St. 590. An agreement for consolidation of two railroad companies, duly executed after the meetings of the stockholders of both companies had been held, in which the consolidation was ordered, is not rendered invalid by the fact that it bears date prior to the meetings. Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671. Substantial compliance with an act authorizing consolidation is sufficient. County of Leavenworth v. Chicago &c. R. Co., 25 Fed. 219.

[21] Sparrow v. Evansville &c. R. Co., 7 Ind. 369; Farmers &c. Co. v. Toledo &c. R. Co., 67 Fed. 49, 55; Swartout v. Michigan &c. Railroad Co., 24 Mich. 389. See Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671. But in Georgia Pacific R. Co. v. Gaines, 88 Ala. 377, 7 So. 382, the supreme court of Alabama held that it must affirmatively appear that several companies consolidated under the laws of that state are so joined as to form a continuous line, or the consolidated company cannot claim to succeed to the rights of the constituent companies. See also Georgia Pac. R. Co. v. Wilks, 86 Ala. 478, 6 So. 34; Brown v. Dibble, 65 Mich. 520, 32 N. W. 656, 30 Am. & Eng. R. Cas. 241. In Cameron v. New York &c. Co., 133 N. Y. 336, 31 N. E. 104, it is held that where proceedings are duly begun under a statute repealed while they are in progress they may be concluded under a saving clause in the repealing act.

it to be questioned collaterally,[22] at least by the corporation and its stockholders, where it assumes to act as a consolidated company under the law and issues bonds and mortgages as such without any objection on the part of the state or the stockholders.[23] But where the constitution of a state provided that no railroad corporation should consolidate its stock, property, franchises or earnings, in whole or in part, with any other railroad company owning a parallel or competing line, it was held that the word "consolidate" was used "in the sense to join or unite," and that the constitution could not be evaded by substituting a lease instead of a conveyance.[24] The case just referred to was a quo warranto proceeding by the attorney-general to oust the lessor company from its franchises, and the court held that they were subject to forfeiture, but refused to decree a forfeiture in the first instance and merely declared the lease void.

[22] Pittsburgh &c. R. Co. v. Rothschild, 26 Am. & Eng. R. Cas. 50. See also Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Casey v. Galli, 94 U. S. 673, 24 L. ed. 168; Dallas County v. Huidekoper, 154 U. S. 654, 14 Sup. Ct. 1190, 25 L. ed. 974; Oregon-Washington R. &c. Co. v. Wilkinson, 188 Fed. 363. Private litigants cannot ordinarily raise the question of the validity of the consolidation. Day v. Tacoma R. &c. Co., 80 Wash. 161, 141 Pac. 347. A de facto consolidated corporation cannot set up the illegality of the consolidation to defeat a recovery against it upon the contracts of one of its constituent companies. Chicago &c. R. Co. v. Putnam, 36 Kans. 121, 12 Pac. 593. Only the state can attack the validity of a consolidation, apparently regular, which has existed and been acted upon by the companies for five years. Atchison &c. R. Co., v. Board Comrs. Sumner Co., 51 Kans. 617, 33 Pac. 312. See also Bell v. Pennsylvania &c. R. Co. (N. J.), 10 Atl. 741. But see, as to right of stockholder in the original corporation to question the existence of the consolidated corporation when sued on his subscription, post, § 378; 1 Thomp. Corp. §§ 357, 358.

[23] Phinizy v. Augusta &c. R. Co., 62 Fed. 678; Farmers &c. Co. v. Toledo &c. R. Co., 67 Fed. 49. See also Ashley v. Supervisors, 60 Fed. 55; Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. ed. 408; Douglas County v. Bolles, 94 U. S. 104, 24 L. ed. 71; Bradford v. Frankfort &c. R. Co., 142 Ind. 383, 40 N. E. 741.

[24] State v Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164, 32 Am. & Eng. R. Cas. 388.

§ 373 (324). Intention to consolidate—Difference between succession and consolidation.—Where a general power to consolidate is given without any specific provision as to the terms or mode, it is held that the companies may unite upon such terms and in such mode as they choose,[25] so long as they do not exceed the statutory authority. But a clear intention to consolidate together with the performance of acts reasonably appropriate to that end, must be shown in order to establish a consolidation,[26] and the mere purchase by one railroad corporation of the franchise and property of another at a sale on execution does not operate to make the purchaser the successor by consolidation of the purchased road.[27] A consolidated corporation

[25] Dimpfel v. Ohio &c. R. Co., 9 Biss. (U. S.) 127, Fed. Cas. No. 3918.

[26] 5 Thomp. Corp. (2nd ed.), § 6035, et seq.; Shrewsbury &c. R. Co. v. Stour Valley R. Co., 21 Eng. L. & Eq. 628. See also Hart v. Rensselaer &c. R. Co., 8 N. Y. 37, 59 Am. Dec. 447; Ericson v. Fraternal Mystic Circle, 105 Tex. 170, 146 S. W. 160. The union of name, officers, business and property of corporations does not, it has been held, change their distinctive character as separate corporations. Nashua &c. R. Corp. v. Boston &c. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363, 42 Am. & Eng. R. Cas. 688. Nor is a temporary cooperation under one management a consolidation. Archer v. Terre Haute &c. R. Co., 102 Ill. 493, 7 Am. & Eng. R. Cas. 249. And the identity of the stockholders, or the fact that one of the corporations, by means thereof, or by means of the ownership of the stock of the other, exercised a controlling influence over it, does not make either the agent of the other, nor merge them into one, so as to make the contract of one binding upon the other, where they are separately organized under distinct charters. Richmond &c. Const. Co. v. Richmond &c. R. Co., 68 Fed. 105; Central Trust Co. v. Bridges, 57 Fed. 753. A railroad company is not liable for the ordinary operation of another company merely because the former owns a majority of the stock and controls the organization of the latter. Stone v. Cleveland &c. R. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770.

[27] Gulf &c. R. Co. v. Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. 788; Crane &c. Co. v. Fry, 126 Fed. 278; Houston &c. R. Co. v. Shirley, 54 Tex. 125; Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156. But consolidation by purchase may be expressly authorized. Williamson v. New Jersey &c. R. Co., 26 N. J. Eq. 398; Eaton &c. R. Co. v. Hunt, 20 Ind. 457. See also Chicago &c. R. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373; Chicago &c. R.

may usually be said to be the successor of the original or constituent companies,[28] but succession is not necessarily consolidation, and a corporation may have authority to become the successor of another without having any authority to consolidate. Succession by purchase, or in any other manner than by consolidation, is usually a very different thing from the latter and gives rise to different rights and liabilities.[29] So, a con-

Co. v. State, 153 Ind. 134, 51 N. E. 924, where all stock of one company is purchased and stock of another company is issued in exchange. But compare Exchange Bank v. Macon &c. Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800. The new corporation gets its rights by grant from the state rather than by transfer from the former corporations. Diggs v. Fidelity &c. Co., 112 Md. 50, 75 Atl. 517.

[28] United States v. Southern Pac. R. Co., 45 Fed. 596.

[29] The distinction is well stated in Compton v. Wabash &c. R. Co., 45 Ohio St. 592 16 N. E. 110, 18 N. E. 380. See also Capital Traction Co. v. Offutt, 17 App. (D. C.) 292; Conn v. Chicago &c. R. Co., 48 Fed. 177; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 7 L. R. A. 605, 16 Am. St. 81; Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274 (citing text); State v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Pennison v. Chicago &c. R. Co., 93 Wis. 344, 67 N. W. 702; note in 89 Am. St. 607-612; note in 52 L. R. A. 369. Thus, the successor by purchase may acquire the property free from debts and liabilities already created. Hoard v. Chesapeake &c. R. Co., 123 U. S. 222, 8 Sup. Ct. 74, 31 L. ed. 130; Cook v. Detroit &c. R. Co., 43 Mich. 349, 5 N. W. 390; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576; Hammond v. Port Royal &c. R. Co., 15 S. Car. 10, 16 S. Car. 567. And while it is usually bound by restrictions on the old company, it does not always acquire the special privileges and franchises of the old company. Thus, if an individual purchaser becomes the successor, the franchise to be a corporation may not pass to him. See Chaffe v. Ludeling, 27 La. Ann. 607; Daniels v. St. Louis &c. R. Co., 62 Mo. 43; Campbell v. Marietta &c. R. Co., 23 Ohio St. 168; Pittsburgh Cin. &c. R. Co. v. Moore, 33 Ohio St. 384, 31 Am. Rep. 543; Pennsylvania R. Co. v. Sly, 65 Pa. St. 205; Ragan v. Aiken, 9 Lea (Tenn.) 609, 42 Am. Rep. 684. The purchase by a foreign company of stock in domestic companies in different localities does not amount to a consolidation. Clarke v. Memphis St. R. Co., 123 Tenn. 232, 130 S. W. 751.

solidation in the strict sense is to be distinguished from a merger,[30] reorganization,[31] amalgamation[32] or lease.[33]

§ 374 (325). Right of majority to effect consolidation—When minority may prevent—Release of dissenting subscribers.—Where the law under which a corporation is formed provides generally for its consolidation with other companies, such consolidation may be effected at the pleasure of the majority of the corporation.[34] But where the power to consolidate was not contained in the charter or governing law, a consolidation cannot be effected without the consent of all the stockholders,[35] even

[30] Vicksburg &c. Tel. Co. v. Citizens' Tel. Co., 79 Miss. 341, 30 So. 725, 89 Am. St. 656; Atlantic &c. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185. See also Central &c. R. Co. v. State, 54 Ga. 401; Ramsey v. Hicks, 44 Ind. App. 490, 87 N. E. 1091; Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274 (citing text); Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; 5 Thomp. Corp. (2nd. ed.), § 6037. As to meaning of "merger" and "consolidation" as used in Alabama statute, see Alabama &c. Ry. v. Tolman (Ala.), 76 So. 381.

[31] See note in 89 Am. St. 609.

[32] See note in 89 Am. St. 612. The terms are sometimes used as synonymous, but amalgamation is an indefinite term and may include what is not strictly a consolidation. See also 5 Thomp. Corp. (2nd. ed.), § 6036.

[33] Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; State v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; 5 Thomp. Corp. (2nd. ed.), § 6039. See also State v. Vanderbilt, 37 Ohio St. 590; Missouri Pac. R. Co. v. Owens, 1 Tex. App. Civ. Cas. 384. But a consolidation sometimes takes the form, in some respects, of a lease, purchase of shares or the like.

[34] Sparrow v. Evansville &c. R. Co., 7 Ind. 369; Nugent v. Supervisors, 19 Wall. (U. S.) 241, 22 L. ed. 83; Bonner v. Terre Haute &c. R. Co., 151 Fed. 985; Bish v. Johnson, 21 Ind. 299; Atchison &c. R Co. v. Phillips Co., 25 Kans. 261; Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. 306; Mansfield &c. R. Co. v. Stout, 26 Ohio St. 241; Cork &c. R. Co. v. Patterson, 37 Eng. L. & Eq. Rep. 398. Under the Louisiana statute requiring a vote of "three-fourths of all the stockholders" of each corporation to effect a consolidation, three-fourths of the number of shares must be voted for it where each share is entitled by charter to one vote. Simon Borg &c. Co. v. New Orleans City R. Co., 244 Fed. 617.

[35] 5 Thomp. Corp. (2nd. ed.), §§ 6056, 6057. See also Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Illinois &c. R. Co. v. Cook, 29 Ill. 237; Botts v. Simp-

though the legislature may have passed a subsequent statute authorizing the consolidation of all railroad companies,[36] except, perhaps, where the power to amend was reserved.[37] In other words, there must usually be the unanimous consent of all the stockholders, unless the right to consolidate was given by the

sonville &c. Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; Chapman v. Mad River &c. R. Co., 6 Ohio St. 119; Indianola R. Co. v. Fryer, 56 Tex. 609; Gulf &c. R. Co. v. Newell, 73 Tex. 334, 11 S. W. 342. Compare Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685. The stockholder may be estopped by his acquiescence for a term of years to deny the validity of a consolidation effected without his express consent. Boston &c. R. Co. v. New York &c. R. Co., 13 R. I. 260; Bell v. Pennsylvania &c. R. Co. (N. J.), 10 Atl. 741. See also Atchison &c. R. Co. v. Sumner County Comrs., 51 Kans. 617, 33 Pac. 312; International &c. R. Co. v. Bremond, 53 Tex. 96. The consent of the bondholders and other creditors is not necessary to a consolidation.

[36] Earle v. Seattle &c. R. Co., 56 Fed. 909; Alexander v. Atlanta &c. R. Co., 108 Ga. 151, 33 S. E. 866; Sparrow v. Evansville &c. R. Co., 7 Ind. 369; McCray v. Junction R. Co., 9 Ind. 358; Kean v. Johnson, 9 N. J. Eq. 401. And it has been held that the fact that the legislature has reserved the right to amend or repeal the original charter does not ordinarily, give it a right to authorize a consolidation against the will of the minority. Mayor &c. Knoxville v. Knoxville &c. R. Co., 22 Fed. 758; Cross v. Peach Bottom R. Co., 90 Pa. St. 392. See also Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Black v. Delaware &c. Co., 24 N. J. Eq. 455; Kenosha &c. R. Co. v. Marsh, 17 Wis. 13. But see Pennsylvania College Cases, 13 Wall. (U. S.) 190, 20 L. ed. 550; Bishop v. Brainerd, 28 Conn. 289, and authorities cited in next following note. "Whether or not the legislature can authorize the consolidation of a corporation, under the general power reserved to alter or annul the charter, is not necessary to be decided. It is certain that it cannot be done when it affects the right of stockholders, by increasing their liability as such, or diminishing the value of their stock. * * * The act in this case is void unless made by the unanimous consent of the stockholders." Botts v. Simpsonville &c. Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; Blatchford v. Ross, 54 Barb. 42, 37 How. Prac. (N. Y.) 110. But see Beal v. New York &c. R. Co., 41 Hun 172, 4 N. Y. S. 174.

[37] See Market St. R. v. Hellman, 109 Cal. 571, 42 Pac. 225; Hanna v. Cincinnati &c. R. Co., 20 Ind. 30; Hale v. Cheshire R. Co., 161 Mass 443, 37 N. E. 307; Pacific R. Co. v. Renshaw, 18 Mo. 210. But compare last preceding note, and see, for review of cases on both sides of the question, the note in 52 L. R. A. 384-387.

law or the "constating instruments" at the time the corporation was created.[38] If the consolidation be effected under legislative authority given after subscriptions are made but without the consent of subscribers who have not yet paid for stock in the original companies, the consolidated company cannot enforce such subscriptions.[39] It has also been held that a municipal corporation has no power to give its consent to or acquiesce in a consolidation by which the enterprise is so far changed that the vote authorizing a subscription does not apply to the road of the new company.[40] But the case referred to has been distinguished, and the general rule is that if a municipal corporation, authorized to make the subscription, has subscribed for stock of a corporation which at the time was empowered to consolidate with another the municipality will not be released by such authorized consolidation thereafter, and its bonds issued in payment are not rendered invalid.[41]

§ 375 (325a). **Right to condemn shares of dissenting stockholder.**—An interesting question has arisen as to the power of the legislature to authorize the condemnation of shares of a dissenting stockholder. It is evident that, if this power does not exist a single dissenting stockholder might, in some instances, seriously interfere not only with the interests of the majority stockholders but also with the public interests. If there is due process of law and just compensation it would seem that there

[38] Earle v. Seattle &c. R. Co., 56 Fed. 909, 912.

[39] Booe v. Junction R. Co., 10 Ind. 93; Harshman v. Bates Co., 92 U. S. 569, 23 L. ed. 747; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; McCray v. Junction R. Co., 9 Ind. 358; 5 Thomp. Corp. (2nd. ed.), § 6061. See ante, §§ 54, 56.

[40] State v. Nemaha, 10 Kans. 569. See also Harshman v. Bates Co., 92 U. S. 569, 23 L. ed. 747; Hamilton Co. v. State, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855; Morrill v. Smith County, 89 Texas 529, 36 S. W. 56.

[41] New Buffalo v. Iron Co., 105 U. S. 73, 26 L. ed. 1024; Bates County v. Winters, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. ed. 744; Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18, 32 L. ed. 359; Mayor v. Dennison, 69 Fed. 58; Chicago &c. R. Co. v. Stafford County, 36 Kans. 121, 12 Pac. 593. See other authorities in note to Cantillon v. Dubuque &c. R. Co., 5 L. R. A. 278, and in note to Morrison v. American Snuff Co., 89 Am. St. 629.

is no valid objection to the enactment of such a law and the exercise of the power of eminent domain in such a case, and so it has been held. In one case it is said: "In the exercise of the right of eminent domain the legislature may authorize shares in corporations and corporate franchises to be taken for public use upon just compensation. The title to this species of property is no more secure against invasion, where the public use requires it, than is the ownership of real estate under this paramount right in the public, subject to which all private property is held."[42] And in a very recent case it is held that such a statute is valid and that it neither grants exclusive privileges to a particular set of men nor impairs the obligation of a contract within the meaning of the prohibition in the constitution.[43]

§ 376 (326). **Statutory provisions for consolidation.**—The laws of the various states for the consolidation of railroad companies generally provide that an agreement for a consolidation must be entered into by the directors of the several companies[44] and ratified by a vote of stockholders.[45] In Indiana the statute

[42] Black v. Delaware &c. Canal Co., 24 N. J. Eq. 455.

[43] New York &c. R. Co. v. Offield, 77 Conn. 417, 59 Atl. 510. To the same effect is the recent case of Spencer v. Seaboard Air Line R. Co., 137 N. Car. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604. See also Gregg v. Northern R. Co., 67 N. H. 452, 41 Atl. 271; Dickinson v. Consolidated Traction Co., 114 Fed. 232. But such a statute is not to be unduly extended or applied so as to deprive the stockholder of his rights without proper proceedings, due process of law and just compensation. See Mowrey v. Indiana &c. R. Co., 4 Biss. (U. S.) 78, Fed. Cas. No. 9891; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 49, 72 Am. Dec. 685; short note on the subject in 3 Mich. Law Rev. 309.

[44] 5 Thomp. Corp. (2nd. ed.), § 6053.

[45] 5 Thomp. Corp. (2nd. ed.), § 6053. The agreement for a consolidation must be ratified by a state board before it is of any force in Michigan. Howell Stat. § 3344. In New Hampshire application must be made to the supreme court, which may, after notice and hearing, authorize the consolidation, "if the public good will be promoted by such union." Pub. Stat. 1892, ch. 156, § 22. Recent railroad commission statute also require the consent of the commission in many jurisdictions. Judge Thompson says: "The statutes generally prescribe: 1. An agreement be-

provides that any railroad corporation in that state may consolidate with a railroad corporation in an adjoining state "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state," and it is held that this does not require that the meeting of the stockholders to act upon the proposition to consolidate shall be called and conducted in accordance with the laws of such adjoining state.[46] The agreement of consolidation as entered into by the directors and ratified by the stockholders is usually required to be filed with the secretary of state,[47] and it is held in Ohio that until this is done the consolidation is not actually completed so as to effect a dissolution of the old companies, but that they still remain competent to accept subscriptions to their capital stock until the agreement is actually filed.[48] The supreme court of

tween the corporations intending to consolidate. 2. Ratified by a certain majority, generally two-thirds of the stockholders of each corporation, at a duly notified meeting for that purpose. 3. The articles of consolidation thus ratified, properly authenticated, are filed with the secretary of state, which are thereafter evidence of the consolidation in all courts." Consolidation of Corporation, 31 Cent. L. J. 4, 5.

[46] Bradford v. Frankfort &c. Co., 142 Ind. 383, 40 N. E. 741.

[47] Trester v. Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110. See article by Judge Thompson in 31 Cent. L. J. 5. Notice is also required in some states. The certificate so filed is made evidence of a lawful consolidation by a statute in some states. A copy of the articles of consolidation between two railroads, duly certified under the seal of the secretary of state, is prima facie evidence of the existence of the consolidated corporation. East St. Louis C. R. Co. v. Wabash &c. R. Co., 24 Ill. App. 279. A certified copy from the secretary of state's office of an agreement for consolidation was held by the Supreme Court of the United States to be conclusive evidence of the consummation of the consolidation of corporations in Missouri, under a similar statute, in suits between the consolidated company and individuals or other corporations. Leavenworth County v. Chicago &c. R. Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064. The filing of the certificate of consolidation may be made a condition precedent. Commonwealth v. Atlantic &c. R. Co., 53 Pa. St. 9; Peninsular R. Co. v. Tharp, 28 Mich. 506. But see Leavenworth County v. Chicago &c. R. Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064. Other steps may also be required as condition precedent. Mansfield &c. R. Co. v. Drinker, 30 Mich. 124.

[48] Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223. See also State v. Vanderbilt, 37 Ohio St. 590.

Pennsylvania, however, holds that the consolidated corporation is so far created by the execution of an agreement of consolidation by the constituent corporations that a valid subscription to its stock may be made before the agreement is recorded.[49] And in a case in one of the federal courts it was held that where the agreement was recorded in the office of the secretary of state and it appeared from the minutes of three of the companies that it had been ratified and accepted by the stockholders, and the new company assumed and exercised for several years entire charge and control of all the roads without objection, this was sufficient to show an acceptance by all of them, although the minutes of the fourth company were lost and although the agreement did not have upon it the certificates of the several secretaries of the different companies, which the statute made conclusive evidence of such acceptance.[50] Statutes granting permissive authority to consolidate often prescribe conditions.[51] A statute granting railroad companies power to consolidate, but coupling the grant with a condition or proviso that the consolidated company shall not have power to create any lien which shall be valid as against a specified class of creditors is not in violation of a constitutional provision that statutes shall embrace but one subject, which must be expressed in the title.[52]

[49] McClure v. People's Freight R. Co., 90 Pa. St. 269. The provision requiring each company to file with the secretary of state a resolution accepting the provision of the act under which the two companies have consolidated is merely directory, and a disregard of it will not invalidate the agreement of cosolidation, if all other provisions of the act have been complied with. Leavenworth County v. Chicago &c. R. Co., 25 Fed. 219, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064.

[50] Phinizy v. Augusta &c. R. Co., 62 Fed. 678. As to proof of consolidation, see Columbus &c. R. Co. v. Skidmore, 69 Ill. 566; Commonwealth v. Carroll, 145 Mass. 403, 14 N. E. 618; Kinion v. Kansas City, &c. R. Co., 39 Mo. App. 382.

[51] See Illinois G. T. R. Co. v. Cook, 29 Ill. 237; Adams v. Yazoo &c. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956, 60 L. R. A. 33; Charlotte &c. R. Co. v. Gibbes, 27 S. Car. 385, 4 S. E. 49; Houston &c. R. Co. v. Shirley, 54 Tex. 125.

[52] Frazier v. East Tenn. &c. R. Co., 88 Tenn. 138, 12 S. W. 537, 40 Am. & Eng. R. Cas. 358.

§ 377 (327). Rights of old stockholders and their relation to the new company.—The stockholders of the constituent corporations cannot be compelled to become stockholders of the new corporation without their consent, unless otherwise provided, and do not become such, as a rule, until the surrender of their old stock in exchange for new.[53] And, although the old corporation may be dissolved by the act of consolidation the property interests of its stockholders usually remain unchanged until divested by their own act or in some manner provided by law.[54] Several of the states, however, provide for the purchase by the company of the shares of stockholders who decline to become members of the consolidated company.[55] And, as a general rule, unless otherwise provided by contract or the governing statute, when the consolidation is duly perfected stockholders in the old companies become stockholders in the new,[56] which may usually enforce the unpaid subscriptions to the stock of the old corpora-

[53] State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405; Gardner v. Hamilton &c. Ins. Co., 33 N. Y. 421; 5 Thomp. Corp. (2nd. ed.), § 6061. See also Kohl v. Lilenthal, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689, 6 L. R. A. 520; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604; Lauman v. Lebanon &c. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685.

[54] Philadelphia &c R. Co. v. Catawissa R. Co., 53 Pa. St. 20. It has been held in Massachusetts that the holder of bonds convertible into the stock of a road which had consolidated with another to form a new corporation, expressly charged with the performance of its obligations and liabilities, was entitled to demand stock in the new corporation, as for the purposes of this contract the old corporation continued under the new name. Day v. Worcester &c. R. Co., 151 Mass. 302, 23 N. E. 824.

[55] See 5 Thomp. Corp. (2nd. ed), § 6060. But this does not prevent a resort to the courts in a proper case. Langan v. Frankyln, 20 N. Y. S. 404. See also as to right to arbitrate. Pittsburgh &c. R. Co. v. Garrett, 50 Ohio St. 405, 34 N. E. 493.

[56] Ridgway Township v. Griswold, 1 McCrary (U. S.) 151, Fed. Cas. No. 11819; 1 Thomp. Corp. (2nd. ed.), § 355. In Fee v. New Orleans &c. Co., 35 La. Ann. 413, it was held that a stockholder in one of the old companies could sue the consolidated company for stock which he was entitled to in exchange. So, under the agreement in Anthony v. American Glucose Co., 146 N. Y. 407, 41 N. E. 23.

tions.[57] But, if the subscription was made upon a valid condition, it passes to the new company subject to such condition.[58]

§ 378 (328). **Remedies of old stockholders.**—As elsewhere stated,[59] a dissenting stockholder cannot always be compelled to become a shareholder in the new consolidated company, nor held liable upon his original subscription, and he may, in some instances, entirely defeat or prevent the consolidation. Thus, he may enjoin an ultra vires consolidation,[60] inimical to him, at least until his interest is purchased or secured.[61] He may, however, lose the right to enjoin a consolidation which could not be made without his consent by acquiescence or laches.[62] It is also

[57] Nugent v. Supervisors, 19 Wall. (U. S.) 241, 22 L. ed. 83; Pope v. Board of Comrs., 51 Fed. 769; Hanna v. Cincinnati &c. R. Co., 20 Ind. 30; Swartout v. Michigan &c. R. Co., 24 Mich. 389; Wells v. Rodgers, 60 Mich. 525, 27 N. W. 671; Cooper v. Shropshire &c. R. Co., 13 Jur. 443, 6 Eng. R. & Canal Cas. 136. See also Hayworth v. Junction R. Co., 13 Ind. 348; Mansfield &c. R. Co. v. Drinker, 30 Mich. 124. But compare Sprague v. Illinois &c. R. Co., 19 Ill. 174; Ottawa &c. R. Co. v. Black, 79 Ill. 262. As to when this cannot be done, see ante, § 374. Here, of course, we refer to a consolidation authorized by charter or statute at the time the subscription was made. See also, Sparrow v. Evansville &c. R. Co., 7 Ind. 369; Hanna v. Cincinnati &c. R. Co., 20 Ind. 30; Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223.

[58] 2 Thomp. Corp. (2d ed.), § 6061; Mansfield &c. R. Co. v. Pettis, 26 Ohio St. 259.

[59] Ante, § 374.

[60] Charlton v. New Castle &c. R. R. Co., 5 Jur. (N. S.) 1096; Nathan v. Tompkins, 82 Ala. 437, 2 So. 747; Watson v. Harlem &c. Co., 52 How. Prac. (N. Y.) 348. See also Mowrey v. Indianapolis &c. R. Co., 4 Biss. (U. S.) 78, Fed. Cas. No. 9891; Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Botts v. Simpsonville &c. Co., 88 Ky. 54, 10 S. W. 134, 2 L. R. A. 594; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Stevens v. Rutland &c. R. Co., 29 Vt. 545. But not, it is held, on the ground that one of the constituent companies was illegally organized. Bell v. Pennsylvania &c. R. Co. (N. J.), 10 Atl. 741.

[61] Lauman v. Lebanon &c. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; State v. Bailey, 16 Ind. 46, 79 Am. Dec. 405.

[62] Bell v. Pennsylvania &c. R. Co. (N. J.), 10 Atl. 741; Zabriskie v. Hackensack &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617; Deaderick v. Wilson, 8 Baxt. (Tenn.) 108; 5 Thomp. Corp. (2nd ed.), §§ 6058, 6059. See also Cole v. Birmingham Un. R. Co., 143 Ala. 427, 39 So. 403; Alton R. &c. Co. v. Mayfield, 95 Ill.

said that where a consolidation is wrongfully effected by the shareholders, over the objection of a dissenting shareholder, who has partly paid for his stock; the consolidated company is liable to him therefor, but he cannot sue the directors personally for damages.[63] We have already referred to the general rule prohibiting collateral attacks upon consolidated corporations as well as other corporations, but this rule ought not, it seems to us, to be applied so as to prevent a subscriber to stock in one of the original corporations from questioning, under certain circumstances, the corporate existence or title of the new consolidated corporation by way of defense to an action by the new company to enforce such subscription.[64]

§ 379 (329). Consolidated company succeeds to rights and liabilities of the old companies.—As a general rule the consolidated company is vested with all the rights, property, privileges and franchises of the several companies of which it is formed,[65]

App. 146; Hale v. Cheshire R. Co., 161 Mass. 443, 37 N. E. 307; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959; Drake v. New York &c. Co., 26 App. Div. 499, 50 N. Y. S. 826; Spencer v. Seaboard Air Line R. Co., 137 N. Car. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604, and note; Boston &c. R. Co. v. New York &c. R. Co., 13 R. I. 260.

[63] International &c. R. Co. v. Bremond, 53 Tex. 96. See also Tanner v. Lindell R. Co., 180 Mo. 1, 79 S. W. 155, 103 Am. St. 534. And see and compare generally as to rights and remedies of dissenting stockholder. Mayfield v. Alton R. &c. Co., 198 Ill. 528, 65 N. E. 100; Barnett v. Philadelphia &c. Co., 218 Pa. 649, 67 Atl. 912.

[64] See Mansfield &c. R. Co. v. Stout, 26 Ohio St. 241; Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223; Tuttle v. Michigan Air Line R. Co., 35 Mich. 247. But see Ottawa &c. R. Co. v. Black, 79 Ill. 262; Kenosha R. &c. R. Co. v. Marsh, 17 Wis. 13.

[65] Mt. Pleasant v. Beckwith, 100 U. S. 514, 25 L. ed. 699; Chicago &c. R. Co. v. Moffit, 75 Ill. 524; Crawfordsville &c. Co. v. Fletcher, 104 Ind. 97, 2 N. E. 243; note to Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Louisville &c. R. Co. v. Blythe, 69 Miss. 939, 11 So. 111, 16 L. R. A. 251, 30 Am. St. 599. See also Birmingham &c. Co. v. Cunningham, 141 Ala. 470, 37 So. 689; 5 Thomp. Corp. (2nd. ed.), § 6080, et seq. State v. Maine Central R. Co., 66 Maine 488, it is held that where a new corporation is formed by the consolidation of two or more previously existing corporations, and by the act is to "have the powers, privileges and immunities possessed by each of the cor-

and is subject to the debts and liabilities of such companies.[66] The statutes generally so provide,[67] and such liability usually exists, even though neither the statute nor the agreement of consolidation expressly so provides.[68] But it is not liable for a

porations," the new corporation will have only the privileges, powers and immunities possessed by the one of such corporations having the fewest privileges, powers and immunities, and which were common to all. But see Natchez &c. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33.

[66] Atlantic &c. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119, and other cases there cited in note, especially as to liability; note to McMahan v. Morrison, 79 Am. Dec. 424, 426; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435, and note. See Harrison v. Arkansas &c. Co., 4 McCrary (U. S.) 264, 13 Fed. 522; Pullman Car Co. v. Missouri Pac. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499; Atlantic &c. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 483, 11 L. R. A. (N. S.) 1119; Berry v. Kansas City &c. R. Co., 52 Kans. 759, 39 Am. St. 371; Thompson v. Abbott, 61 Mo. 176. The new company cannot aver ignorance of an unrecorded mortgage given by one of its constituent companies. Mississippi &c. Co. v. Chicago &c. R. Co., 58 Miss. 846. See also Bloxam v. Florida &c. R. Co., 35 Fla. 625, 17 So. 902. The New York statute authorizing the consolidation of railroad companies, and providing that all debts and liabilities of either company, except mortgages, shall attach to the new corporation, and be enforced against it and its property to the same extent as if created by it, allows an action against the new company on bonds and coupons of one of the former companies, though secured by a mortgage on the property of the original debtor corporation. Polhemus v. Fitchburg R. Co., 123 N. Y. 502, 26 N. E. 31. See Plainview v. Winona &c. R. Co., 36 Minn. 505, 32 N. W. 745. Such liability attaches unless there is a special agreement to the contrary. Berry v. Kansas City &c. R. Co., 52 Kans. 759, 774, 39 Am. St. 371.

[67] See note in 89 Am. St. 636; Kansas City &c. R. Co. v. Langley, 70 Kans. 453, 78 Pac. 858.

[68] "The foundation of the liability of a consolidated corporation may rest on a statute or an agreement, either express or implied. If the statute does not provide that the new company shall assume the debts and liabilities of the constituent companies, and there is no express agreement respecting the same, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation." Berry v. Kansas City &c. R. Co., 52 Kans. 774, 36 Pac. 724, 39 Am. St. 381. See also People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E. 657; State v. Baltimore &c. R. Co., 77 Md. 489, 26 Atl. 865; Chase v. Michigan Tel.

penalty incurred by the lessee of one of the constituent companies.[69] Even in the absence of express statutory provisions on the subject the property and franchises of the old companies will usually vest in the new corporation,[70] and it will succeed to all the rights of each of such companies, and may compromise and settle a claim against one of them and enforce the settlement by suit.[71] Where the law under which the corporation

Co., 121 Mich. 631, 80 N. W. 717; Shadford v. Detroit &c. R. Co., 130 Mich. 300, 89 N. W. 960; Thompson v. Abbott, 61 Mo. 176; Houston &c. R. Co. v. Shirley, 54 Tex. 125; Missouri Pac. R. Co. v. Owens, 1 Tex. App. Civ. 384; Langborne v. Richmond R. Co., 91 Va. 369, 22 S. E. 159; National &c. Works v. Oconto City &c. Co., 105 Wis. 48, 81 N. W. 125; Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833; notes in 11 L. R. A. (N. S.) 1119; 32 L. R. A. (N. S.) 616.

[69] State v. Pittsburgh &c. R. Co., 135 Ind. 578, 35 N. E. 700.

[70] Green County v. Conness, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. ed. 872; Southern Pac. R. Co. v. Poole, 32 Fed. 451; State v. Seaboard &c. R. Co., 52 Fed. 450; Meyer v. Johnston, 53 Ala. 237; Zimmer v. State, 30 Ark. 677; Baltimore v. Baltimore &c. R. Co., 6 Gill (Md.) 288, 438 Am. Dec. 531; Consolidated Gas Co. v. Baltimore &c., 98 Md. 689, 57 Atl. 29; Daniels v. St. Louis &c. R. Co., 62 Mo. 43; Trester v. Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; Trenton St. R. Co., In re, (N. J. Eq.), 47 Atl. 819; South Carolina R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. 159. Cashman v. Brownlee, 128 Ind. 266, 27 N. E. 560. In this latter case it is held that where land is conveyed in fee simple to a railroad company and afterward the company is consolidated with another, and further consolidations take place from time to time, the new companies formed by the successive consolidations succeed to the said real estate, and may recover it from grantor or those to whom he afterward transfers it, although he has remained in possession of the premises for more than twenty years after the conveyance was made, since the possession of a grantor cannot be adverse to the title of his grantee. See also Union Trac. Co. v. Barey, 164 Ind. 249, 73 N. E. 263 (right to appeal eminent domain proceedings); Ball v. Rutland R. Co., 93 Fed. 513 (right to fix rates).

[71] Pain v. Lake Erie &c. R. Co., 31 Ind. 283. See also St. Paul &c. R. Co. v. Western Union Tel. Co., 118 Fed. 497. The consolidated company may collect municipal aid voted to one of the companies of which it is formed, where the consolidation was authorized at the time it was voted. Scott v. Hansheer, 94 Ind. 1; East Lincoln v. Davenport, 94 U. S. 801, 24 L. ed. 322; Atchison &c. R. Co. v. Phillips Co., 25 Kans. 261. See also Pope v. Board of Comrs., 51 Fed. 769 (hold-

was organized authorizes a consolidation, the consolidated company may recover on the contracts of subscription given to the original companies, since the subscriptions will be held to have been made with reference to the law as it then existed.[72] The consolidated company may accept a continuing offer to subscribe made to one of the original companies, and may, when authorized to do so, perform any conditions annexed to a subscription given to such company.[73] A valid consolidation or a right as successor may, however, be required to be shown to enable the consolidated company or its assignee to maintain an action upon the contracts of one of the roads out of which it was formed.[74] But it is sufficient, in pleading such a consolidation, to show the organization of the original companies into

ing in accordance with the Indiana decision that the tax must be levied and collected or there is no legal right to it). The Pennsylvania statute governing the consolidation of connecting railroad companies provides that the new company shall possess all the rights theretofore vested in either of them; and all the property and rights of actions shall be deemed to be transferred to the new company. It was held that the consolidated company could recover on an indemnity bond given by a passenger agent to one of the old companies, its attorney, successors, or assigns; prior to the act of consolidation, where such agent continues in his position and discharges substantially the same duties as before. Pennsylvania &c. R. Co. v. Harkins, 149 Pa. St. 121, 24 Atl. 175, 50 Am. & Eng. R. Cas. 587. The new company may lawfully use a patent axle box which the old companies were licensed to use. Lightner v. Boston &c. R. Co., 1 Lowell (U. S.) 338, Fed. Cas. No. 8343.

[72] Nugent v. Supervisors, 19 Wall. (U. S.) 241, 22 L. ed. 83; Scotland County v. Thomas, 94 U. S. 682, 24 L. ed. 219; Bates County v. Winters, 112 U. S. 325, 5 Sup. Ct. 157, 28 L. ed. 744; Bish v. Johnson, 21 Ind. 299; Atchison &c. R. Co. v. Phillips Co., 25 Kans. 261; Mansfield &c. R. Co. v. Stout, 26 Ohio St. 241; ante, § 355.

[73] Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223.

[74] Brown v. Dibble, 65 Mich. 520, 32 N. W. 656, 30 Am. & Eng. R. Cas. 241. After a railroad company has been merged by consolidation with another railroad company, and such new corporation is carrying on a railway business, and is a de facto corporation, the existence and validity of the corporation can only be attacked in a direct proceeding brought for that purpose; such a matter will not be the subject of a collateral attack by way of defeating the right to recover on bonds of the merged railroad subscribed to by a county in aid of railroad construction. Chicago &c. R. Co. v. Putnam, 36 Kans. 121, 12 Pac. 593.

the consolidated company by a given name and as a corporate body by authority of law, without setting out the steps taken to effect the same.[75]

§ 380 (330). Special privileges and immunities—When they pass to the new company.—Special privileges possessed by all of the consolidating companies will pass to the new company, where the statute provides that it shall have all the "franchises, privileges and immunities of the constituent companies."[76] Thus, it has been held that an exemption from taxation will pass to the new company so far as the property originally covered by the exemption is concerned.[77] But, in the absence of such a provision, it seems that a special immunity of exemption from

[75] Collins v. Chicago &c. R. Co., 14 Wis. 492. See also Jackson Consolidated Trac. Co. v. Jackson Circ. Judge, 155 Mich. 522, 119 N. W. 915. In the pleading the consolidation of two railway corporations under the statutes of another state it is sufficient to set out a copy of the statutes, and to allege that their provisions have been complied with, and the consolidation effected; it is not necessary to set out the steps taken under the statutes, such steps being evidence of the consolidation. Rothschild v. Rio Grande W. R. Co., 63 Hun 632, 18 N. Y. S. 548.

[76] In State v. Maine &c. R. Co., 66 Maine 488, it was held that the consolidated company took only such privileges and immunities as were common to all the constituent companies. It could, however, doubtless be given all that any one of them possessed. See 5 Thomp. Corp. (2nd. ed.), § 6111.

[77] International &c. R. Co. v. Anderson Co., 59 Tex. 654; Natchez &c. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33. Where two companies, whose charters exempt their capital stock from taxation, consolidate to form a single corporation, it has been held that the shares of stock of such consolidated company are not subject to taxation. Tennessee v. Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, 29 L. ed. 833, affirming State v. Whitworth, 22 Fed. 75, 81. See Philadelphia &c. R. Co. v. Maryland, 10 How. (U. S.) 376, 13 L. ed. 461; Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Central R. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Chesapeake &c. R. Co. v. Virginia, 94 U. S. 718, 24 L. ed. 310; Atlantic &c. R. Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; State Treasurer v. Auditor-General, 46 Mich. 224, 9 N. W. 258. But compare State v. Maine Central R. Co., 66 Maine 488; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Railroad Co. v. Gaines, 97 U. S. 697, 24 L. ed. 1091; and see authorities cited in next following note; State v. Keokuk &c. R. Co., 99 Mo. 30, 12 S. W. 290, 6 L. R. A. 222.

taxation enjoyed by one of the original companies will not pass to the consolidated company.[78] It has been held that a right to take land for a right of way,[79] or to borrow money or mortgage the road as security,[80] or to charge a certain rate for transportation,[81] will pass to the consolidated company. So it has been held that the right conferred by special charter upon a street railway company to operate a street railway upon all or any of the streets of a city, survives to the company in

[78] Rochester R. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784. See also ante, § 75, note 2; Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450, in which attention is called to the apparent conflict in the decisions of the Supreme Court of the United States. In Phoenix, &c. Co. v. Tennessee, 161 U. S. 174, 16 Sup. Ct. 471, 40 L. ed. 660, the conflicting authorities are reviewed and the conclusion reached that the weight of authority and the better reason is to effect that the word "immunity" or "exemption" must be used unless the legislative intention to pass the exemption is otherwise clearly shown, and that a mere transfer of the "privileges" of the constituent companies is insufficient to pass the exemption from taxation. And this is followed in Rochester R. Co. v. Rochester, supra. But the question as to whether an exemption survives may also depend somewhat upon the nature and effect of the so-called consolidation as to whether it does or does not work a dissolution, and there are some cases in which the exemption from taxation was held to pass, although no such language was used as that which seems to be required according to the decision above referred to. See authorities cited in last preceding note; also St. Louis &c. R. Co. v. Berry, 41 Ark. 509; St. Louis &c. R. Co. v. Berry, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1055; Rochester R. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784; Atlantic &c. R. Co. v. Allen, 15 Fla. 637; Natchez &c. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33; State v. Woodruff, 36 N. J. L. 94; note in 89 Am. St. 626; 5 Thomp. Corp. (2nd. ed.), § 6112.

[79] South Carolina R. Co. v. Blake, 9 Rich. (S. Car.) 228. See also Lawrence v. Morgan &c. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; Adee v. Nassau Elec. R. Co., 65 App. Div. 529, 72 N. Y. S. 992.

[80] Mead v. New York &c. R. Co., 54 Conn. 199. See also Dupont v. Northern Pac. R. Co., 18 Fed. 467; Wabash &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. ed. 235.

[81] Ball v. Rutland R. Co., 93 Fed. 513; Fisher v. New York Central &c. R. Co., 46 N. Y. 644. But see Covington &c. Co. v. Sanford, 14 Ky. Law Rep. 689, 20 S. W. 1031; Pittsburgh &c. Co. v. Moore, 33 Ohio St. 384, 31 Am. Rep. 543.

which it is merged by consolidations.[82] And where the officers and servants of a company are exempt from jury duty, it has likewise been held that the officers and servants of the company into which it is merged by consolidation will possess the same privilege.[83]

§ 381 (331). **When special privileges do not pass.**—A surrender by the companies of all special privileges is sometimes made the condition of a grant by the state of authority to consolidate, in which case the new company will have only the special privileges conferred by its charter.[84] And, when the consolidation under the law giving the power to consolidate operates in effect as a charter, and the company formed by the consolidation is a new corporation organized under that charter,[85] no special privileges or exemptions will be transmitted to the new company which the legislature could not confer at the time the consolidation was effected.[86] This is in

[82] Citizens' Street R. Co. v. Memphis, 53 Fed. 715.

[83] Zimmer v. State, 30 Ark. 677. See also Hawkins v. Small, 7 Baxt. (Tenn.) 193; Tennessee v. Whitworth, 22 Fed. 81.

[84] State v. Keokuk &c. R. Co., 99 Mo. 30.

[85] The consolidation of a railroad corporation with companies organized under the laws of other states is not an incorporation within the meaning of laws requiring the payment of an organization tax. People v. New York &c. R. Co., 129 N. Y. 474, 654, 29 N. E. 959. See opinion of the justices, 65 N. H. 673, to the same effect as to the union of two domestic corporations.

[86] St. Louis &c. R. Co. v. Berry, 113 U. S. 465, 5 Sup. Ct. 529, 28 L. ed. 1025; Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; State v. Keokuk &c. R. Co., 99 Mo. 30, 6 L. R. A. 222; Keokuk &c. R. Co. v. Scotland Co., 41 Fed. 305. In these cases it is held that the corporation formed by a consolidation effected after the state has adopted a constitution prohibiting the legislature from granting any exemption from taxation cannot claim benefit of an exemption previously granted to the companies of which it is composed. But in Citizens' Street R. Co. v. Memphis, 53 Fed. 715, Judge Hammond held that a consolidation did not have any effect to destroy the special privileges and immunities held by the consolidating companies where the consolidation was effected under a law passed after the adoption of a constitution providing "that the legislature shall have no power * * * to pass any law granting to any individual or individuals rights, privileges, immuni-

accordance with the rule announced in a previous section.[87] It has also been held by the Supreme Court of the United States, in a recent case, that a grant to the new corporation of the exemptions and immunities of each of the constituent companies did not pass the exemption of the stockholders of the constituent companies from individual liability, as the exemption of stockholders was not an exemption of the corporation.[88] And in a still more recent case it is held by the same court that an immunity of a street railway company from paving between its tracks did not pass under a statutory provision that the "estate, property, rights, privileges, and franchises" of the old company should vest in and be held and enjoyed by the consolidated or purchasing company.[89]

§ 382 (332). Duties and obligations of new company.—Not only does the new company usually possess all of the rights and privileges of the original companies not expressly taken from it, but it is subject in general to all the duties imposed upon them by the law or laws of their creation, except so far as the law under which the consolidation is effected relieves it from the performance of such duties.[90] It is bound to per-

ties or exemptions other than such as may be, by the same law extended to any member of the community who may be able to bring himself within the provisions of such law. No corporation shall be created, or its powers increased or diminished by special laws, but the general assembly shall provide by general laws for the organization of all corporations hereafter created, which laws may at any time be altered or repealed."

[87] See ante, § 373.

[88] Minneapolis &c. R. Co. v. Gardner, 177 U. S. 332, 20 Sup. Ct. 656, 44 L. ed. 793. This seems to be a dangerous doctrine and in conflict with the reasoning in such cases as those cited in note (at close of § 380), ante, yet technically and logically it seems to be correct, at least if the letter rather than the spirit of the law is to be followed and the rule that exemptions must be clearly granted, and that the corporation is a distinct entity separate from its stockholders, is to be applied as against the stockholders in such a case.

[89] Rochester R. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784.

[90] Chicago &c. R. Co. v. Moffitt, 75 Ill. 524; Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; State v. Northern Pac. R. Co., 36 Minn. 207; Charity Hospital v.

form the duties resting upon the original companies as common carriers, and any agreement to avoid such duties is contrary to public policy and void.[91] So, it has been held liable for a failure to restore a stream crossed by one of the constituent companies to its former condition,[92] and for the continuance of a nuisance erected by such company.[93]

§ 383 (333). **Liability of new company on old contracts.**— The contracts entered into by the constituent railroad companies may usually be enforced against the new company to the extent that it is capable of performing their conditions.[94] Thus, it has been held that the consolidated company is bound to perform the contract of transportation called for by a mileage ticket issued by a constituent company,[95] to convey land

New Orleans &c. Co., 40 La. Ann. 382, 4 So. 433; 5 Thomp. Corp. (2nd. ed.), §§ 6083, 6095, et seq.

91 Peoria &c. R. Co. v. Coal Valley Min. Co., 68 Ill. 489; People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E. 657.

92 Chicago &c. R. Co. v. Moffitt, 75 Ill. 524; Cott v. Lewiston R. Co., 36 N. Y. 214.

93 Eyler v. County Comrs., 49 Md. 257, 33 Am. Rep. 249; Wellcome v. Leeds, 51 Maine 313; Central R. Co. v. State, 32 N. J. L. 220.

94 Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499. Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. ed. 673; Smith v. Los Angeles &c. R. Co., 98 Cal. 210, 33 Pac. 53 (liable for breach of contract). See also Columbus &c. R. Co. v. Skidmore, 69 Ill. 566; Hancock &c. Ins. Co. v. Worcester &c. R. Co., 149 Mass. 214, 21 N. E. 364; Day v. Worcester &c. R. Co., 151 Mass. 302, 23 N. E. 824; Thompson v. Abbott, 61 Mo. 176. Under a statute authorizing the consolidation of a railroad company, which is the grantee of a right of way, with another company, a section of the statute providing that the consolidation shall not affect the rights of creditors of the companies, the new company is not protected, as an innocent purchaser, against the enforcement of covenants entered into by the grantee of the right of way, and which run with the land, even though the breach occurred after the consolidation was effected. Mobile &c. R. Co. v. Gilmer, 85 Ala. 422, 5 So. 138. But the mere fact that the stockholders of two separate companies are the same, or the like, does not necessarily operate as a merger or consolidation and make one liable for the contracts of the other. Richmond &c. Co. v. Richmond &c. Co., 68 Fed. 105; Chase v. Michigan Tel. Co., 121 Mich. 631, 80 N. W. 717.

95 Tompkins v. Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992. In Cox v. Baltimore &c. R. Co., 180

agreed to be conveyed by a constituent company,[96] to maintain a depot at a certain place as so agreed,[97] and the like.[98] But, while the contracts of the original companies may be binding upon the corporation formed by their consolidation to the same extent and in the same manner that they were binding upon the original companies respectively, the new company, ordinarily, assumes no greater obligations than rested upon those companies at the time of the consolidation. Thus, in a suit to compel a railroad company formed by consolidation to perform a contract made by one of the original companies to use the complainant's cars on its entire line of railway, and on all roads which it might thereafter control by ownership, lease, or otherwise, the court held that the new company must use the plaintiff's cars upon all roads owned or controlled at the time of the consolidation by the company which had made the contract, but that the contract did not apply to roads acquired after the consolidation.[99]

Ind. 495, 103 N. E. 337, 50 L. R. A. (N. S.) 453n, it is expressly stated that the act of consolidation involves an implied assumption by the new company of the obligation and liabilities of the old companies, but it is held that this rule does not apply where the company is merely a purchaser at judicial sale so as to make it liable in a parol contract of employment made by the old company.

[96] Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 9 Sup. Ct. 286, 32 L. ed. 673.

[97] People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E. 657.

[98] Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Sappington v. Little Rock &c. R. Co., 37 Ark. 23. For many illustrations of liability as to indebtedness and contracts of constituent companies, see generally Atlantic &c. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119 and other cases cited in note; also Shadford v. Detroit &c. R. Co., 130 Mich. 300, 89 N. W. 960.

[99] Pullman's Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 6 Sup. Ct. 194, 29 L. ed. 499. The liability of a succeeding corporation for the debts of the old may depend upon the nature of the transaction and be limited by the value or extent of the property received from the old and many of the courts hold that there is generally a liability for such debts to that extent but no further unless assumed or imposed by statute. In re, Halstead, 204 Fed. 115; Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696; Ferguson Wheeler Land, Lumber & Handle Co. v. Good, 112 Ark. 260, 165 S. W. 628; Wesco Supply Coke v. El Dorado Light &c. Co., 107 Ark. 424, 155 S. W. 518; Ft. Wayne &c. Trac. Co.

§ 384 (334). **Liability of new company for torts—Extent of liability—Generally.**—The consolidated company is generally held liable for the torts of the original companies as well as upon their contracts.[1] Where suit is brought directly against the consolidated company upon a demand against one of its constituent corporations, the fact of the consolidation should be averred in the complaint, declaration, or bill, in order to avoid a variance in the proof.[2] The debts and liabilities may be en-

v. Kendlesparker, 46 Ind. App. 299, 92 N. E. 228; United Zinc Co. v. Harwood, 216 Mass. 474, 103 N. E. 1037; Irvine v. New York Edison Co., 207 N. Y. 425, 101 N. E. 358, Ann. Cas. 1914C, 441.

[1] Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654 (stock killing case); Warren v. Mobile &c. R. Co., 49 Ala. 582 (personal injuries; Zealy v. Birmingham R. Co., 99 Ala. 579, 13 So. 118; Coggin v. Central R. Co., 62 Ga. 685, 35 Am. Rep. 132; Chicago &c. R. Co. v. Moffitt, 75 Ill. 524; Columbus &c. R. Co. v. Powell, 40 Ind. 37 (personal injuries); Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48 (personal injuries); Cleveland &c. R. Co. v. Prewitt, 134 Ind. 557, 33 N. E. 367, 54 Am. & Eng. R. Cas. 198; State v. Baltimore &c. R. Co., 77 Md. 489, 26 Atl. 865; New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397; Batterson v. Chicago &c. R. Co., 53 Mich. 125, 18 N. W. 584; Railroad Co. v. Hutchins, 37 Ohio St. 282 (conversion); Texas &c. R. Co. v. Murphy, 46 Tex. 356, 26 Am. Rep. 272; Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. 159. But see Louisvill &c. R. Co. v. Hughes, 134 Ga. 75, 67 S. E. 542; Cotzhausen v. H. W. Johns Mfg. Co., 100 Wis. 473, 76 N. W. 622; Joseph v. Southern R. Co., 127 Fed. 606. It is the identity of the corporation, and not of the name, that determines the liability of a railroad company for a trespass. De Lissa v. Missouri R. Co., 36 Mo. App. 706. As to whether liability for torts is included in express assumption of indebtedness or liabilities of one company by another in the agreement and just what such an agreement covers, see Luedecke v. Des Moines Cabinet Co., 140 Iowa 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616, and cases there cited in note; Billmyer Lumber Co. v. Merchants' Coal &c. Co., 66 W. Va. 696, 66 S. E. 1073, 26 L. R. A. (N. S.) 1101, and note reviewing cases. It is held in Cooper v. Utah Light &c. R. Co., 35 Utah 570, 102 Pac. 202, that a corporation is not generally liable for the torts of the corporation to which it has succeeded, but is liable under the Utah constitution for judgments for personal injuries to employes in its operation where the new company paid for the property and franchise of the old company by issuance of stock.

[2] Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654. See also Langhorne v. Richmond City

forced against the consolidated company into which it is merged, without any statute imposing such liability,[3] at least to the extent of the property received by it from the old corporation.[4] Equity will consider the effects of a merged or dissolved corporation as a trust fund for the payment of creditors, into whosesoever hands they may come.[5] But it has

R. Co., 91 Va. 364, 22 S. E. 357; Selma &c. R. Co. v. Harbin, 40 Ga. 707; Marquette &c. R. Co. v. Langton, 32 Mich. 251; note in 89 Am. St. 647, 648, as to suing the consolidated company directly and as to abatement and substitution. A variance arising from such omission cannot be taken advantage of for the first time in an appellate court. Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654.

[3] The consolidated company, it is said, should be deemed to be merely the same as each of its constituents, their existence continued in it, under the new form and name, their liabilities still existing as before, and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name. Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 29 Am. Dec. 654; Columbus &c. R. Co. v. Powell, 40 Ind. 37; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Thompson v. Abbott, 61 Mo. 176; Miller v. Lancaster, 5 Coldw. (Tenn.) 514. There can be no loss of identity of the original companies in the consolidation to the prejudice of the rights of prior creditors, or the destruction of prior liens. Hamlin v. Jerrard, 72 Maine 62; Central R. &c. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757. Where one railroad company terminates its existence by being consolidated with another, and no arrangements are made respecting the property and liabilities of the first company, the consolidated company will succeed to all the property and be answerable for all the liabilities of the consolidating companies. Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Atlantic &c. R. Co. v. Johnson, 127 Ga. 392, 56 S. E. 482.

[4] Tompkins v. Augusta Southern R. Co., 102 Ga. 436, 30 S. E. 992; Brum v. Merchants' Mut. Ins. Co. 16 Fed. 140; Harrison v. Arkansas Valley R. Co., 4 McCrary (U. S.) 264, 13 Fed. 522; United States Capsule Co. v. Isaacs, 23 Ind. App. 533, 55 N. E. 832; Morrison v. American Snuff Co., 79 Miss. 330, 30 So. 723, 89 Am. St. 598. And probably even this limitation does not ordinarily apply where there is a strict consolidation. Atlantic &c. R. Co. v. Johnson, 127 Ga 392, 56 S. E. 482, 11 L. R. A. (N. S.) 1119. See ante, § 379.

[5] Powell v. North Missouri R. Co., 42 Mo. 63. The creditors have not only a remedy at law against the new company, but also may enforce their claims in equity against the assets of the original company; for it is not competent for the legislature by law to compel the credit-

been held that where the act of consolidation merely merges the identity of one railroad company into that of another which has already become the owner of its property and franchises freed from liens, this rule does not apply: for the foundation of the liability of a consolidated corporation for the debts and liabilities of the constituent corporations must rest, it is said, upon an agreement either express or implied from its further act in taking possession of all means of meeting those liabilities; and no assumption of liability can be implied from a consolidation by which no assets pass to the corporation sought to be charged.[6]

§ 385. Constituent companies are usually dissolved—When not.—There is, it seems, a clear distinction between a consolidation whereby the several corporations are merged into a new one and the union or combination of two or more corporations by dissolving all but one into which the others are merged.[7] And the fact that the company absorbing the others

ors of a company to accept the liability of a new company formed of the stockholders of their debtor company and others, in substitution for their original rights. Harrison v. Arkansas Valley R. Co., 4 McCrary (U. S.) 264, 13 Fed. 522; Montgomery &c. R. Co. v. Branch, 59 Ala. 139; Barksdale v. Finney, 14 Grat. (Va.) 338. See also where one company takes over as owner all the property and assets of another without compensation except issuance of stock in new company. Chicago &c. R. Co. v. Taylor, 183 Ind. 240, 108 N. E. 1. In some jurisdictions it is held that the new company, in the absence of a statute or contract to the contrary, does not assume the debts and liabilities of the old, and is liable only to the extent of the property which it has received from the debtor company. Prouty v. Lake Shore R. Co., 52 N. Y. 363; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Shaw v. Norfolk County R. Co., 16 Gray (Mass.) 407; Shackelford v. Mississippi Cent. R. Co., 52 Miss. 159.

[6] Houston &c. R. Co. v. Shirley, 54 Tex. 125. See also Hatcher v. Toledo &c. R. Co., 62 Ill. 477, where the debts of the old company, having been wiped out by foreclosure and sale, were held not to be fastened upon the new by a subsequent statute making consolidated companies liable for the debts of the constituent companies. And compare ante, § 379.

[7] See United States v. Southern Pac. R. Co., 46 Fed. 683; Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Central R. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Philadelphia &c. R. Co. v. Mary-

is given a new name and enlarged powers will not, necessarily, affect its identity, but a mortgage upon its property, together with all future acquisitions executed before such other companies were absorbed or merged into it will, it has been held, attach to the entire line of road as it exists after the merger.[8] Ordinarily, the effect of a consolidation is to dissolve the old companies and form a new one;[9] but this result does not always follow from a so-called consolidation, for it depends largely upon the terms of the consolidation and the legislative intent as manifested in the statute under which the consolidation takes place,[10] and the constituent companies usually have at least a qualified existence for the purpose of wind-

land, 10 How. (U. S.) 376, 13 L. ed. 461; Citizens' Street R. Co. v. Memphis, 53 Fed. 715; Vicksburg &c. Tel. Co. v. Citizens Tel. Co., 79 Miss. 341, 30 So. 725, 89 Am. St. 656; note in 89 Am. St. 607-609; Lee v. Atlantic &c. R. Co., 150 Fed. 775, 787 (citing text); note in 11 L. R. A. (N. S.) 1119.

[8] Meyer v. Johnston, 64 Ala. 603, 8 Am. & Eng. R. Cas. 584. But compare Metropolitan Trust Co. v. Chicago &c. R. Co., 253 Fed. 868.

[9] Railroad Co. v. Georgia, 98 U. S. 359, 363, 25 L. ed. 185; Yazoo &c. R. Co. v. Adams, 180 U. S. 1, 21 Sup. Ct. 240, 45 L. ed. 395 (reviewing the earlier cases in the Supreme Court of the United States); Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 28 L. ed. 450; Clearwater v. Meredith, 1 Wall. (U. S.) 25, 17 L. ed. 604. Shields v. Ohio, 95 U. S. 319, 325, 24 L. ed. 357; St. Louis &c. R. Co. v. Berry, 41 Ark. 509; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418, and note; Fee v. New Orleans &c. Co., 35 La. Ann. 413; Miner v. New York &c. R. Co., 124 N. Y. 242; Cheraw &c. R. Co. v. Commissioners, 88 N. Car. 519; Ashley v. Ryan, 49 Ohio 504, 31 N. E. 721, 725, 726; note to State v. Chicago &c. R. Co., 2 L. R. A. 564; note to Louisville &c. R. Co. v. Boney, 3 L. R. A. 435 See also Lester v. Georgia &c. R. Co., 90 Ga. 802, 17 S. E. 113; Chicago &c. R. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373; Scheidel Coil Co. v. Rose, 242 Ill. 484, 90 N. E. 221; Louisville &c. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881; State v. Leueur, 145 Mo. 322, 46 S. W. 1075; Charlotte &c. R. Co. v. Gibbes, 27 S. Car. 385, 4 S. E. 49.

[10] Wabash &c. R. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. ed. 235; Central R. Co. v. Georgia, 92 U. S. 665, 670, 23 L. ed. 757. See also People v. New York &c. R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82; Evans v. Interstate Rapid Transit R. Co., 106 Mo. 594, 17 S. W. 489; Boston &c. R. Co. v. New York &c. R. Co., 13 R. I. 260. See also ante, § 373, note 26.

ing up their affairs and preserving the rights of their creditors.[11] The term "consolidation" is an elastic one and may include a union of two or more corporations into a new one with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter.[12] There is, as we have already said, a distinction between these modes of consolidation. In the latter case, if the merger is complete, it is evident that the one corporation is extinguished, unless kept alive for certain purposes, while it is equally clear that the other, in which it is merged, is not dissolved.[13] In other words, the legislative intention in such a case would seem to be to unite the two companies under the old charter of one of them, while statutes authorizing the consolidation of two or more corporations in the ordinary way are generally construed as authorizing the formation of a new and distinct corporation, thus extinguishing all the constituent companies unless a contrary intention is manifest. It all depends ordinarily, however, upon the opinion of the legislature, as shown in the statute authorizing the consolidation, and the agreement of consolidation in pursuance of the statute.[14] "There is nothing in the nature of the

[11] Edison Electric Light Co. v. New Haven &c. Co., 35 Fed. 233; Eaton &c. R. Co. v. Hunt, 20 Ind. 457; Compton v. Wabash &c. R. Co., 45 Ohio St. 592, 16 N. E. 110, 117; 5 Thomp. Corp. (2nd. ed.), § 6041. And see Mansfield &c. R. Co. v. Brown, 26 Ohio St. 223; Day v. Worcester &c. R. Co., 151 Mass. 302, 23 N. E. 824; Spence v. Mobile &c. R. Co., 79 Ala. 576; Selma &c. R. Co. v. Harbin, 40 Ga. 706. See ante, § 384, note 2, also Atlantic &c. R. Co. v. Cone, 53 Fla. 400, 43 So. 514, 521 (citing text).

[12] Text quoted with approval in Pingree v. Michigan Cent. R. Co., 118 Mich. 314, 76 N. W. 635, 643, 53 L. R. A. 274. In Powell v. North Mo. R. Co., 42 Mo. 63, however, it is said that a union by which several companies are merged into and constituted one body, corporate under the name of one of them, and all are continued in existence, is a consolidation proper, while it is not a mere consolidation where one is extinguished and the other continued in existence.

[13] Central R. &c. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Meyer v. Johnston, 64 Ala. 603, 8 Am. & Eng. R. Cas. 584.

[14] See Crawfordsville &c. Co. v. Fletcher, 104 Ind. 97, 2 N. E. 243; Central R. &c. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757; Meyer v. Johnston, 64 Ala. 603; note in 52

subject-matter, nor of the process of consolidation, that requires the extinction of the old corporations to make the new. It may be done, or it may not."[15] So far at least as domestic corporations are concerned, it is for the state to say upon what terms they may consolidate and it may thus determine the effect of the consolidation. As said in a recent case, "It is perfectly competent for the legislature, in consolidation acts, to declare what shall be the status of the domestic corporations which shall avail themselves of their provisions, and also of the consolidated company. Whether the new consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of the corporate franchises and an extinguishment of their corporate existence, and as creating a new corporation combining to the extent permitted by the act, the powers of the corporations out of which it is formed, and vesting in it the property of the constituent companies, depends upon the legislative intention."[16]

§ 386 (335a). Duration of life and franchises of consolidated company.—The statute and agreement of consolidation generally fix the duration of the life of the consolidated company, but a question of some difficulty arises when the law is silent and does not speak upon the subject. In one case it was said that where the law is silent the life of the new consolidated com-

Am. St. 369; Chicago &c. R. Co. v. Ashling, 160 Ill. 373, 43 N. E. 373, 375, 376. But consolidation in the strict and narrowest sense usually operates to create a new corporation and extinguish the old ones except as they may be kept alive in a limited sense or the purpose of winding up or under statutory provision for the benefit of creditors or the like.

[15] Citizens' St. R. Co. v. Memphis, 53 Fed. 715, 718. But in strictness, we think the term is more properly used as applying to cases in which the constituent companies are dissolved or extinguished as separate corporations.

[16] People v. New York &c. R. Co., 129 N. Y. 474, 482, 29 N. E. 959, 15 L. R. A. 82. To the same effect is Day v. Worcester &c. R. Co., 151 Mass. 302, 23 N. E. 824. See also Shrewsbury &c. R. Co. v. Stour Valley R. Co., 2 DeG., M. & G. 866; Parkinson v. West End St. R. Co., 173 Mass. 446, 53 N. E. 891.

pany cannot exceed that of the shorter-lived of the constituent companies, and it was held that where the charter of one expired by limitation on the same day that the other began there could be no consolidation under a statute providing for consolidations between existing corporations.[17] But this decision, as to the latter point, was reversed by the Supreme Court of the United States,[18] which did not, however, consider the other question. The fallacy of the reasoning in the first case cited lies, it is said, "in the assumption that the old corporations have anything to do with granting a life to the new corporation."[19] At all events, if, as is generally the case and is generally held, a new and distinct corporation is created, which owes its life to the existing law and act of consolidation thereunder, and that existing law, while not expressly stating in particular what shall be the duration of the life of consolidated companies, authorizes new companies to be created for a certain term, the better view would seem to be that the new consolidated company may be created and organized for that term, notwithstanding the life or lives one or both of the constituent companies would have terminated before that time.[20]

§ 387 (336). **Effect of consolidation upon liens.**—A mortgage placed upon the property by the original corporation remains a lien upon it in the hands of the consolidated company,[21] and

[17] New Orleans Gas Light Co. v. Louisiana &c. Co., 11 Fed. 277.

[18] New Orleans Gas Light Co. v. Louisiana &c. Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516.

[19] See note in 89 Am. St. 615.

[20] See Market St. R. Co. v. Hellman, 109 Cal. 571, 42 Pac. 225; Charity Hospital v. New Orleans &c. Co., 40 La. Ann. 382, 4 So. 433; Rio Grande &c. R. Co. v. Telluride &c. Co., 16 Utah 125, 51 Pac. 146. And see generally Blair v. Chicago &c. R. Co., 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801; Cleveland v. Cleveland &c. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854.

[21] Hazard v. Vermont &c. R. Co., 17 Fed. 753; Mississippi Valley Co. v. Chicago &c. R. Co., 58 Miss. 846; Morrison v. American Snuff Co., 79 Miss. 330, 30 So. 723, 89 Am. St. 598; Rutten v. Union Pac. R. Co., 17 Fed. 480; Compton v. Wabash &c. Co., 45 Ohio St. 592, 16 N. E. 110. But see Wabash &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235. And the consolidated company will not be permitted to aver ignorance of such

where the mortgage so provides, it will cover all acquisitions of the consolidated company which become a part of the property to which it originally attached.[22] It has been held, however, that a mortgage executed by a consolidated corporation will take priority over unsecured debts of one of the consolidating companies, contracted while the company possessed the power to enter into an agreemet of consolidation, and transfer all of its assets and liabilities to the new company thereby formed.[23] Where a person purchases unsecured bonds of a railroad com-

mortgage though unrecorded. Mississippi &c. R. Co. v. Chicago &c. R. Co., 58 Miss. 846; The Key City, 14 Wall. (U. S.) 653, 20 L. ed. 896; Cordova Coal Co. v. Long, 91 Ala. 538, 8 So. 865; Eaton &c. R. Co. v. Hunt, 20 Ind. 457. See also North Carolina R. Co. v. Drew, 3 Woods (U. S.) 691. A railroad company with notice of plaintiff's lien on the road entered into a consolidation with another company. The property of the consolidated company was leased to a canal company. Held, that neither the consolidated company nor its lessee, the canal company, was, in respect to plaintiff's lien, a purchaser for value without notice. Vilas v. Page, 106 N. Y. 439, 13 N. E. 743.

[22] Central R. &c. Co. v. Georgia, 92 U. S. 665, 23 L. ed. 757, 98 U. S. 359, 25 L. ed. 185; Compton v. Jesup, 68 Fed. 263; Hamlin v. Jerrard, 72 Maine 62; Hamlin v. European &c. R. Co., 72 Maine 83. The lien of a mortgage having the usual provisions as to after-acquired property does not, ordinarily, on the consolidation of the mortgager company with another, attach to property contributed by such latter company or afterwards acquired by the consolidated company. Metropolitan Trust Co. v. Chicago &c. R. Co., 253 Fed. 868.

[23] Wabash &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. ed. 235; Tysen v. Wabash &c. R. Co., 15 Fed. 763; Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654. In the first case just cited the old bondholders were given an opportunity to exchange their bonds for bonds secured by a mortgage of the consolidated company, but failed to do so for six years, after which the mortgage in question was executed. See Blair v. St. Louis &c. R. Co., 24 Fed. 148. But where a consolidated company stipulated that certain bonds of the old company should be protected by the new company, it was held that the holders of these bonds acquired the right to require the property of the company issuing them to be applied to their payment in preference to mortgagees of the consolidated company. Compton v. Wabash &c. R. Co., 45 Ohio St. 592. This case grew out of the same transaction as the first case above cited and the supreme court of Ohio refused to follow the Supreme Court of the United States.

pany which is authorized by law to consolidate with other companies he may be held to have made the purchase in contemplation of a possible consolidation;[24] but liens created by the constituent companies and existing at the time of the consolidation are superior to those of the same class created by the consolidated company.[25] So, where the act of consolidation provides that the old companies shall remain in existence to preserve the rights of creditors, they are not relieved from liability on previously issued bonds by reason of the fact that their property has passed into the hands of the consolidated company.[26] It has been held, however, that where several railroad companies are consolidated the bonded indebtedness of each, although secured by mortgage on its property and franchises, may be enforced against the new corporation, under a statute providing that "all debts and liabilities incurred by either of said corporations, except mortgages, shall thenceforth attach to such new corporation."[27]

§ 388 (337). De facto consolidation—Estoppel—Liability of constituent companies where consolidation is set aside.—Rail-

[24] Tysen v. Wabash &c. R. Co., 15 Fed. 763; Montgomery &c. Railroad Co. v. Branch, 59 Ala. 139. But see Wabash &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. ed. 235; Polhemus v. Fitchburg R. Co., 123 N. Y. 502, 26 N. E. 31.

[25] Hazard v. Vermont &c. R. Co., 17 Fed. 753; Spence v. Mobile &c. R. Co., 79 Ala. 576; Mobile &c. R. Co. v. Gilmer, 85 Ala. 422, 5 So. 138; Shackelford v. Mississippi &c. R. Co., 52 Miss. 159; Pittsburgh &c. R. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596, 5 Thomp. Corp. (2nd. ed.), § 6087.

[26] Gale v. Troy &c. R. Co., 51 Hun (N. Y.) 470, 4 N. Y. 295; Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Jones Corp. Bonds & Mtg. § 362. An agreement between the old companies and the consolidated company that the old shall be liable has been held not to be binding upon creditors of the old without their consent. Smith v. Los Angeles &c. R. Co., 98 Cal. 210, 33 Pac. 53.

[27] Polhemus v. Fitchburg R. Co., 123 N. Y. 502, 26 N. E. 31. The court held that the words "except mortgages," confined the mortgage lien to the property owned by the company which had executed the mortgage prior to the consolidation without affecting the other property of the consolidated company, but did not prevent the latter from becoming liable for the debt of the old company secured by such mortgage. See also Utica Nat. Brewing Co., Matter of, 154 N. Y. 268, 48 N. E. 521.

road companies which, being authorized by law to consolidate their lives, enter into a de facto consolidation, and transact business in the name of the consolidated company, will be estopped to deny the validity of the consolidation in a suit to enforce liabilities incurred in the transaction of such business and upon the faith of their legal existence as a consolidated company.[28] This rule has been said to be applicable where business within the ordinary powers of the constituent companies was transacted by a company into which they had formed themselves without legislative authority.[29] This decision rests upon the theory that the companies, having power to do the acts, could not deny a liability incurred thereby upon the ground that they exceeded their charter powers in selecting the means by which the acts should be done. Possibly it may be upheld on this ground, but, in any event, it is an extreme application of the doctrine. And, where there is no authority to consolidate, a direct attack may be made by quo warranto proceedings by the state,[30] but it has been held that a suit to enjoin an ultra vires consolidation will also lie.[31] Where an ineffectual attempt is made to effect a consolidation, and the attempted consolida-

[28] Racine &c. R. Co. v. Farmers' &c. Co., 49 Ill. 331, 347, 95 Am. Dec. 595; Southern Kans. &c. R. Co. v. Towner, 41 Kans. 72, 21 Pac. 221; Callender v. Painsville &c. R. Co., 11 Ohio St. 516; Tagart v. Northern Central R. Co., 29 Md. 557; Reynolds v. Myers, 51 Vt. 444; Farmers' &c. Co. v. Toledo &c. R. Co., 67 Fed. 49, 55. Ante, § 372; 5 Thomp. Corp. (2nd. ed.), § 6064. See also Greene v. Michigan United States R. Co., 159 Mich. 58, 123 N. W. 607. A de facto consolidated corporation results from a bona fide attempt to consolidate under a statute authorizing it and actual exercise of corporate functions thereunder, notwithstanding some irregularities in the attempt to comply with the statutes. Cleveland &c. R. Co. v. Feight, 41 Ind. App. 416, 84 N. E. 15.

[29] Bissell v. Michigan Southern &c. R. Co., 22 N. Y. 258.

[30] Distilling &c. Co. v. People, 156 Ill. 448, 41 N. E. 188; State v. Beck, 81 Ind. 500; People v. North River &c. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. 843; East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690.

[31] Trust Company of Georgia v. State, 109 Ga. 736, 35 S. E. 323, 48 L. R. A. 520; Louisville &c. R. Co. v. Commonwealth, 97 Ky. 675, 31 S. W. 476. See also Bohmer v. Haffen, 161 N. Y. 390, 55 N. E. 1047 (suit by taxpayer).

tion is afterward set aside by the court as being null and void, it has been held that the several companies are individually liable for liabilities contracted by the consolidated company; and execution may be had against them upon a judgment recovered against the consolidated company before it was judicially dissolved.[32]

§ 389 (338). **Effect of consolidation upon pending suits.**—It is sometimes provided by statute that pending suits against a corporation shall not be affected by its consolidation with other companies.[33] And, even in the absence of such a provision, the action of the state in granting authority to consolidate and the action of the corporation in effecting a consolidation under that authority cannot affect the rights of the plaintiff in a suit pending against it. The corporation cannot, by its own act, defeat the right of persons to maintain suits actually begun.[34] The

[32] Ketcham v. Madison &c. R. Co., 20 Ind. 260. Where two competing railway lines executed an illegal consolidation, and defendant has derived all the benefits arising from the contract of consolidation, its illegality is no defense to a bill in equity for an accounting and a return of the consideration to plaintiff whose property passed to defendant under the contract. Manchester &c. R. v. Concord R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582, 47 Am. & Eng. R. Cas. 359.

[33] Baltimore &c. R. Co. v. Musselman, 2 Grant's Cas. (Pa.) 348; Shackelford v. Mississippi &c. R. Co., 52 Miss. 159; East Tennessee &c. R. Co. v. Evans, 6 Heisk. (Tenn.) 607. Under a New York statute, which provided that actions pending against either of the consolidating companies should not abate, but might be conducted to final judgment in the name of the existing company, and the rights of creditors preserved unimpaired, and the corporations continued in existence to preserve the name, it was held that an action could be brought after the consolidation against one of the consolidating companies on its bonds previously executed. Gale v. Troy &c. Co., 51 Hun 470, 4 N. Y. S. 295.

[34] Shackelford v. Mississippi &c. R. Co., 52 Miss. 159. See also Kinion v. Kansas City &c. R. Co., 39 Mo. App. 574; Atlantic &c. R. Co. v. Cone, 53 Fla. 1017, 43 So. 514, 521 (citing text); Evans v. Interstate &c. R. Co., 106 Mo. 594, 17 S. W. 489. It is no defense that defendant has no property, but that the property it formerly possessed had vested in the new company. Gale v. Troy &c. R. Co., 51 Hun 470, 4 N. Y. S. 295.

identity of the old corporation may be considered, in some jurisdictions, at least, as continued for the purposes of the suit.[35] But it has been held in other jurisdictions that the new company should be made a party to the suit by substitution, and that all proceedings against the original company after consolidation without bringing the consolidated company into court are void.[36] Where such a substitution is made it has been held that the substituted defendant may treat the pleadings filed by the original defendant as its own and avail itself of the exceptions reserved by the original defendant before the substitution.[37] There is conflict among the authorities as to whether an action at law can be instituted against the consolidated company after the consolidation. Some of the courts hold that it is only liable to

[35] Shackelford v. Mississippi &c. R. Co., 52 Miss. 159; Baltimore &c. R. Co. v. Musselman, 2 Grant Cas. (Pa.) 348; East Tennessee &c. R. Co. v. Evans, 6 Heisk. (Tenn.) 607. But see Kansas &c. R. Co. v. Smith, 40 Kans. 192, 19 Pac. 636. See also Birmingham R. Co. v. Enslen, 144 Ala. 343, 39 So. 74; Solomonocich v. Denver &c. Tramway Co., 39 Colo. 282, 89 Pac. 57; Calvert &c. R. Co. v. Driskill, 31 Tex. Civ. App. 200, 71 S. W. 997.

[36] Selma &c. R. Co. v. Harbin, 40 Ga. 706; Kansas City &c. R. Co. v. Way, 60 Kans. 856, 56 Pac. 78; Prouty v. Lake Shore &c. R. Co., 52 N. Y. 363. See also note in 89 Am. St. 648; Cunkel v. Interstate R. Co., 54 Kans. 194, 40 Pac. 184. But compare Kinion v. Kansas City &c. R. Co., 39 Mo. App. 382; Indianapolis &c. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Indianola R. Co. v. Fryer, 56 Tex. 609. A railroad company which has consolidated with other railroad companies under a new name ceases to exist as a corporation, and a suit by or against such railroad company before consolidation cannot afterwards be prosecuted by or against it or in its original name. Kansas &c. R. Co. v. Smith, 40 Kans. 192, 19 Pac. 636. Under the Missouri statute, which provides that the consolidated company succeeds to the liabilities of the consolidating corporations where such a consolidation takes place pending a suit against one of the consolidating companies, the complaint may be amended by substituting the consolidated company as defendant, and judgment may be entered against it without further notice to it. Kinion v. Kansas City &c. R. Co., 39 Mo. App. 574. It has been held that judgment against the consolidated company on a claim against a constituent company, afterwards dissolved, may be enforced against the property which the latter received and held from both of the constituent companies. Ketcham v. Madison &c. R. Co., 20 Ind. 260.

[37] Louisville &c. R. Co. v. Utz, 133 Ind. 265, 32 N. E. 881.

the extent of the property received from the constituent company, against which the liability existed, and that it can only be reached by suit in equity,[38] but the better rule seems to be that an action at law can be maintained against the consolidated company for the prior torts or debts of the constituent companies, for which it is made liable under the statute or agreement of consolidation.[39] It has been held, however, that even where an action might have been maintained against either the constituent company committing a tort or against the consolidated company, at the election of the plaintiff, he cannot sue both in one action.[40]

§ 390 (339). **Consolidation with foreign corporations.**—The legislature of a state may authorize corporations of that state to consolidate with those of other states.[41] Railroads of other states

[38] See ante, § 384.

[39] Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. 159, citing 1 Thomp. Corp., §§ 372, 395; 5 Thomp. Corp. (2nd. ed.), § 6104; Warren v. Mobile &c. R. Co., 49 Ala. 582; Montgomery &c. R. Co. v. Boring, 51 Ga. 582; Columbus &c. R. Co. v. Skidmore, 69 Ill. 566; Arbuckle v. Illinois &c. R. Co., 81 Ill. 429; Berry v. Kansas City &c. R. Co., 52 Kans. 774, 36 Pac. 724, 39 Am. St. 381; State v. Baltimore &c. R. Co., 77 Md. 189, 26 Atl. 865; New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397; Thompson v. Abbott, 61 Mo. 176; Houston &c. R. Co. v. Shirley, 54 Tex. 125. See also ante, § 384, and note to Austin v. Tecumseh Nat. Bank, 59 Am. St. 551. The right to bring an action at law against the consolidated company is placed upon various grounds. It avoids circuity of action, and the necessary privity is created, according to some of the decisions, by the statute and consolidation thereunder, or, according to others, the right to maintain such an action may be supported upon the theory that the old corporations are continued in existence in the new for the purpose of enforcing such liability. .

[40] Langhorne v. Richmond R. Co., 91 Va. 369, 22 S. E. 159.

[41] Chicago &c. R. Co. v. Lake Shore &c. R. Co., 5 Fed. 19; Peik v. Chicago &c. R. Co., 94 U. S. 164, 24 L. ed. 97; Maine Central R. Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Lousiville &c. R. Co. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849; Bishop v. Brainerd, 28 Conn. 289; Ohio &c. R. Co. v. Weber, 96 Ill. 443; Ellis v. Boston &c. R. Co., 107 Mass. 1; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157; Richardson v. Vermont &c. R. Co., 44 Vt. 613. But a state may of course, permit a railroad of another state to acquire the property and

are generally permitted to consolidate with roads within the state upon the same terms as domestic corporations, if the laws of such states also authorize the consolidation.[43] But the new company so formed is a domestic corporation, in each state within which its property lies, so far as the ownership and use of such property is concerned,[44] and it is subject to the jurisdiction of the courts of the several states, so far as its property and the operation of its road in them respectively is concerned.[45]

franchises of domestic corporations and to operate their roads by other means than consolidation. Copeland v. Memphis &c. R. Co., 3 Woods (U. S.) 651, Fed. Cas. No. 3209. A statute may be so drawn as to authorize the consolidation of only domestic and foreign corporations and not two purely domestic corporations. Greene v. Michigan &c. R. Co., 159 Mich. 58, 123 N. W. 607; or, on the other hand to authorize consolidation of domestic corporations only. William B. Riker &c. Co. v. United Drug Co., 79 N. J. Eq. 580, 82 Atl. 930, Ann. Cas. 1913A, 1190; Gordon v. American Patriots (Tex. Civ. App.), 141 S. W. 331.

[43] The laws of Indiana require the consolidation to be made in accordance with the laws of the adjoining state. Burns' R. S. (1914), § 5375.

[44] Eaton &c. R. Co. v. Hunt, 20 Ind. 457; Delaware &c. Tax Cases, 18 Wall. (U. S.) 206, 21 L. ed. 888; Graham v. Boston &c. R. Co., 14 Fed. 753; Peters v. Boston &c. R. Co., 114 Mass. 127; State v. Chicago &c. R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564 and note; Trester v. Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110. See also Williamson v. Illinois Cent. R. Co. (Ind. App.), 121 N. E. 324; Polletz v. Public Utilities Com., 96 Ohio St. 49, 117 N. E. 149. It has been held that the corporation cannot be sued in the Federal courts of one state by a citizen of that state for injuries received in another state, into which the consolidated line extends. See Nashville &c. Railway Co. v. Edwards, 91 Ga. 24, 16 S. E. 347; Memphis &c. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518; Western &c. R. Co. v. Roberson, 61 Fed. 592. As to whether the result of the consolidation is one or two companies, see ante, §§ 35, 37. See also Central Trust Co. v. Chattanooga &c. R. Co., 68 Fed. 685, 693; Burger v. Grand Rapids &c. R. Co., 22 Fed. 561, 20 Am. & Eng. R. Cas. 607; Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874.

[45] See Mackay v. New York &c. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768; Angier v. East Tenn. &c. R. Co., 74 Ga. 634; St. Paul &c. R. Co., In re, 36 Minn. 85, 30 N. W. 432; Sage v. Lake Shore &c. R. Co., 70 N. Y. 220; Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721. The courts of a state will still retain jurisdiction of a corporation after its consolidation with a foreign corporation unless an express surren-

One state, while it may fix the status of domestic companies which consolidate under its laws, has no power to authorize the consolidation of domestic corporations with those of another state, without the consent of the latter state, in such a manner as to vest the franchises, rights and property of the foreign corporations in the consolidated company, or to authorize the conversion of the stock of all the constituent corporations into that of the consolidated company.[46] Where a corporation is formed by the consolidation of corporations of several states it generally acts as a unit in the transaction of its business, and, in the absence of a statutory provision to the contrary, it has been held that it may transact its corporate business in one state for all, and the contracts it enters into, and the liabilities it incurs in one state are binding upon it in all the states, and may be enforced against it in any one of them when the action is transitory.[47] Yet, as the laws of a state have no effect outside of its limits, it is held that the consolidated corporation in one state acts under the authority of the charter of that state, and is not affected by the legislation of another state in which a part of its line lies,[48] and that it may be dissolved and its business

der of jurisdictional power is shown. Eaton &c. R. Co. v. Hunt, 20 Ind. 457.

[46] People v. New York &c. R. Co., 129 N. Y. 474, 29 N. E. 959, 15 L. R. A. 82.

[47] Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Horne v. Boston &c. R. Co., 62 N. H. 454, ante, § 36. The provision in the constitution of Illinois requiring a majority of the directors of any company incorporated under the laws of that state to be residents thereof, does not apply to a corporation formed by the consolidation of an existing corporation of that state with similar corporations of other states. Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874. A railroad corporation, chartered and operated in two states, consolidated and made subject to all the duties and liabilities, under one charter and the laws of one state, as if wholly located therein, is an entity, and it is responsible as a whole for its acts and its negligence. Providence Coal Co. v. Providence & W. R. Co., 15 R. I. 303, 4 Atl. 394; Southern R. Co. v. Bouknight, 70 Fed. 442.

[48] Pittsburgh &c. R. Co. v. Rothschild (Pa.), 26 Am. & Eng. R. Cas. 50; Mead v. New York &c. R. Co., 45 Conn. 199; Quincy R. Bridge Co. v. Adams Co., 88 Ill. 615; Eaton &c. R. Co. v. Hunt, 20 Ind. 457; State v. Northern Central R. Co.,

wound up in one state by the courts of that state without affecting its franchise in another.[49] It is not safe, however, to lay down any unqualified general rules upon these subjects. In order to determine, with any degree of certainty, the effect of a consolidation, and the rights, powers, duties and liabilities of the consolidated company, in any particular case, resort must be had to the legislation of the states in which the company is consolidated and the agreement of consolidation in pursuance thereof.

18 Md. 193; Pittsburgh &c. Co.'s Appeal (Pa.), 4 Atl. 385; Gardner v. James, 5 R. I. 235; ante, § 36. In Ohio &c. R. Co. v. People, 123 Ill. 467, 14 N. E. 874, it is said explicity that the consolidated corporation has in each state all the rights, powers and franchises that the constituent company of that state had therein, but will not have therein the rights, powers and franchises of the constituent company of the other state, or, in other words, that the new corporation will stand in each state as the original company had stood in the same state. This, however, cannot be affirmed as an invariable rule, for much depends upon the statute and consolidation agreement. The legislature of each state could give, and often does give, the new company the right to exercise in its own jurisdiction all the powers and franchises that any or all of the constituent companies may have possessed.

[49] Hart v. Boston &c. R. Co., 40 Conn. 524. For a further and fuller treatment of the subject-matter of this section, see ante, §§ 35, 36, 37. See also notes in 47 L. R. A. (N. S.) 1058, and L. R. A. 1915C, 279.

CHAPTER XVI.

CONTRACTS.

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§ 395 (340). **Contracts—Power to make—Generally.**—A railroad company has the implied or incidental power to enter into any and all contracts necessary to enable it to carry out the purposes of its organization, except so far as it is restrained by its charter or the general law. The presumption is in favor of the power of the corporation to make any contract, which is regular on its face and is not in conflict with any prohibition of law, and is within the scope of the general powers conferred upon the corporation.[1] Within the scope of the corporate pow-

[1] Baltimore v. Baltimore &c. R. Co., 21 Md. 50; Mitchell v. Rome &c. R. Co., 17 Ga. 574; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Stewart v. Erie Trans. Co., 17 Minn. 372; Morris &c. R. Co. v. Sussex R. Co., 20 N. J. Eq. (5 Green) 542; Rider Life Raft Co. v. Roach, 97 N. Y. 378; Shipper v. Pennsylvania R. Co., 47 Pa. St. 338; South Wales R. Co. v. Redmond, 10 C. B. N. S. 675. See also Choctaw &c. R. Co. v. Bond, 160 Fed. 403. The burden of proof is generally upon the person asserting the illegality or ultra vires character of a contract made by a corporation. Morris &c. R. Co. v. Sussex R. Co., 20 N. J. Eq. (5 Green) 542; Ohio &c. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Alabama Gold Life Ins. Co. v. Central &c. Assn., 54 Ala. 73; Oakland Elec. Co. v. Union Gas &c. Co., 107 Maine 279, 78 Atl. 288. Prima facie, it has been said, all its contracts are valid, and it lies on those who would impeach any contract to make out that it is invalid. Scottish North Eastern R. Co. v. Stewart, 3 Macq. 382, 415.

ers the right to contract is much the same as that of natural persons,[2] but as corporate powers are derivative and not inherent, the authority of a corporation to contract is limited by the charter or act of incorporation. It is, of course, competent for the legislature to limit the power to contract, and to designate the mode in which corporations may contract and where a limitation is imposed or a mode prescribed the corporation cannot rightfully make a contract beyond the limits fixed by the statute, nor can it regularly contract in any other mode than that prescribed by law in cases where a specific mode is prescribed.[3]

§ 396 (341). **Contracts—Scope of corporate power.**—The power of a railroad company to make contracts is limited by the act of incorporation, but is, nevertheless, very broad and comprehensive. Every charter granted a railroad corporation invests it with implied as well as with express powers. The doctrine seems to have been asserted in England, and receives some support in this country, that the legislature, when it creates a corporation, gives to that body an absolute right of contract, except so far as it may be restrained by positive law.[4] It cannot, how-

[2] Fitzgerald &c. Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36; Hall v. Tanner &c. Co., 91 Ala. 363, 8 So. 348; Tennessee &c. Co. v. Kavanaugh, 93 Ala. 324, 9 So. 395; Gloninger v. Pittsburgh R. Co., 139 Pa. St. 13, 21 Atl. 211; Hand v. Clearfield &c. Co., 143 Pa. St. 408, 22 Atl. 709. See also St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607, 615.

[3] Perrine v. Chesapeake &c. Co., 9 How. (U. S.) 172, 13 L. ed. 92; Pearce v. Madison &c. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Zabriskie v. Cleveland &c. Co., 23 How. (U. S.) 381, 398, 16 L. ed. 488; Thomas v. West Jersey &c. Co., 101 U. S. 71, 25 L. ed. 950; Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279; Green Bay &c. R. Co. v. Union &c. Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; Pennsylvania R. Co. v. St. Louis &c. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Salt Lake City v. Holister, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. ed. 176; Oregon &c. Co. v. Oregonian R. Co., 130 U. S. 1, 4 Sup. Ct. 409, 33 L. ed. 90; Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; Central &c. Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55, 45 Am. & Eng. R. Cases 607; New London v. Brainard, 23 Conn. 522; Commonwealth v. Erie &c. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

[4] Shrewsbury &c. R. Co. v. Northwestern R. Co., 6 H. L. Cas. 113;

ever, be true that a corporation has an absolute right to contract, for it cannot make a contract entirely foreign to the object for which it was created.[5] It is generally held in the United States, and it is the only defensible doctrine, that the power of a corporation to make contracts is limited to the making of contracts which it is expressly authorized to enter into and such as are reasonably necessary or incident to the enjoyment of the express powers granted by its charter, and, in general, its officers and agents can only bind it to this extent.[6] It is not necessary, however, that the powers of a corporation should be enumerated, nor is it necessary that the power to contract should be expressly conferred, for the power to make such contracts as will promote the corporate welfare and enable the corporation to conduct its corporate affairs is implied.[7]

Riche v. Ashbury R. Car Co., L. R. 9 Exch. 224, citing case of Sutton's Hospital, 10 Coke 1; Norwich v. Norfolk &c. R. Co., 4 El. & Bl. 397.

[5] This is an old familiar doctrine, for it has long been settled that a corporation cannot make a contract beyond the sphere of corporate power, as defined by the act of incorporation. Utica Ins. Co. v. Scott, 19 Johns. (N. Y.) 1; Pierce v. New Orleans &c. Co., 9 La. 397; Lawler v. Walker, 18 Ohio 151; Dublin Corp. v. Attorney General, 9 Bligh N. S. 395; Webb v. Manchester &c., 4 Mylne & Craig 116. See also Western Md. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 2 L. R. A. (N. S.) 887, 111 Am. St. 362; Williams v. Johnson, 208 Mass. 544, 95 N. E. 90; Nor, in general, that would disable it from performing its public functions, or be against public policy. See Sammons v. Kearney Power &c. Co., 77 Nebr. 580, 110 N. W. 312, 8 L. R. A. (N. S.) 404n; 1 Elliott Cont. § 575, et seq, and post, §§ 414, 423, et seq.

[6] Vandall v. South San Francisco Dock Co., 40 Cal. 83; Winter v. Muscogee R. Co., 11 Ga. 438; Bowling Green R. Co. v. Warren County, 10 Bush (Ky.) 711; Mobile &c. R. Co. v. Franks, 41 Miss. 494; Downing v. Mt. Washington R. Co., 40 N. H. 231. See also Pittsburgh &c. R. Co. v. Lyon, 123 Pa. St. 140, 16 Atl. 607, 2 L. R. A. 489, 10 Am. St. 517; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; 1 Elliott Cont. §§ 540, 541.

[7] Jacksonville &c. R. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; Toledo &c. R. Co. v. Rodriguez, 47 Ill. 188, 95 Am. Dec. 484; People v. Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368, 122 Am. St. 181, 16 L. R. A. (N. S.) 604, and other cases there cited in notes; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Smith v. Nashua &c. R. Co., 27 N. H. 86, 59 Am. Dec. 364; Bufiit v. Troy &c.

§ 397 (342). General power to contract—Illustrative instances.—Railroad companies, unless forbidden by statute, may borrow money for corporate purposes and issue negotiable instruments.[8] It is held, however, that under a power to borrow money and issue negotiable bonds a railroad company cannot issue perpetual or irredeemable bonds.[9] A railroad company has power to compromise all controversies relating to corporate affairs.[10] A

Co., 36 Barb. (N. Y.) 420. See also Choctaw &c. R. Co. v. Bond, 160 Fed. 403; State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814; Logansport v. Smith, 47 Ind. App. 64, 93 N. E. 883; 1 Elliott Cont. §§ 540, 542. Some of the cases affirm that the inquiry which the courts are to make is whether the power to make the contract is forbidden, not whether it is granted. Taylor v. Chichester &c. R. Co., L. R. 2 Exch. 356, 384; Scottish &c. R. Co. v. Stewart, 3 Macq. 382, 415; Eastern &c. R. Co. v. Hawkes, 5 H. L. Cas. 331. See Mississippi &c. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Ohio &c. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Kitchen v. Cape Girardeau &c. Co., 59 Mo. 514; Cary v. Cleveland &c. R. Co., 29 Barb. (N. Y.) 35, 52; Madison &c. Co. v. Watertown &c. Co., 5 Wis. 173; Bateman v. Mayor &c. Ashton &c., 3 Hurl. & N. 323; South Yorkshire R. Co. v. Great Northern R. Co., 9 Exch. 55, 88; South Wales R. Co. v. Redmond, 10 C. B. (N. S.) 675; Norwich v. Norfolk R. Co., 4 El. & Bl. 397, 432.

[8] White Water Valley R. Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Mississippi &c. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Galveston &c. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Frye v. Tucker, 24 Ill. 180; Goodrich v. Reynolds, 31 Ill. 490, 83 Am. Dec. 240; Marion &c. Co. v. Hodge, 9 Ind. 163; Butler v. Rahm, 46 Md. 541; Dupee v. Boston &c. Co., 114 Mass. 37; Pierce v. Emery, 32 N. H. 484; Richards v. Merrimack &c. R. Co., 44 N. H. 127, 135; Olcott v. Tioga R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Philadelphia &c. Co. v. Hickman, 28 Pa. St. 318; Golinger v. Pittsburgh &c. R. Co., 139 Pa. St. 13, 21 Atl. 211, 46 Am. & Eng. R. Cas. 276. See also Alabama &c. Ins. Co. v. Central &c. Co., 54 Ala. 73; Philadelphia &c. R. Co. v. Stichter, 21 Am. R. Reg. (N. S.) 713, and note; Commonwealth v. Smith, 10 Allen (Mass.) 448, 455, 87 Am. Dec. 672.

[9] Taylor v. Philadelphia &c. R. Co., 7 Fed. 386, 1 Am. & Eng. R. Cases 616, citing Thomas v. West Jersey &c. R. Co., 101 U. S. 71, 25 L. ed. 950. Contra Philadelphia &c. R. Co.'s Appeal, 11 W. N. C. (Pa.) 325, 4 Am. & Eng. R. Cas. 118, 21 Am. L. Reg. 713.

[10] Philadelphia &c. Co. v. Hickman, 28 Pa. St. 318; Macon &c. R. Co. v. Vason, 57 Ga. 314. See generally Bath's Case, L. R. 8 Ch. Div. 334; Kipling v. Todd, L. R. 3 C. P. Div. 350.

contract to haul a designated quantity of goods each month is one that may be lawfully made, provided no discrimination is made against other shippers.[11] So, it has recently been held that a railroad company may contract with a person to build up, develop, and conduct the business of transporting milk over its lines of road.[12] There can, of course, be no doubt as to the power to employ and contract to pay a compensation to such agents and officers as may be required to conduct the corporate business, and it has been held that two companies may employ one general manager.[13] A contract between two railroad companies, wherein they agreed to establish and maintain a dispatch line for the transportation of freight, was recognized as valid, but there seems to have been no discussion of the question whether the contract was or was not against public policy.[14] An arrangement by which the receiver of existing companies was to receive all the stock and bonds of a proposed railroad, to be used in constructing the roadbed, leaving no funds for building side-tracks or purchasing equipment, was held to be invalid and the organization of the proposed company a fraud upon the statute.[15] A railroad company may contract with a municipal corporation to erect a depot at a designated place, but in the absence of clear words constituting a covenant to perpetually maintain the depot at the designated place the company is not bound to do so.[16] It seems to us doubtful whether an agree-

[11] Harrison v. New Orleans &c. Co., 28 La. Ann. 777; Chicago &c. R. Co. v. Chicago &c. R. Co., 79 Ill. 121. See also Cleveland &c. R. Co. v. Himrod Furnace Co., 37 Ohio St. 321, 41 Am. Rep. 509.

[12] Delaware &c. R. Co. v. Kutler, 147 Fed. 51. See, however, as to contracting for the use of space in its cars for advertising. National Car Advertising Co. v. Louisville &c. R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010.

[13] State v. Concord R. Co., 62 N. H. 375, 13 Am. & Eng. R. Cas. 94.

[14] Chicago &c. R. Co. v. New York &c. R. Co., 24 Fed. 516, 22 Am. & Eng. R. Cas. 265. See also Prather v. Western Un. Tel. Co., 89 Ind. 501; Western Un. Tel. Co. v. Rich, 19 Kans. 517, 27 Am. Rep. 159, ante, §§ 52, 53.

[15] Chicago &c. R. Co. v. Miller, 91 Mich. 166, 51 N. W. 981.

[16] Texas &c. R. Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. ed. 385, 42 Am. & Eng. R. Cas. 637; citing Mead v. Ballard, 7 Wall. (U. S.) 290, 19 L. ed. 190.

ment to perpetually maintain a depot at a designated place would be valid, since the changes wrought by time and progress may make it necessary for the public interest and the promotion of the public welfare to locate the station elsewhere. We suppose that when parties enter into a contract they must be held to contract with reference to such matters. This subject, however, is considered in another section.[17] It has also been held that one railroad company may grant to another the right to use the track without pecuniary compensation and that where such a contract is made by the general superintendent with the knowledge of the board of directors, it will be enforced.[18]

§ 398 (343). **Power to contract—Control of by courts.**—The business policy of a corporation is a matter for the management and control of the corporation, and the courts will not dictate the policy to be pursued in such a matter, nor exercise surveillance over the corporation in regard to mere matters of business policy or expediency.[19] Where the action is lawful and not beyond the power of the corporation, the courts will not examine "into the affairs of the corporation to determine the expediency of its action, or the motives for it."[20] Courts will not control corporate action where the matter is one of pure discretion, but may

[17] See post, § 417.

[18] Alabama &c. R. Co. v. South &c. R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. 401. Some of the expressions used in the opinion delivered in the case cited indicate that the directors may make a donation of the property rights of the company, but we think that the agreement before the court disclosed a consideration, so that it cannot be said that there was an entire absence of consideration. We do not believe that the officers of a railroad company have power to make a gift of any material part of the corporate property. But see Central R. &c. Co. v. Cheatham, 85 Ala. 292, 4 So. 824, 7 Am. St. 48; Hutton v. West Cork R. Co., 23 Ch. Div. 654. Other illustrations of the power of railroad companies to contract were given in considering charter powers, and will be found in § 52, ante.

[19] Evans v. Union Pacific R. Co., 58 Fed. 497. See generally Willoughby v. Chicago &c. Co., 50 N. J. Eq. 656, 25 Atl. 277, 39 Am. & Eng. Corp. Cas. 153; Sewell v. East Cape May Co., 50 N. J. Eq. 717, 25 Atl. 929.

[20] Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186; Bailey v. Birkenhead &c. R. Co., 12 Beav. 433.

interfere where there is a palpable abuse of discretion which causes a legal injury to the person who seeks judicial assistance.[21] To justify interference upon the ground of an abuse of discretion, a very strong and clear case must be made by the complainant, for it is only where there is palpable abuse and manifest injury that courts will give relief.[22]

§ 399 (344). **Effect of changes in charter.**—A party who contracts with a railroad company deals, as he is bound to know, with a creature of the law invested with limited powers. He cannot successfully insist that it possesses unlimited power to enter into contracts, and he must take notice of the general power of the legislature over the corporation. In accordance with this principle it has been held that all parties contracting with a corporation must take notice of the conditions on which it holds its franchises, and of its subjection to the legislative will, and that executory contracts for the construction of the road may be annulled or rendered less profitable by the act of the legislature in amending the charter under a reserved power so as to change the route and render the performance of such contracts impossible or more expensive.[23]

[21] Davis v. Mayor &c. 1 Duer (N. Y.) 451; Baldwin v. Bangor, 36 Maine 518; Methodist &c. Church v. Baltimore, 6 Gill (Md.) 391. See Western Union &c. Co. v. Mayor &c., 38 Fed. 552, 3 L. R. A. 449; Montgomery &c. Co. v. Montgomery, 87 Ala. 245, 6 So. 113, 4 L. R. A. 616; Chicago v. Evans, 24 Ill. 52; Richmond v. Davis, 103 Ind. 449, 3 N. E. 130; Des Moines &c. Co. v. Des Moines, 44 Iowa 505, 24 Am. Rep. 756; Williams v. New York &c. R. Co., 16 N. Y. 97, 69 Am. Dec. 615; Smith v. McCarthy, 56 Pa. St. 359.

[22] Wildes v. Rural &c. Co., 53 N. J. Eq. 452, 32 Atl. 676.

[23] Macon &c. R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. 135, 11 S. E. 442, Bleckly, J., said: "Nor is the right of a state so to amend or modify the charter abridged or in any manner affected by executory contracts, entered into by the company with third persons, before the amending act was passed. The Macon Construction Company, in dealing with the railroad company, was bound to take notice of the general law of the state, under which the right and power were reserved which have been exercised. A tenant at will cannot make contracts with reference to the estate, which will limit the power of the landlord to terminate the estate by means compatible with its nature. So a corporation in the possession of fran-

§ 400 (345). Contracts—Formal requisites of.—The old doctrine that a corporation could only contract under its common seal does not, as every one knows, any longer prevail. Some contracts must be evidenced by the corporate seal, but the instances in which a seal is essential to the validity of a corporate contract are comparatively few, for in the vast majority of cases no seal is required. It is not required where the contract relates to ordinary corporate business. The legislature may, of course, require that all contracts shall be attested by the corporate seal, but a provision in the charter requiring the corporation to have a common seal does not require all con-

chises held at the will of the state cannot hinder the resumption or modification of those franchises by entering into executory contracts with third persons. Nor can that effect be wrought by like contracts between the parties immediately contracting with the corporation, and subcontractors under them. On no contract whatsoever does the amendment now in question have any direct effect. Its only effect upon contracts is incidental and, if they cannot be performed consistently with the alteration in the charter made by the amending statute, their performance, in so far as thus hindered or obstructed, will be excused; the rule of law being that performance of contracts, when rendered impossible by act of law, stands excused. (Citing Bish. Cont. § 594, and other authorities.) Under these authorities, if the Macon Construction Company, or a subcontractor under it, was under a stipulation to complete the railway by a given time, and if time was of the essence of the contract, a valid excuse for failing so to do would be furnished by this subsequent legislation, in that legislation has rendered, or should render, it impossible to complete the work by the stipulated time. In so far as this or any other executory contract has been rendered less valuable or profitable to the parties concerned by the legislation, in question, that is a consequence which should have been forseen as possible, and which must be accepted by the parties as an incident of the exercise by the legislature of its rightful legislative power. Surely it cannot rationally be contended that because the alteration of charters with respect to the latitude of the franchises granted may or does operate unfavorably upon executory contracts made by or under the corporations, the charters must remain unaltered in this respect, and the reserved power in the legislature be reduced to a power in name only." See also Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945; Thornton v. Railway Co., 123 Mass. 32; and compare Cincinnati &c. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524, and post, § 405.

tracts to be under seal.[24] In a monographic note written or edited by Mr. Freeman it is said that in this country "the rule is well nigh, if not absolutely, universal" that a corporate seal is unnecessary in most cases, and in every case in which a seal would be unnecessary if the act or contract in question were that of an individual.[25] In considering the authority of corporate representatives, we referred to the familiar rule that where the charter prescribed the mode of contracting, that mode must be pursued, and also said that the general rule is that corporations are not bound by contracts executed by persons having no authority from the corporation, or by agents who transcended the authority conferred upon them. It is not necessary to add anything to what has been said upon those subjects, for they are familiar ones and our consideration of them has been as full as is consistent with the scope of our work.[26]

[24] Sarmiento v. Davis &c. Co., 105 Mich. 300, 63 N. W. 205, 55 Am. St. 446. See Cary &c. Co. v. Cain, 70 Miss. 628, 13 So. 239. The seal, where one is required, may be attached by a person whom the governing board recognizes as secretary, although such a person is not secretary de jure. Augusta &c. R. Co. v. Kittel, 52 Fed. 63. A contract not required to be under seal, which professes to be executed by the president in behalf of the corporation, is presumptively a corporate contract. National &c. Assn. v. Prentice &c. Co., 49 Minn. 220, 51 N. W. 916. See Muscatine &c. Co. v. Muscatine Lumber Co., 85 Iowa 112, 52 N. W. 108, 39 Am. St. 284. Of course a corporate contract must possess the essential elements of a contract between natural persons, such as a consideration and the like. It is barely necessary to suggest that where the statute requires a contract to be in writing or requires it to be under seal, the statutory requirement must be obeyed. Pauling v. London &c. R. Co., 8 Exch. 867. See Chase v. Second Ave. R. Co., 97 N. Y. 384, 49 Am. Rep. 531. Real estate conveyances are still usually required to be under seal. 1 Elliott Cont. § 544, and authorities there cited in note 49.

[25] Note to Green Co. v. Blodgett, 50 Am. St. 146, 152, citing and reviewing many atuhorities.

[26] In addition to the authorities heretofore cited, see Missouri Pac. R. Co. v. Sidell, 67 Fed. 464; Leroy &c. R. Co. v. Sidell, 66 Fed. 27; National &c. Bank v. Vigo County &c. Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. 330; Bradford v. Frankfort &c. R. Co., 142 Ind. 383, 40 N. E. 741; Tulleys v. Keller, 45 Nebr. 220, 63 N. W. 388; Canada &c. Co. v. Woodbridge &c. Co., 58 N. J. L. 134, 32 Atl. 66; First National Bank v. Asheville &c. Co., 116 N. Car. 827, 21 S. E. 948; Eaton

§ 401 (346). Formal defects.—Merely formal defects in a corporate contract not affecting the substantial rights of the parties will be disregarded by the courts. If there is no defect affecting substantial rights the courts will ascertain and carry into effect the intention of the contracting parties.[27] But, of course, if the defects are of such a character as to render the alleged contract nugatory, or so vague and uncertain that the intention of the parties cannot be discovered, it will not be enforced.

§ 402 (347). Contracts—Who may make—Generally.—The general power of a railroad company to enter into contracts may be exercised by the board of directors.[28] The general rule is that in the board is vested the paramount power of making corporate contracts, but other officers may often contract on behalf of the corporation.[29] As was said at another place, there are some contracts which the board of directors must make, but ordinary corporate contracts relating to the usual business of the corporation may be made by other officers, or by duly ap-

v. Robinson, 19 R. I. 146, 31 Atl. 1058, 32 Atl. 339, 29 L. R. A. 100. Effect of notice by one who takes promissory note executed by treasurer of corporation in fraud of its rights. Millward &c. Co., In re, 161 Pa. St. 157, 28 Atl. 1072, 1077. Authority to an agent to execute a mortgage empowers him to insert usual conditions therein. Gribble v. Columbus &c. Co., 100 Cal. 67, 34 Pac. 527; Vincent v. Snoqualmie &c. Co., 7 Wash. 566, 35 Pac. 396. Acts in excess of authority may be ratified where they are within scope of corporate power. People v. Eel River &c. R. Co., 98 Cal. 665, 33 Pac. 728; Nebraska &c. Co. v. Bell, 58 Fed. 326; Thomas v. City &c. Bank, 40 Nebr. 501, 58 N. W. 943, 24 L. R. A. 263.

[27] Underhill v. Santa Barbara &c. Co., 93 Cal. 300, 28 Pac. 1049. See Seymour v. Spring Forest &c. Assn., 64 Hun 632, 19 N. Y. 94; Hasselman v. Japanese &c. Co., 2 Ind. App. 180, 27 N. E. 718, 28 N. E. 207; Dexer v. Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. 867.

[28] Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 159; Wright v. Oroville &c. Co., 40 Cal. 20; Clark Corp. 485.

[29] A president who has general managing authority may assent to the reformation of a contract, in case of a mistake therein, executed by him in behalf of the corporation. Nichols v. Scranton &c. Co., 137 N. Y. 471, 33 N. E. 561. See also Taussig v. St. Louis &c. R. Co., 186 Mo. 269, 85 S. W. 378.

pointed agents acting within the scope of their employment;[30] and the powers of the board of directors are often permitted to be delegated to its executive committee.[31]

§ 403 (348). Contracts by interested persons.—The general rule is that a corporate agent cannot at the same time act for himself and for the corporation in a matter where his interests are antagonistic to those of the corporation. This rule is one of wide sweep. It has even been held that corporations having common officers and trustees cannot enter into valid contracts with each other.[32] Nor can an officer or agent of the company

[30] Where the purchasing agent of a railway has apparent authority to make contracts for supplying the company with stationery, a third person, who has dealt with him a number of years on the faith of his having such authority, can enforce a contract with said purchasing agent as against the company, and the defense that the agent had no authority is not a good one. Levy v. New York &c. R. Co., 4 Misc. 415, 24 N. Y. S. 124.

[31] Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265. See also Kelsey v. New England &c. R. Co., 60 N. J. Eq. 230, 46 Atl. 1059; Salem &c. Co. v. Lake Superior &c. Co., 112 Fed. 239; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Sheridan Electric Light Co. v. Chatham Nat. Bank, 52 Hun 575, 5 N. Y. S. 529; Black River &c. Co. v. Holway, 85 Wis. 344, 55 N. W. 418.

[32] Stokes v. Phelps Mission, 47 Hun 570, 14 N. Y. S. 901; Barr v. New York &c. R. Co., 52 Hun 555, 24 N. Y. S. 188. See also Montgomery Traction Co. v. Harmon, 140 Ala. 505, 37 So. 371. A contract leasing cars from one railroad company to another, whose officers are substantially the same, will not be recognized on a claim for compensation against a receiver of the lessee railroad company, though a reasonable compensation for the use of the cars will be allowed. Thomas v. Peoria &c. R. Co., 36 Fed. 808. Four persons, common directors of two different railroads, became assignees of a construction contract made by one of the companies, by which they received its stocks and bonds, thereby making a large profit. Afterwards acting for the two companies, they executed a lease of the road and franchises of the company whose bonds and stocks they held to the other company, binding it to pay as rental certain sums to meet interest on the bonds and dividends on the stocks. The lease was held invalid as an attempt by the directors to impose obligations on the lessee company for their own private benefit and no formal rescission of the lease was necessary: Barr v. New York &c. R. Co., 52 Hun 555, 5 N. Y. S. 623. Certain

bind it, as a general rule, by a contract in which he is personally interested,[33] at least where the interests are conflicting. It

persons, being stockholders and directors of both a railroad company and an iron company negotiated in good faith a contract between the railroad company and the iron company, which took the form of a resolution by the railroad company to lease a railroad owned by the iron company and pay in stocks and bonds, and of a subscription by the iron company to be paid in property, viz., a lease of their railroad, the contract was unanimously ratified by a vote of all the stockholders of the railroad company. The contract was held to be at worst, only voidable, and as no fraud or intentional over valuation appeared, and the consideration was nearly adequate, the bonds issued were held valid. Coe v. East &c. R. Co. of Alabama, 52 Fed. 531. In Chicago &c. Co. v. Yerkes, 141 Ill. 320, 30 N. E. 667, 33 Am. St. 315, it is held that where authority to sell corporate property was conferred upon the president and secretary a sale to the secretary was ineffective. But the prevailing rule is that a contract between two corporations is not necessarily void merely because some of the directors or other officers of each are the same. Such contracts are voidable rather than void and are usually upheld where there is good faith and the absence of fraud. Leavenworth Co. v. Chicago &c. R. Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064; Memphis &c. R. Co. v. Woods, 88 Ala. 630, 7 So. 108, 16 Am. St. 81, 7 L. R. A. (N. S.) 605, and note where other authorities are cited; San Diego &c. R. Co. v. Pacific Beach Co., 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788, and cases cited in note; United States Rolling Stock Co. v. Atlantic &c. R. Co., 34 Ohio St. 450, 32 Am. Rep. 380; 2 Thomp. Corp. (2nd. ed.), §§ 1241, 1242.

[33] Sargent v. Kansas Midland R. Co., 48 Kans. 672, 29 Pac. 1063. See 2 Thomp. Corp. (2nd. ed.), § 1411, ante, §§ 317, 332. But such a contract may by the weight of authority, be binding if it is shown to be fair and free from fraud and the corporation is represented by another proper agent, or if the contract is ratified and adopted by the corporation, and it may, in any event, be liable for the benefits actually received and retained by it. See also 2 Thomp. Corp. (2nd. ed.), §§ 1243, 1244, 1411. The fact that the president of a railroad company, without the knowledge of the other directors, is interested in a construction contract let by the company, does not in itself make the contract void, but simply voidable. Augusta &c. R. Co. v. Kittel, 2 U. S. App. 409, 52 Fed. 63; Langan v. Krancklyn, 29 Abb. N. Cas. 102, 20 N. Y. S. 404. See also Schnittger v. Old Home &c. Co., 144 Cal. 603, 78 Pac. 9. A corporation which sells certain of its bonds to its directors for less than par, but for their actual value, is estopped from attacking the validity of the

is, therefore, to be understood that when it is said that a corporation may be bound by the act of its agent performed within the scope of his authority the meaning is that he must be acting for the corporation and not in a matter in which his interests and those of the corporation are in conflict.

§ 404 (349). Mode prescribed must be pursued.—The mandatory requirements of the charter must be observed, when it prescribes a mode of contracting, since it is from the charter alone that the corporation derives power to enter into contracts.[34] This elementary rule applies to provisions respecting the designation of the officers by whom the contract shall be made, as well as to other matters. The stockholders of a corporation cannot, by a majority vote, bind the corporation to a contract, when the charter lodges the power of contracting wholly with the board of directors.[35] But if a contract were adopted by a unanimous vote of the stockholders, they would, no doubt, be estopped to deny the binding force of the contract.[36] Although

sale. Union Loan &c. Co. v. Southern California &c. Co., 51 Fed. 840. See Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911. The rule prohibiting persons in a fiduciary relation from contracting for their own advantage in the name of the beneficiaries does not apply to directors who own all the stock of the corporation, and such contracts are not void as against public policy. McCracken v. Robinson, 57 Fed. 375.

[34] Head v. Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229; Bissell v. Spring Valley Twp., 110 U. S. 162, 3 Sup. Ct. 555, 28 L. ed. 105.

[35] Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156; Gashwiler v. Willis, 33 Cal. 11, 91 Am. Dec. 607; McCullough v. Moss, 5 Denio (N. Y.) 567. See also Jenkins Gastonia &c. Co., 115 N. Car. 535, 20 S. E. 724. But at common law a corporation may contract by a vote accepting a proposal made in a meeting. Maxwell v. Dulwich College, 1 Fonbl. 306, 7 Sim. 222n; Essex Tpk. Corp. v. Collins, 8 Mass. 292.

[36] The act of incorporation furnishes no security to persons assenting to unauthorized acts. Kearny v. Buttles, 1 Ohio St. 362. But the creditors or a receiver acting for their interests may dispute the corporate liability on such a contract so far as it tends to impair the ability of the corporation to pay its valid obligations. Bank of Chattanooga v. Bank of Memphis, 9 Heisk. (Tenn.) 408; National Trust Co. v. Miller, 33 N. J. Eq. 155. A shareholder ratifying, participating in or acquiescing in the acts of a corporation will be bound by such acts and

the acts, doings and declarations of individual members of a corporation, unsanctioned by the body, are not binding upon it, yet, in the absence of any vote, a contract may be shown by inferences drawn from corporate acts, much the same as in the case of an individual.[37]

§ 405 (350). Contracts—Parties bound to take notice of charter provisions.—The constitution of a corporation, and the powers which it possesses under its constitution, are presumed to be known as matters of law to its members and to all persons dealing with the corporation.[38] It is a logical conclusion from this general rule that parties contracting with a railroad company cannot successfully aver that they were ignorant of the nature of the powers conferred upon it by the legislature, but, nevertheless, the courts do in some measure at least depart from this general doctrine, since they do protect persons who contract with the company. The doctrine, however, exerts an important influence on almost all cases. The general principle stated leads to the conclusion that the corporation is not bound by any act of the board of directors, or any other corporate agent, done in excess of the charter powers, since a person deal-

his trustee cannot bring action adversary to said acts in his favor. Memphis &c. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. 69.

[37] New York &c. R. Co. v. New York, 1 Hilton (N. Y.) 562; Gowen Marble Co. v. Tarrant, 73 Ill. 608; Canal Bridge v. Gordon, 1 Pick. (Mass.) 297; Goodwin v. Union Screw Co., 34 N. H. 378.

[38] Spence v. Mobile &c. R. Co., 79 Ala. 576; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Western Nat. Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. ed. 470; Steele v. Fraternal Tribunes &c. 215 Ill. 190, 74 N. E. 121, 106 Am. St. 160; Leonard v. American Insurance Co., 97 Ind. 299; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Kraniger v. People's &c. Society, 60 Minn. 94, 61 N. W. 904; Hoyt v. Thompson, 19 N. Y. 207; Alexander v. Cauldwell, 83 N. Y. 480; Jemison v. Citizens' Savings Bank, 122 N. Y. 135, 9 L. R. A. 708, 19 Am. St. 482, 3 Am. R. & Corp. Cas. 285. In Jenkins v. Gastonia &c. Co., 115 N. Car. 535, 20 S. E. 724, it is held that where the statute requires the corporate contract to be in writing it cannot be ratified by silence. See also Spence v. Wilmington &c. Mills, 115 N. Car. 210, 20 S. E. 372. These cases seem to us to go very far.

ing with the corporation is bound to know that no agent can exceed the powers of the corporation itself.[39] And, of course, nobody can hold a principal bound by a contract made with his agent in excess of that agent's known powers, much less can the corporation be held on the contract where the contract is one which the corporation had no power to make. The same general rule holds as to ultra vires act of the majority of the stockholders, for the majority can bind absent or dissenting stockholders only by acts done under sanction of the charter.[40] While a person dealing with the corporation is held to be affected with notice of the corporate powers as indicated by the law of its incorporation, he is not, as a rule, bound to take notice of extraneous circumstances upon which the right to exercise those powers may depend.[41]

§ 406 (351). **Contracts—Unauthorized—Notice.**—A party who deals with a corporation is bound to take notice of the powers conferred upon it by the act of incorporation, but is not bound to take notice of the purpose of the corporation in making the contract unless that purpose is made apparent by the nature of the transaction. There is, it is obvious, a clearly marked distinction between cases where a party asserts that he was ignorant of extrinsic facts or circumstances, and cases where he avers ignorance of the provisions of a charter or statute.[42] Although the purpose of the corporation be to do an illegal act, the person will be unaffected by that fact unless he had notice of it. Thus, if a contract in the form of a negotiable corporate

[39] Elevator Co. v. Memphis &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221.

[40] Bird v. Bird's Patent &c. Co., L. R. 9 Ch. 358.

[41] Galveston Railroad v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Express Co. v. Railroad Co., 99 U. S. 191, 199, 25 L. ed. 319; Oxford Iron Co. v. Spradley, 51 Ala. 171; Madison &c. R. Co. v. Norwich Sav. Soc., 24 Ind. 457; Thompson v. Lambert, 44 Iowa 239; Gano v. Chicago &c. R. Co., 60 Wis. 12, 17 N. W. 15; Eastern Counties R. v. Hawkes, 5 H. L. C. 331.

[42] It was held in Kuser v. Wright, 52 N. J. Eq. 825, 31 Atl. 397, that a person receiving a mortgage is not bound to know that sufficient notice was given corporate directors.

security, issued by a corporation having authority to issue such paper, gives no suggestion that it was issued as accommodation paper, an innocent holder will not be affected by the fact that it was issued for accommodation and without consideration,[43] but it would be otherwise if the person who took the paper had actual knowledge of its character.[44] If it is within the scope of the power of the corporate agents to issue such securities, the purchaser may assume that they were properly issued.[45] A person who sells to a corporation property which it has power to purchase, will not be affected by the circumstances that it was purchased for an unauthorized purpose, if he has no knowledge of such fact.[46] The general doctrine applies to a loan of money which is afterward misapplied. If the corporation had general authority to borrow money the lender is not bound to supervise its application.[47] It is held that if a corporation, with authority to borrow not more than a certain sum, borrows in excess of that sum, the lender may recover

[43] Estabrook, Ex parte, 2 Low. (U. S.) 547, Fed. Cas. No. 4534; Farmers' &c. Bank v. Sutton &c. Co., 52 Fed. 191; Madison &c. R. Co. v. Norwich Sav. Soc., 24 Ind. 457; Bird v. Daggett, 97 Mass. 494; Monument &c. Bank v. Globe Works, 101 Mass. 57. But see McLellan v. Detroit &c. Works, 56 Mich. 579, 23 N. W. 321; Lafayette &c. Bank v. St. Louis &c. Co., 2 Mo. App. 299; National Bank v. Young, 41 N. J. Eq. 531, 3 Atl. 94; Farmers' &c. Bank v. Empire Stone Dressing Co., 5 Bosw. (N. Y.) 275; Bank of Genesee v. Patchin Bank, 19 N. Y. 312.

[44] National Bank v. Wells, 79 N. Y. 498; West St. Louis &c. Bank v. Shawnee &c. Bank, 95 U. S. 557, 24 L. ed. 490.

[45] Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Ellsworth v. St. Louis &c. R. Co., 98 N. Y. 553; Eastern Counties R. Co. v. Hawkes, 5 H. L. C. 331; London &c. R. Co. v. McMichael, 5 Exch. 855. A corporation having power to execute negotiable paper may bind itself by becoming an indorser or guarantor of bonds received by it in the course of business, with a view to increasing the value of such bonds. Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Tod v. Kentucky Union Land Co., 57 Fed. 47.

[46] And in case the property is such as the corporation is authorized to purchase, the vendor is under no obligation to inform himself as to whether this particular purchase was a proper one for it to make. Eastern Counties R. Co. v. Hawkes, 5 H. L. C. 331.

[47] Thompson v. Lambert, 44 Iowa 239; Tracy v. Talmadge, 14 N. Y. 162, 67 Am. Dec. 132.

provided he made the loan in ignorance that the excess was already reached.[48] It may be well enough to suggest, in passing, that the rules respecting rights depending upon the ignorance of the party dealing with the corporation, are subject to the further rule that he must have acted in good faith and as a prudent man, and his ignorance must not be due to his own fault or negligence.[49]

§ 407 (352). Estoppel—Generally.—A corporation may estop itself to deny the existence and binding force of a contract, the same as an individual, provided that the contract is not entirely beyond the scope of its corporate powers. Where a corporation voluntarily accepts the benefit arising from the performance of a contract which it had power to make, but which was made on its behalf by one who was not authorized to represent it, it cannot afterward deny its liability on the contract.[50] A railroad company may, of course, be estopped by acts or con-

[48] New Providence v. Halsey, 117 U. S. 336, 6 Sup. Ct. 764, 29 L. ed. 904; Auerbach v. LeSueur Mill Co., 28 Minn. 291, 9 N. W. 799, 41 Am. Rep. 285; Ossipee &c. Mfg. Co. v. Canney, 54 N. H. 295; Mutual Benefit &c. Co. v. Elizabeth, 42 N. J. L. 235; Cotton v. New Providence, 47 N. J. L. 401, 2 Atl. 253. See Coffin v. Indianapolis, 59 Fed. 221.

[49] Express Co. v. Railroad Co., 99 U. S. 191, 199, 25 L. ed. 319.

[50] Bonner v. Spiral Hinge Mfg. Co., 81 N. Y. 468; Little Rock &c. R. Co. v. Perry, 37 Ark. 164; Jourdan v. Long Island R. Co., 115 N. Y. 380, 22 N. E. 1126; Windsor v. St. Paul &c. R. Co., 37 Wash. 156, 79 Pac. 613. See Weatherford &c. R. Co. v. Granger, 85 Tex. 574, 86 Tex. 350, 22 S. W. 70, 959, 23 S. W. 425. When a natural principal would be estopped under similar circumstances, to deny his liability on a contract made in his name by his agent, a corporation will be estopped in like manner, provided the contract is not in the proper sense ultra vires. Foulkes v. San Diego &c. R. Co., 51 Cal. 365; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. ed. 86; Hayden v. Middlesex Tpk. Co., 10 Mass. 397, 6 Am. Dec. 143; Tyler v. Trustees, 14 Ore. 485, 13 Pac. 329. Where the president and general manager of a company borrowed money and executed notes in the corporate name it was held that the corporation is not estopped from attacking the validity of the notes, even though one member of the board of trustees knew of the transaction and though the money was used for the company's benefit. Dunbar, C. J., dissenting. Elwell v. Puget Sound &c. R. Co., 7 Wash. 487, 35 Pac. 376.

duct, as well as by matter of record. It may be estopped to deny that it has ratified the unauthorized act of a person who has assumed to represent it. It is not necessary to show a formal ratification of a contract by a board of directors of a corporation, but it is sufficient to render it binding upon the corporation if it accepted and acted under it and performed its terms with full knowledge of its import.[51]

§ 408 (353). Ratification of unauthorized acts—Rights of the public and of creditors.—So far as concerns the corporation and its stockholders, there can be no doubt that the unauthorized acts of the company's officers and agents may be ratified by the stockholders, so as to render them valid and binding upon the corporation and its stockholders. This is elementary doctrine.[52] But, as we have elsewhere said, we do not believe that an act entirely outside of and beyond the scope of the powers conferred upon the corporation can be ratified so as to give vitality to the contract, for what could not be done directly by entering into contract cannot be accomplished by ratification.[53] We

[51] Taylor v. Albermarle Steam Nav. Co., 105 N. Car. 434, 10 S. E. 897; Jacksonville &c. R. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; Anderson v. Connor, 43 Misc. 384, 87 N. Y. S. 449; Gulf &c. R. Co. v. Pittman, 4 Tex. Civ. App. 167, 23 S. W. 318. The acceptance of a bonus by a railroad company ratifies the representations made by a director while soliciting the bonus from the citizens of a town.

[52] Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279; Taylor v. S. & N. Alabama R. Co., 13 Fed. 152; Augusta &c. R. Co. v. Kittel, 52 Fed. 63; Kelley v. Newburyport &c. R. Co., 141 Mass. 496, 6 N. E. 745; Hitchings v. St. Louis &c. Trans. Co., 68 Hun 33, 22 N. Y. S. 719; Taylor v. Chichester &c. R. Co., L. R. 2 Exch. 356, 380. If stockholders of a corporation stand by and sanction, or seem by their silence to sanction, unauthorized acts of the officers of the company, they must abide by such acts. Burgess v. St. Louis County R. Co., 99 Mo. 496, 12 S. W. 1050. But in Weatherford &c. R. Co. v. Granger, 86 Tex. 350, 24 S. W. 795, it was held, reversing 23 S. W. 425, that a corporation accepting a bonus on its organization is not liable on the contract of the promoter for services in procuring the bonus, in the absence of a statutory provision or an express agreement to that effect.

[53] Post, § 426; Kelner v. Baxter, L. R. 2 C. P. 174; Scott v. Lord Ebury, 36 L. J. C. P. 161; Melhado

make a distinction between acts performed by agents outside of the scope of their authority, and acts entirely beyond the scope of the powers conferred upon the corporation by the legislature. The question of the right to ratify and of the effect of a ratification is radically different in cases where the interests of creditors are involved, and in cases where the state assails the contract, from what it is where the corporation or its stockholders seek to avoid the contract. The state, and in some instances the creditors of the company, may object to the enforcement of such a contract, although the corporation and its stockholders may have assumed to ratify it.[54]

§ 409 (354). Contracts in conjunction with other parties.—The power to unite with other corporations or with natural persons in making contracts required by legitimate corporate business is one of the implied powers of a railroad company. The general power to contract authorizes the execution of all such contracts as are necessary to enable the corporation to successfully and properly conduct its corporate business. Thus a railroad company may unite with natural persons in a contract for the maintenance of crossings,[55] or, in many instances, with individuals or corporations for various other legitimate purposes.[56]

v. Porto Alegre &c. R. Co., L. R. 9 C. P. 503; Spiller v. Paris Rink Co., L. R. 7 Ch. Div. 368; Empress Eng. Co., In re, L. R. 16 Ch. Div. 125; North'd Ave. Hotel Co., In re, L. R. 33 Ch. Div. 16. See Gooday v. Colchester & S. W. Co., 15 Eng. L. & Eq. 596; Preston v. Liverpool M. &c. R. Co., 7 Eng. L. & Eq. 124; Webb v. Direct &c. R. Co., 9 Hare 129. See also Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121, 106 Am. St. 160; 1 Elliott Cont. §§ 560-562.

[54] Oil Creek &c. R. Co. v. Pennsylvania Trans. Co., 83 Pa. St. 160; Shewalter v. Pirner, 55 Mo. 218; Kelly v. Peoples' Trans. Co., 3 Ore. 189. As to the rights of creditors, see Bank of Chattanooga v. Bank of Memphis, 9 Heisk. (Tenn.) 408; Abbott v. Baltimore &c. Co., 1 Md. Ch. 542; National Trust Co. v. Miller, 33 N. J. Eq. 155; Talmage v. Pell, 7 N. Y. 328.

[55] Chattanooga &c. R. Co. v. Davis, 89 Ga. 708, 15 S. E. 626.

[56] See Chicago &c. R. Co. v. Ayres, 140 Ill. 644, 30 N. E. 687; Nashua &c. R. Co. v. Boston &c. R. Co., 27 Fed. 821; Chicago &c. R. Co. v. Mulford, 162 Ill. 522, 44 N. E. 861, 39 L. R. A. 599; State v. Concord R. Co., 59 N. H. 85; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 241; Sussex R. Co. v. Morris &c.,

§ 410 (355). Pledge of corporate securities.—A party who, in good faith, receives from the board of directors of a corporation bonds in pledge, will be protected provided the directors had authority to issue such bonds.[57] The general doctrine is that the power to sell carries with it the power to pledge.[58] But an officer or agent who has no power to sell or negotiate the bonds cannot, of course, pledge them, and the decisions in analogous cases clearly establish the doctrine that neither the president nor any other executive or ministerial officer has authority, merely by virtue of his office, to pledge the bonds of the company.[59] The board of directors, if it has the power to issue and sell bonds, may authorize the president or other representative of the company to pledge them. If the course of business has been such as to warrant the inference that the president or other representative has authority to pledge the bonds, and such an act is not ultra vires in the proper sense, then a pledge by the president would be upheld for the protection of a bona fide pledgee.

§ 411 (356). Contracts between connecting lines—Division of fares.—In the absence of a statute interdicting it, one railroad company may rightfully enter into a contract with another for

19 N. J. Eq. 13; Rocky Mt. Mills v. Wilmington &c. R. Co., 119 N. Car. 693, 25 S. E. 854, 56 Am. St. 682.

57 Farmers' Loan &c. Co. v. Toledo &c. R. Co., 54 Fed. 759; Beecher v. Marquette &c. Mill Co., 45 Mich. 103, 7 N. W. 695; Duncomb v. New York &c. Railroad Co., 84 N. Y. 190.

58 Platt v. Union Pac. R. Co., 99 U. S. 48, 25 L. ed. 424; Leo v. Union Pac. Railway Co., 17 Fed. 273; Farmers' Loan &c. Co. v. Toledo &c. R. Co., 54 Fed. 759.

59 Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. ed. 1135, 40 Am. & Eng. Corp. Cas. 286; Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. ed. 361; Bank of U. S. v. Dunn, 6 Pet. (U. S.) 51, 8 L. ed. 316; Blanding v. Davenport &c. R. Co., 88 Iowa 225, 55 N. W. 81; Chemical &c. Bank v. Wagner, 93 Ky. 525, 20 S. W. 535, 40 Am. St. 206; Famous &c. Co. v. Eagle Iron Works, 51 Mo. App. 66; Davis v. Rockingham &c. Co., 89 Va. 290, 15 S. E. 547. See also Second Ave. R. Co. v. Mehrbach, 49 N. Y. Super. Ct. 267; Titus v. Cairo &c. R. Co., 37 N. J. L. 98. Nor, it is held, to let a construction contract. Griffith v. Chicago R. Co., 74 Iowa 85, 36 N. W. 901; Templin v. Chicago &c. R. Co., 73 Iowa 548, 35 N. W. 634.

the purpose of making a through line, and agree upon a division of the fares according to local rates.[60] Where the object of such a contract is to secure through connections and not to stifle competition, there is, it is obvious, no violation of the principles of public policy. If, however, under the guise of securing a through connection, one railroad company should contract with another for the purpose of shutting off all competition and enabling one of the companies to charge unreasonable fares, the contract would be illegal. Where there is a statute forbidding combinations and the division of fares an essentially different question is presented, and that question is not here considered.

§ 412 (357). **Contracts permitting use of part of road.**—A distinction is made between the lease of the entire road and a contract granting permission to one railroad company to use part of the road of another, and contracts of the latter class may be, and usually are, upheld[61] even though a lease of the entire road

[60] Hartford &c. R. Co. v. New York &c. R. Co., 3 Robt. (N. Y.) 411; Columbus &c. R. Co. v. Indianapolis &c. R. Co., 5 McLean (U. S.) 450, Fed. Cas. No. 3047; Androscoggin &c. Co. v. Androscoggin R. Co., 52 Maine 417; Stewart v. Erie &c. Co., 17 Minn. 372; Sussex &c. Co. v. Morris &c. Co., 19 N. J. Eq. 13; Great Northern R. Co. v. Manchester R. Co., 10 Eng. L. & Eq. 11. See Missouri Pac. R. Co. v. Texas &c. R. Co., 30 Fed. 2; note in 72 Am. Dec. 230, 231; Continental Securities Co. v. Interborough &c. Transit Co., 207 Fed. 467; State v. Chicago &c. R. Co., 95 Ark. 114, 128 S. W. 555; Bartlette v. Norwich &c. R. Co., 33 Conn. 560; Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 321, citing text; Graham v. Macon &c. R. Co., 120 Ga. 757, 49 S. E. 75; Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Pennsylvania &c. Co. v. Delaware &c. Co., 1 Keyes (N. Y.) 72; Munhall v. Pennsylvania R. Co., 92 Pa. St. 150. Compare also Chicago &c. R. Co. v. Ayres, 140 Ill. 644, 30 N. E. 687; 1 Elliott Cont. § 585. But compare Union Trust &c. Bank v. Kinlock &c. Tel. Co., 258 Ill. 202, 101 N. E. 535, Ann. Cas. 1914B, 258, and cases there cited in note, as to rule where the contract creates a monopoly or is restraint of trade. As to power of state to compel joint traffic arrangements between conecting carriers, see State v. Minneapolis &c. R. Co., 80 Minn. 191, 83 N. W. 60, 89 Am. St. 514, and note, including opinion of Supreme Court of the United States affirming the decision of the state court.

[61] Chicago &c. R. Co. v. Ayres, 140 Ill. 644, 30 N. E. 687; Chicago &c. R. Co. v. Denver &c. R. Co., 143

and property would be unauthorized, in the absence of any statute to the contrary. Where the company granting the permission does not disable itself from performing its duty to the public, there is no reason for holding invalid a contract which simply grants the use of part of the road. It would be otherwise if one of the companies by such a contract should disable itself from performing the duties enjoined upon it by law. If the governing statute authorizes the execution of a lease, then, of course, there can be no question as to the power of one company to lease all of its road to another.

§ 413 (358). Contracts regarding terminal facilities.—A contract by one railroad company to permit the use of its terminal facilities by another company is valid, in the absence of any statute to the contrary, provided the company owning the terminal facilities does not by the terms or the effect of the contract disable itself from performing its corporate functions.[62]

U. S. 596, 12 Sup. Ct. 479, 36 L ed. 277; Union Pacific R. Co. v. Chicago &c. R. Co., 51 Fed. 309. See also Bacon v. Boston &c. R. Co., 83 Vt. 421, 76 Atl. 128; Evansville &c. Ry. Co. v. Evansville &c. Ry. Co., 50 Ind. App. 502, 514, 98 N. E. 649 (citing text).

[62] Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309, 51 Am. & Eng. R. Cas. 162; Chicago &c. R. Co. v. Union Pacific R. Co., 47 Fed. 15. See also Miller v. Green Bay &c. R. Co., 59 Minn. 169, 60 N. W. 1006, 26 L. R. A. 443. In the case first cited the court referred to Oregan &c. Co. v. Oregonian R. Co. 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Central Trans. &c. Co. v. Pullman &c. Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55, and other cases of like character, and discriminated them from the case where there was a grant of a right to use terminal facilities. The court cited, in support of its conclusion, the following cases: Joy v. St. Louis, 138 U. S. 1, 43, 11 Sup. Ct. 243, 34 L. ed. 843; Hendee v. Pinkerton, 96 Mass. 381, 386; Brown v. Bellows, 4 Pick. (Mass.) 179; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Providence v. St. John's Lodge, 2 R. I. 46; Dike v. Greene, 4 R. I. 285; Gregory v. Mighell, 18 Ves. 328; Midland R. Co. v. Great Western R. Co., 8 Ch. App. 841, 851; Simpson v. Westminster Hotel Co., 8 H. L. Cas. 712. On appeal to the Supreme Court the judgment was affirmed and the distinction clearly drawn between such a contract and one disabling a railroad company from performing its duties to the public, two justices, however, dissenting. 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265. See generally Harper v.

But under guise of such a contract, a railroad company cannot so divest itself of its property and franchises as to incapacitate itself from discharging the duties resting upon it, nor unlawfully discriminate and give exclusive rights contrary to the law. The paramount rule that railroad corporations cannot abdicate their functions, nor surrender their powers without the consent of the legislature is not impinged by a reasonable contract granting to another company use of its tracks and stations.

§ 414 (359). **Traffic contract—Surrender to competing line.**—A traffic contract which destroys the independence of a railroad company and disables it from performing its duties cannot be enforced, except where such a contract is authorized by statute.[63] The policy of the law is to prevent the creation of monopolies and to foster fair competition,[64] and hence one railroad company has no implied power to absorb another, but such power may be granted by the legislature. The rule that a railroad company cannot "absolve itself from the performance of its functions without the consent of the legislature,"[65] is a general

Cincinnati &c. Co., 15 Ky. L. 223, 22 S. W. 849. The text is cited with approval in Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 321, where it is said that such an arrangement, instead of disabling either company from transacting its own business, increases the facilities of each and correspondingly benefits the general public.

[63] Earle v. Seattle &c. R. Co., 56 Fed. 909; Evansville &c. Ry. Co. v. Evansville &c. Ry. Co., 50 Ind. App. 502, 513, 98 N. E. 649 (citing text).

[64] Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843, 845, quoting text. See also as to invalidity of contracts between competing lines creating a monopoly. J. H. Field & Son v. E. G. Holland & Son, 158 Ky. 544, 165 S. W. 699; Louisville &c. R. Co. v. Commonwealth, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849. And for additional agreements and combinations held invalid, see United States v. Pacific &c. R. Co., 228 U. S. 87, 33 Sup. Ct. 443, 57 L. ed. 742; United States v. Terminal R. R. Assn., 224 U. S. 383, 32 Sup. Ct. 507, 56 L. ed. 810; United States Tel. Co. v. Central Union Tel. Co., 202 Fed. 66; Fields v. Holland, 158 Ky. 544, 165 S. W. 699, L. R. A. 1915C, 865, and note.

[65] Fisher v. West Virginia &c. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; Ricketts v. Chesapeake &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. 901; New York &c. R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27; Washington &c. R. Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675; Pennsylvania &c. Co. v. St. Louis &c. Co., 118 U. S. 290,

one applicable to all classes of contracts made by railroad corporations. An arrangement by which one company grants to another a right to use its track, the purpose of the two companies being to secure an interchange of traffic, is not a mere naked license but is an enforceable contract.[66] Trackage contracts, unless forbidden by statute, may be made between railroad companies.[67] Railroad companies have general power to make contracts to build, repair and restore public or private crossings.[68]

§ 415 (360). Contracts with municipal corporations for terminal facilities.—A contract may be made between a railroad company and a municipal corporation, by which the company is granted terminal facilities.[69] The grant is taken with the bur-

6 Sup. Ct. 1094, 30 L. ed. 83; Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; United States v. Union Pac. R. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. ed. 319; Grand Tower &c. Co. v. Ullman, 89 Ill. 244. See George v. Central &c. R. Co., 101 Ala. 607, 14 So. 752; Attorney General v. Haverhill Gaslight Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266, and note; Quigley v. Toledo R. &c. Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992, and note; Biles v. Tacoma &c. Co., 5 Wash. 507, 32 Pac. 211. In Galveston &c. Co. v. Davis, 4 Tex. Civ. App. 468, 23 S. W. 301, and in Galveston &c. Co. v. Arispe, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33, it was held that an arrangement by which several companies lease their roads to one company for ninety-nine years, is an agreement of partnership and not a lease. We very much doubt the soundness of those decisions, for, as we believe, the contract, whether technically a lease or not, was ineffective.

[66] Louisville &c R. Co. v. Kentucky &c. R. Co. 95 Ky. 55, 26 S. W. 532.

[67] Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265; Boston &c. R. Corp. v. Nashua &c. R. Corp., 157 Mass. 258, 31 N. E. 1067, citing Nashua &c. R. Co. v. Boston &c. R., 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. ed. 363. Contract granting right to use railroad and appurtenances is governed by ordinary rules of construction. Chicago &c. Co. v. Denver &c. R. Co., 143 U. S. 596, 12 Sup. Ct. 479, 36 L. ed. 277, 50 Am. & Eng. R. Cas. 60. See St. Paul &c. R. Co. v. St. Paul &c. Co., 44 Minn. 325, 46 N. W. 566.

[68] Post v. West Shore &c. R. Co., 123 N. Y. 580, 26 N. E. 7. See Atchison &c. R. Co. v. Lenz, 35 Ill. App. 330; Elgin v. Baltimore &c. R. Co., 74 Md. 61, 21 Atl. 688.

[69] Louisville &c. Co. v. Mississippi &c. Co., 92 Tenn. 681, 22 S. W. 920, 59 Am. & Eng. R. Cas. 99; Baltimore &c. R. Co. v. Pittsburgh &c. R. Co., 55 Fed. 701; St. Paul &c.

dens imposed upon it by the town or city,[70] and all companies claiming through the company to which the grant is made take subject to the burdens so imposed.[71] It is true of all grants of rights to use public parks, streets or roads, that the grantee takes with the burdens imposed by the municipal authorities, and all parties whose claims are founded upon the grant are bound by its terms and conditions.

§ 416 (361). Use of tracks constructed under grant from municipal corporation.—It is common for municipal corporations to grant the right to use its streets to one railroad company upon a condition that other companies may be permitted to use the track.[72] The power to make such a contract is unquestionable, and the disputes that the courts have been called upon to adjudicate generally are as to the construction to be given such contracts.[73] Ordinarily, the municipal corporation

v. Minnesota &c. R. Co., 47 Minn. 154, 49 N. W. 646, 13 L. R. A. 415, 50 Am. & Eng. R. Cas. 55; Chicago &c. Co. v. St. Paul &c. R. Co., 54 Minn. 411, 56 N. W. 129. See also Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 241, Ann. Cas. 1914A, 1054.

[70] Hays v. Michigan Cent. R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. ed. 410, 15 Am. & Eng. R. Cas. 394.

[71] Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843, 45 Am. & Eng. R. Cas. 655; Cincinnati v. White, 6 Pet. (U. S.) 431, 8 L. ed. 452; Randall v. Latham, 36 Conn. 48; Stockett v. Howard, 34 Md. 121; Van Doren v. Robinson, 16 N. J. Eq. 256; Winfield v. Henning, 21 N. J. Eq. 188; Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Parker v. Nightingale, 88 Mass. 341, 83 Am. Dec. 632; Bronson v. Coffin, 108 Mass. 175; Trustees of Watertown v. Cowen, 4 Paige (N. Y.) 510, 27 Am. Dec. 80; Verplanck v. Wright, 23 Wend. (N. Y.) 506; Drew v. Van Deman, 6 Heisk. (Tenn.) 433; citing Tulk v. Moxhay, 2 Phil. Ch. 774; Luker v. Dennis, 7 Ch. Div. 227; Western v. Macdermott, L. R. 2 Ch. 72.

[72] We merely touch upon the general question here, as we have considered the subject more at length in discussing the subject of railroads in streets.

[73] Chicago &c. R. Co. v. Kansas City &c. R. Co., 52 Fed. 178, 38 Fed. 58; Central &c. Co. v. Wabash &c. R. Co., 29 Fed. 546. The power of determining where tracks shall be located, unless an express provision to the contrary is made by the legislature, resides in the municipal corporation. Citizens &c. Co. v. Jones, 34 Fed. 579; West End &c. R. Co. v. Atlanta &c. Co., 49 Ga. 151; Chicago &c. R. Co. v. People, 73 Ill. 541;

may impose such conditions as in its discretion it deems expedient, and the company accepting such a grant, as well as such companies as avail themselves of the benefit of it, must accept the benefit with its conditions and burdens.[74] It has also been held that a municipal corporation may contract with a railroad company to pay part of the expense of changing a grade crossing, and in making such a contract the municipality does not loan its credit.[75]

§ 417 (362). **Contracts for location of stations.**—Elsewhere we have directed attention to the cases which hold that a railroad company cannot enter into a valid contract to locate a station at a designated place, and have said that in our opinion such a contract may be made if no public interest is prejudiced. If the contract is made solely to promote private interests at the expense of the public welfare, the contract should, as we think, be held to be illegal. But if public interests are not prejudiced, or the power of the company to do what the public welfare requires is not abridged, we believe the contract should be regarded as valid. Many cases hold that a railroad corporation may contract for the erection and maintenance of a station at a certain point.[76] where its right to maintain stations at other

State v. Henderson, 38 Ohio St. 644; Elliott Roads & Streets (3rd ed.), § 966.

[74] Louisville &c. Co. v. Mississippi &c. Co., 92 Tenn. 681, 22 S. W. 920; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843, 45 Am. & Eng. R. Cas. 655.

[75] Brooke v. Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781. See also Detroit v. Detroit United R. Co., 133 Mich. 608, 95 N. W. 736; Detroit v. Detroit R. Co., 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. 600. But compare as to lack of power of street railway company to make agreement with property owners in regard to paving where the city has excessive power. Farson v. Fogg, 205 Ill. 326, 68 N. E. 755.

[76] Atlantic &c. R. Co. v. Camp, 130 Ga. 1, 60 S. E. 177, 15 L. R. A. (N. S.) 594, 597, 598 (quoting text); Gray v. Chicago &c. R. Co., 189 Ill. 400, 59 N. E. 950; Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Cedar Rapids &c. R. Co. v. Spafford, 41 Iowa 292; First Nat. Bank v. Hendrie, 49 Iowa 402, 31 Am. Rep. 153; Owensboro &c. R. Co. v. Griffith, 92 Ky. 137, 17 S. W. 277; McClure v. Missouri River &c. R. Co., 9 Kans. 373; Kansas Pac. R. Co. v. Hopkins, 18 Kans. 494; Port Huron

points is not thereby impaired.[77] This we believe to be the sound doctrine. But an agreement not to locate a station or depot within prescribed limits, where it is needed for the business of the company and for the use of the public would be illegal.[78]

§ 418 (363). Location of tracks, switches and the like.—The first duty of a railroad company in the location of tracks and

&c. R. Co. v. Richards, 90 Mich. 577, 51 N. W. 680; Grimes v. Minneapolis &c. Trac. Co., 133 Minn. 442, 158 N. W. 719, L. R. A. 1916F, 687, and authorities there cited in note; Vicksburg &c. R. Co. v. Ragsdale, 46 Miss. 458; Martindale v. Kansas City &c. R. Co., 60 Mo. 508; Kinealy v. St. Louis &c. R. Co., 69 Mo. 658; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Currier v. Concord R. Co., 48 N. H. 321; Cumberland Valley R. Co. v. Baab, 9 Watts (Pa.) 458, 36 Am. Dec. 132; Caldwill v. East Broad Top &c. R. Co., 169 Pa. St. 99, 32 Atl. 85; Texas &c. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; Mosel v. San Antonio &c. R. Co. (Tex. Civ. App.), 177 S. W. 1048; Jessup v. Grand Trunk R. Co., 28 Grant's Ch. (U. C.) 583; Wallace v. Great Western R. Co., 3 Ont. App. 44. Contra Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Burney v. Ludeling, 47 La. Ann. 73, 16 So. 507. As to specific performance of such contracts, see 16 L. R. A. (N. S.) 307, and note.

[77] Williamson v. Chicago &c. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206; St. Louis &c. R. Co. v. Mathers, 72 Ill. 592. Where a right of way and ground for the erection of station were granted to a railroad at a nominal quit rent in consideration that "all passenger trains should stop regularly" at such station, it was held on appeal to the House of Lords that the company was bound to stop all trains passing through said station for the conveyance of passengers, excepting trains chartered by individuals for their own use, and special excursion trains. Burnett v. Great North of Scotland R. Co., L. R. 10 App. Cas. 147, 24 Am. & Eng. R. Cas. 647.

[78] Florida Cent. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30; Marsh v. Fairbury &c. R. Co., 64 Ill. 414, 16 Am. Rep. 564; Louisville &c. R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843; St. Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357; Baird v. Salina &c. R. Co., 103 Kans. 452, 173 Pac. 1069, L. R. A. 1918F, 1201; Currie v. Natchez &c. R. Co., 61 Miss. 725; Mobile &c. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556. See also notes in 6 L. R. A. (N. S.) 524; 25 L. R. A. (N. S.) 967.

switches is to the public, and it cannot rightfully make any contract which will prevent it from performing this duty. Where, however, no public interest is affected, and there is no statute to the contrary, a railroad company may bind itself to locate a switch at a designated place.[79] If, however, it appears that the company is governed by a consideration of self-interest, and that the interest of the public will be prejudiced by such a contract, it should be regarded as illegal.[80] It has been held that a railroad company may make a valid agreement to stop its trains at a certain point at specified times for the receipt of freight.[81] But in our opinion such contracts cannot be upheld if it is shown that they are materially injurious to the interests of the public, for the public welfare cannot be sacrificed for mere private benefit.[81a] It has also been adjudged that a railroad company may agree with the lessee of refreshment rooms at a point upon its line for the stoppage of its trains at such point for a reasonable time to enable the passengers to obtain refreshments there,[82] and that a recovery may be had for a breach of such agreement.[83]

[79] Whalen v. Baltimore &c. R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130n, 129 Am. St. 423; Lydick v. Baltimore &c. R. Co., 17 W. Va. 427.

[80] See Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843.

[81] Lydick v. Baltimore &c. Co., 17 W. Va. 427; Lindsay v. Great Northern R. Co., 17 Jur. 522. In these cases it was held that such an agreement could be specifically enforced, and a court of equity will restrain a breach thereof.

[81a] See Ford v. Oregon Elec. R. Co., 60 Ore. 278, 117 Pac. 809, 36 L. R. A. (N. S.) 358, Ann. Cas. 1914A. 280.

[82] Phillips v. Great Western R. Co., L. R. 7 Ch. 409.

[83] Flanagan v. Great Western R. Co., L. R. 7 Eq. 116; Rigby v. Great Western R. Co., 4 Eng. R. & Canal Cas. 190. But we think that such contracts are to be carefully scrutinized and not upheld where they materially infringe the rights of the public. The public interest is always, as it seems to us, the paramount consideration. Contracts to stop trains at designated places, or to do like acts, may in many instances be detrimental to the public welfare, and in such instances they should not be enforced. See Whalen v. Baltimore &c. R. Co., 108 Md. 11, 69 Atl. 390, 17 L. R. A. (N. S.) 130n, 129 Am. St. 423; Conger v. New York &c. R. Co., 120 N. Y. 29, 23 N. E. 983.

§ 419 (364). Contracts that may be made by railroad companies—Particular instances.—We have called attention to the general and familiar rule that all railroad companies possess implied and incidental contract powers, and we do not attempt to give many cases illustrating the general rule, but shall refer to some cases possessing peculiar features. Unless some statute forbids, a railroad company may contract to carry a person and his family upon its trains free during his life,[84] or for any period of time,[85] subject to any prescribed legal conditions.[86] It may make special contracts for the carriage of passengers,[87] provided that it makes no unjust discrimination and violates no

[84] Grimes v. Minneapolis &c. R. Co., 37 Minn. 66, 33 N. W. 33. See Pennsylvania Co. v. Erie &c. R. Co,. 108 Pa. St. 621; Rice v. Illinois Cent. R. Co., 22 Ill. 643. The interstate commerce act may not only forbid such a contract but may also prevent its enforcement even though entered into before the passage of the act. Louisiville &c. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671. See also note in 23 L. R. A. (N. S.) 217. Where right of way is granted to a railroad company in consideration of a free pass for the grantor during his life, the purchaser of the road at a foreclosure sale cannot be held liable for failure to grant such pass. Helton v. St. Louis &c. R. Co., 25 Mo. App. 322.

[85] Knopf v. Richmond &c. R. Co., 85 Va. 769, 8 S. E. 787.

[86] In Knopf v. Richmond &c. R. Co., 85 Va. 769, 8 S. E. 787, it was decided that, under the circumstances, the company was not at fault for failing to issue a pass which had not been applied for, and that the company's agents rightfully ejected the plaintiff on his failure to produce and show a pass. In Grimes v. Minneapolis &c. R. Co., 37 Minn. 66, 33 N. W. 33, it was held that the defendant, having contracted to carry the members of the family of plaintiff's father, in consideration of a conveyance of land for a right of way, and making it a rule to issue no passes, was under an obligation to inform the conductors of plaintiff's rights, and instruct them to allow them.

[87] Gulf &c. R. Co. v. McGown, 65 Tex. 640; Mosher v. St. Louis &c. R. Co., 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. ed. 249; Pennington v. Philadelphia &c. R. Co., 62 Md. 95; Johnson v. Philadelphia &c. R. Co., 63 Md. 106; Bates v. Old Colony R. Co., 147 Mass. 255, 17 N. E. 633. See also Quimby v. Boston &c. R. Co., 150 Mass. 365, 23 N. E. 205, 5 L. R. A. 846; Griswold v. New York &c. R. Co., 53 Conn. 371, 4 Atl. 261, 55 Am. Rep. 115; Ulrich v. New York &c. R Co., 108 N. Y. 80, 15 N. E. 60, 2 Am. St. 369.

statute or rules of law. This is true also respecting the carriage of goods.[88] It may, by contract, extend its duties and liabilities to the carriage of goods beyond its own line.[89] Many cases also hold that where no statutory provisions control, a railway company may contract to carry for less than a reasonable compensation, though it may not charge more.[90]

§ 420 (365). **Pooling contracts—Generally.**—There is much diversity of opinion as to the wisdom or expediency of permitting railroad companies to enter into pooling contracts, and there is some diversity of opinion among authors and judges as to the validity of such contracts. It seems to us that some confusion has been caused by the failure to clearly discriminate a pooling contract from a contract for the maintenance of fair rates and the prevention of ruinous competition. If a contract is simply one wherein provision is made for preventing ruinous competition and is neither intended to nor does limit or suppress fair competition and is neither intended to nor does fix or maintain unreasonable rates of fare, then it cannot be regarded

[88] Ball v. Wabash &c. R. Co., 83 Mo. 574; Louisville &c. R. Co. v. Sherrod, 84 Ala. 178, 4 So. 29, 35 Am. Rep. 628; Bartlett v. Pitts-Wabash &c. R. Co., 111 Ill. 351, 53 Am. Rep. 628; Bartlett v. Pittsburgh &c. R. Co., 94 Ind. 281; Sprague v. Missouri Pac. R. Co., 34 Kans. 347, 8 Pac. 465; Chicago &c. R. Co. v. Abels, 60 Miss. 1017; Brown v. Manchester &c. R. Co., L. R. 9 Q. B. Div. 230, 10 Q. B. Div. 250, affirmed, L. R. 8 App. Cas. 703.

[89] Houston &c. R. Co. v. Hill, 63 Tex. 381, 51 Am. Rep. 642; Dardenelle &c. R. Co. v. Shinn, 52 Ark. 93, 12 S. W. 183; Pereira v. Central Pac. R. Co., 66 Cal. 92, 4 Pac. 988; Atlanta &c. R. Co. v. Texas G. Co., 81 Ga. 602, 9 S. E. 600; St. Louis &c. R. Co. v. Larned, 103 Ill. 293; Cummins v. Dayton &c. R. Co. (Marion Co., Ind., Super. Ct.), 9 Am. & Eng. R. Cas. 36; Beard v. St. Louis &c. R. Co., 79 Iowa 527, 44 N. W. 803; Swift v. Pacific Mail &c. Co., 106 N. Y. 206, 12 N. E. 583; Hanson v. Flint &c. R. Co., 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791.

[90] Toledo &c. R. Co. v. Elliott, 76 Ill. 67; Christie v. Missouri Pac. R. Co., 94 Mo. 453, 7 S. W. 567; Garton v. Railway Co., 1 Best & S. 112, 154. But it may not unjustly discriminate in favor of certain shippers so as to foster monopoly. Scofield v. Lake Shore &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846. See Houston &c. R. Co. v. Rust, 58 Tex. 98, 9 Am. & Eng. R. Cas. 123.

as an illegal pooling contract, but must be regarded as a valid traffic contract. If there is no restraint placed upon any one of the contracting companies, if all are left free to perform their duties, and if there is no incentive or inducement to any one of them to neglect or refuse to perform its duty there is not, as it seems to us, any illegal element in the contract. But if the contract either in terms or in effect disables any one of the contracting companies from performing its duty or makes it to its interest not to perform its duty the contract should, as we believe, be held void as against public policy. Whether the contract does or does not disable some one of the contracting companies, or whether it makes it to its interest not to perform its duty, or limits fair competition, or tends to enable the companies, or some one of them, to obtain unreasonable fares, are questions to be determined from the facts of the particular case. Where the constitution or statute prohibits contracts between competing or rival lines then, of course, no such contract can be valid.[93] If the policy of the state as indicated by its laws is against such contracts they are not, it is obvious, of any validity.[94] We do not at this place enter upon a consideration of the effect of the federal interstate commerce law, or of the federal statute directed against trusts, or the effect of state statutes directed against trusts and combinations, but confine our discussion to the subject of what are commonly called pooling contracts without regard to constitutional or statutory provisions.[95]

[93] In some of the states railroad companies are forbidden to enter into any contract for pooling their earnings.

[94] Morrill v. Boston &c. R. Co., 55 N. H. 531. But see Manchester &c. R. Co. v. Concord R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582, 47 Am. & Eng. R. Cas. 359, 3 Am. R. & Corp. R. 22; Currier v. Concord R. Co., 48 N. H. 321.

[95] The effect of the so-called Sherman anti-trust act and the interstate commerce act and the recent decisions of the Supreme Court of the United States in such cases as United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup Ct. 436, 48 L. ed. 679, and Southern Pac. R. Co. v. Interstate Com., 200 U. S. 536, 26 Sup. Ct. 330, 50 L. ed. 585, will be considered in another volume. And see "Transportation Act, 1920".

§ 421 (366). Pooling contracts—The authorities.—The rule which seems to be sanctioned by the weight of authority is that contracts between railroad companies providing for the regulation of charges and preventing ruinous competition are not in themselves illegal, but they are illegal if they are intended to suppress fair competition or have that effect, and so they are if they disable any of the contracting companies from performing their duty or make it to the interest of any one of them not to perform the duty enjoined upon them by law.[96] We have stated

[96] Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; Central Trust Co. v. Ohio Central R. Co., 23 Fed. 306; Koehler, Ex parte, 23 Fed. 529; United States v. Trans-Missouri &c. Assn., 58 Fed. 58; Eclipse &c. Co. v. Pontchartrain R. Co., 24 La. Ann. 1; Stewart v. Erie &c. Co., 17 Minn. 372; Burke v. Concord R. Co., 61 N. H. 160; Manchester &c. R. Co. v. Concord R. Co., 66 N. H. 100, 20 Atl. 383, 49 Am. St. 582, 47 Am. & Eng. R. Cas. 359, 3 Am. R. & Corp. Cas. 22; Sussex &c. R. Co. v. Morris R. Co., 19 N. J. Eq. 13; Shrewsbury &c. R. Co. v. London &c. R. Co., 17 Q. B. 652, 21 L. J. Q. B. 89; Hare v. London &c. R. Co., 2 J. & H. 80, 30 L. J. Ch. 817; Lancaster &c. Co. v. Northwestern &c. Co., 2 K. & J. 293, 25 L. J. Ch. 223. In Ives v. Smith, 3 N. Y. 645, 19 N. Y. St. 645, a violation of such a contract by a company was enjoined at the suit of a stockholder. A contract between railroad companies, members of a freight association, binding them to establish and maintain such rates, rules and regulations on freight traffic between competitive points, as a committee of their choosing shall recommend, providing for monthly meetings of the association, and that each company shall give five days' notice before a monthly meeting of every reduction of rates or deviation from the rules it proposes to make; that it will advise with the representatives of the other members at the meeting relative to proposed changes, and if the proposition is voted down, that it will then give ten days' notice that it will make the changes, notwithstanding the vote, if it will not abide by the vote; that no member will bill any freight falsely, or at a wrong classification; and, providing that any member may withdraw from the asociation on a notice of thirty days, does not substantially disable the parties to the contract from the performance of their public duties. United States v. Trans-Missouri Freight Assn., 58 Fed. 58, In this case there is a strong dissenting opinion by Shiras, J. See Texas &c. R. Co. v. Southern Pacific R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. 445, 10 Am. & Eng. R. Cas. 475; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 43 N. W. 469, 40 Am. & Eng. R. Cas. 449.

the doctrine in somewhat narrower terms than some of the cases declare it, but we believe our statement to be a fair expression of the prevailing opinion. If the purpose of the contract between the companies is to stifle competition so as to obtain unreasonable fares, or if its effect be to disable one of the contracting companies from performing the duty enjoined upon it, the contract should be condemned as illegal.[97]

[97] In the case of Chicago &c. R. Co. v. Wabash &c. Co., 61 Fed. 993, 10 Lewis' Am. R. & Corp. 173, the court said: "A railroad company is quasi public corporation and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and to charge only reasonable rates for such service. Any contract by which it disables itself from these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void, and the obvious purpose of this contract being to suppress or limit competition between the contracting companies, in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy and void." The court cited Cleveland &c. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; United States v. Trans-Missouri &c. Assn., 58 Fed. 58; Western Union Tel. Co. v. American &c. Co., 65 Ga. 160, 38 Am. Rep. 781; Chicago &c. Co. v. People's &c. Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; Sayre v. Louisville &c. Assn., 62 Ky. 143, 85 Am. Dec. 613; Texas &c. Co. v. Southern Pac. R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. 445; Hooker v. Vandewater, 4 Denio (N. Y.) 349, 47 Am. Dec. 258; Stanton v Allen, 5 Denio (N. Y.) 434, 49 Am. Dec. 282; Central &c. Co. v. Guthrie, 35 Ohio St. 666; State v. Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. 541; Morris Run Co. v. Barclay &c. Co., 68 Pa. St. 173, 8 Am. Rep. 159; Gulf &c. R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. 815; West Va. &c. Co. v. Ohio River &c. Co., 22 W. Va. 600, 46 Am. Rep. 527. The court denied the doctrine of Central &c. Co. v. Ohio Central R. Co., 23 Fed. 306. Mr. Lewis, in this note to the case from which we have quoted, cites and comments upon many cases. 10 Lewis' Am. R. & Corp. R. 181-184. See also as to contracts for division of territory or the like. Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843; Home Telephone Co. v. North Manchester Tel. Co., 47 Ind. App. 411, 92 N. E. 558, 93 N. E. 234.

§ 422 (357). **Pooling contracts—Presumption.**—It seems to us that when it appears that several railroad companies have entered into an agreement to establish and maintain rates the presumption should be against its validity, and that the contracting companies should be required to show that it was not intended to unjustly stifle fair competition or disable any one of the companies from performing its duty. Prima facie such a contract should be regarded as against public policy.[98] The presumption against such a contract may doubtless be removed, but the contract should be jealously scrutinized and not upheld if it be not made to appear that it was not entered into in order to prevent ruinous or, as some of the cases say, unhealthy competition. The burden of making this appear should be placed on the party who asserts the validity of the contract.[99] But a contract between companies whose roads connect and are not competing is not such a pooling contract as we mean, and, unless prohibited by charter or statute, such a contract between connecting companies is usually valid.[1]

§ 423 (368). **Contracts—Ultra vires—Definitions.**—In discussing many of the subjects which have been considered in the preceding pages we have referred to the doctrine of ultra vires, and so we shall do in other parts of our work, but it seems ap-

[98] Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593; Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843.

[99] In a subsequent part of our work, we have discussed the effect of the interstate commerce law and other statutes upon the question of the validity of pooling arrangements between railroad companies. It has been held that the performance of an unlawful pooling contract may be enjoined. Gulf &c. R. Co. v. State, 72 Tex. 404, 10 S. W. 81, 13 Am. St. 815; Currier v. Concord R. Corp., 48 N. H. 321; Morrill v. Boston &c. R. Co., 55 N. H. 531. But a court will not help a guilty party where such a contract has been performed. Harriman v. Northern Securities Co., 197 U. S. 244, 25 Sup. Ct. 493, 49 L. ed. 739; Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. 306.

[1] Atchison &c. R. Co. v. Denver &c. R. Co., 110 U. S. 667, 4 Sup. Ct. 185, 28 L. R. A. 291; Sussex R. Co. v. Morris &c. R. Co., 19 N. J. Eq. 13; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 241; Cumberland Valley R. Co. v. Gettysburg &c. R. Co., 177 Pa. St. 519, 35 Atl. 952. See also ante, § 411.

propriate to treat briefly of the general doctrine of ultra vires at this place. The term "ultra vires" is one very frequently employed and not always with strict accuracy. Roughly defined the term, when applied to a corporation, means beyond the powers of the corporation.[2] It may be here noted that the doctrine of ultra vires is applicable as a defense on the part of the corporation only to actions arising out of the contract.[3] Contracts and other acts of the corporation which are outside or in excess of the corporate powers are ultra vires. The term is sometimes applied to acts which corporations, as well as natural persons, are forbidden by law to do,[4] and when so used it means illegal contracts, but this is not, in strictness, an accurate use of the term. Acts may be ultra vires and yet not be illegal in the strict sense, for acts in excess of the corporate powers, although entirely honest and moral, may be ultra vires.[5] If the

[2] In the case of National &c. Bank v. Porter, 125 Mass. 333, 28 Am. Rep. 235, the court said: "There is nothing of mystery or sanctity in the use of the words of a dead language, ultra vires; and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really ultra vires as the unauthorized act of a corporation." See generally as to the meaning of the term, 8 Elliott Cont. § 556, n. 24; and note in L. R. A. 1917A, 754.

[3] National Bank v. Graham, 100 U. S. 699, 25 L. ed. 750; Central &c. R. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Gruber v. Washington &c. R. Co., 92 N. Car. 1; Hussey v. Norfolk &c. R. Co., 98 N. Car. 34, 3 S. E. 923, 2 Am. St. 312; Hutchinson v. Western &c. R. Co., 6 Heisk. (Tenn.) 634.

[4] East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; South Yorkshire R. Co. v. Great Northern R. Co., 9 Exch. 55, 84. It is held that the word "unlawful," as applied to the purposes for which corporations are formed, is not used exclusively in the sense of malum in se or malum prohibitum, but it is also used to designate such acts, powers, and contracts as are ultra vires. People v. Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. 319.

[5] In Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, it was said: "When acts of corporations are spoken of as ultra vires it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the share-

corporation is not invested with power to make the contract or perform the act which is the subject of controversy, the contract or act is ultra vires, although it may be free from any taint of fraud. The term ultra vires is often used in denoting contracts voidable because of their violation of public policy, but, as said by an eminent English judge, the term "illegality" is the better one.[6] The term ultra vires is sometimes used to characterize a contract made by a corporate officer who has no authority to act for the corporation in the transaction out of which the contract arises, but this is not an accurate use of the term. A president of a railroad company, for example, may have no authority to contract for the construction of the road, because such authority is vested in the board of directors, but such a contract could not be justly said to be ultra vires of the corporation.[7]

§ 424 (369). **Contracts—Ultra vires—General doctrine.**—Contracts which are beyond the scope of the powers granted by the

holders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created." The court cited Earl of Shrewsbury v. North Staffordshire &c. R. Co., L. R. 1 Eq. 593; Tyler v. Chichester &c. Co., L. R. 2 Exch. 356; Bissell v. Michigan &c. R. Co., 22 N. Y. 258. In Bissell v. Mich. &c. R. Co. supra, the court said: "The words ultra vires and illegality represent totally different and distinct ideas. It is true that a contract may have both these defects, but it may also have one without the other." See generally Ashbury &c. Co. v. Riche, L. R. 7 H. L. 653; Kadish v. Garden City &c. Assn., 151 Ill. 531, 38 N. E. 236, 42 Am. St. 256; Neilsville Bank v. Tuthill, 4 Dak. 295, 30 N. W. 154; Kent v. Quicksilver &c. Co., 78 N. Y. 159; Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; note in 70 Am. St. 157, 158; 3 Thomp. Corp. (2nd. ed.), § 2767.

[6] Cairns, L. C., in Ashbury &c. R. Co. v. Riche, L. R. 7 H. L. 653.

[7] An agent may exceed his authority, but the contract entered into by him not be ultra vires as to the corporation. The distinction between cases where an agent exceeds the authority conferred upon him and cases where the act is beyond the corporate power or capacity is often of importance. It is especially so in cases where the question is whether the agent's act has been ratified; if the agents simply transcended his authority his act may be validated by ratification, but if the act was beyond the corporate power, ratification will not always validate it. See note in 70 Am. St. 160.

act of incorporation or outside of the objects for which it was created, are, in the just sense, ultra vires, but they are not necessarily illegal in the strict sense.[8] An illegal contract, that is, a contract condemned or prohibited by law, differs from a contract made by a corporation in excess of its corporate powers, but involving no moral turpitude or wrong, and this difference leads to important practical results. If a party engages with a corporation in an illegal contract, that is, a contract involving moral turpitude, the courts will not aid him to enforce the contract nor to recover money or property yielded the corporation under it. Where, however, a corporation obtains money or property under a contract that is not illegal, the party from whom such money or property is obtained may be aided by the courts, although the contract was ultra vires.[9] It is held upon the same general prin-

[8] Lord Chancellor Selborne in Great Eastern &c. R. Co. v. Turner, L. R. 8 Ch. 149, said: "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently, an act which is ultra vires and unauthorized is not an act of the company in such a sense as that the consent of the company to that act can be pleaded." See also note in 70 Am. St. 157, 158; and compare Oakland Elec. Co. v. Union Gas. &c. Co., 107 Maine 279, 78 Atl. 288; Scham v. Brandt, 116 Md. 560, 82 Atl. 551.

[9] Union Trust Co. v. Illinois Midland &c. Co., 117 U. S. 434, 6 Sup Ct. 809; 29 L. ed. 963; Pennsylvania &c. Co. v. St. Louis &c. Co., 118 U. S. 290, 6 Sup. Ct. 1094; 30 L. ed. 83; Central Transportation Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Atlantic &c. Co. v. Union Pacific R. Co., 1 Fed. 745; Memphis &c. R. Co. v. Dow, 19 Fed. 388; New Castle &c. R. Co. v. Simpson, 23 Fed. 214; Pullman &c. Co. v. Central &c. Co., 65 Fed. 158; Argenti v. San Francisco, 16 Cal. 255; Miners' &c. Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Hazelhurst v. Savannah &c. R. Co., 43 Ga. 13; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; State Board &c. v. Citizens &c. Co., 47 Ind. 407, 17 Am. Rep. 702; Wapello v. Burlington &c. Co., 44 Iowa 585; Franklin Co. v. Lewiston &c. Bank, 68 Maine 43, 49, 28 Am. Rep. 9; Dill v. Wareham, 7 Metc. (Mass.) 438; Morville v. American &c. Co., 123 Mass. 129, 25 Am. Rep. 40; Attleborough Bank v. Rogers, 125 Mass. 339; Manchester &c. Co. v. Concord &c. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582; Degroff v. American &c. Co., 21 N. Y. 124; Bissell v. Michigan &c. Co., 22 N. Y. 258; Parrish v. Wheeler, 22 N. Y. 494; Hays v. Galion &c. Co., 29 Ohio St.

ciple that if the party contracting with a corporation retains the property obtained from the corporation, thus securing a benefit under the contract, he cannot escape payment of the value of the property so obtained on the ground that the contract was ultra vires.[10] A contract expressly forbidden by statute or one malum in se is not enforceable, but is to be regarded as void, for in such cases the corporation does more than perform an act in excess of its corporate powers.[11] Some of the cases hold that contracts executed in a mode different from that prescribed by the act of incorporation are ultra vires,[12] but this doctrine we regard as untenable. It is, no doubt, true that the contract should be made in the mode prescribed by the charter,[13] but the fact that the contract was not made in the prescribed mode does not authorize

330, 340; Oil Creek &c. Co. v. Pennsylvania Trans. Co., 83 Pa. St. 160; Wright v. Pipe Line Co., 101 Pa. St. 204, 47 Am. Rep. 701; Rutland &c. R. Co. v. Proctor, 29 Vt. 93; Northwestern &c. Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Miller v. American &c. Co., 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765. In many jurisdictions, however, as shown in some of the decisions above cited, there can be no recovery upon the contract itself.

[10] Bath Gaslight Co. v. Claffy, 56 N. Y. St. 426, 26 N. Y. S. 287; Ashenbroedel Club v. Finlay, 53 Mo. App. 256; Whitney Arms Co. v. Barlow, 63 N. Y. 70. See Belcher &c. Co. v. St. Louis &c. Elevator Co., 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; Salmon &c. Co. v. Dunn, 2 Idaho 26, 3 Pac. 911; Baker v. Northwestern &c. Co., 36 Minn. 185, 30 N. W. 464. See elaborate note in L. R. A. 1917A, 737, 1026, et seq., on the general subject.

[11] Root v. Godard, 3 McLean (U. S.) 102, Fed. Cas. No. 12037; Root v. Wallace, 4 McLean (U. S.) 8, Fed. Cas. No. 12039; Davis v. Bank, 4 McLean (U. S.) 387, Fed. Cas. No. 3626; Hayden v. Davis, 3 McLean (U. S.) 276, Fed. Cas. No. 6259; Jaycox, In re, 12 Blatch. (U. S.) 209, Fed. Cas. No. 7237; Philadelphia &c. Co. v. Towner, 13 Conn. 249; Talmage v. Pell, 7 N. Y. 328; New York State &c. Co. v. Helmer, 77 N. Y. 64. See also McNulta v. Corn Belt Bank, 164 Ill. 427, 56 Am. St. 203; Cincinnati &c. Co. v. Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Visalia Gas &c. Co. v. Sims, 104 Cal. 326, 43 Am. St. 105.

[12] Farmers &c. Bank v. Harrison, 57 Mo. 503; Matthews v. Skinker, 62 Mo. 329, 21 Am. Rep. 425; McSpedon v. New York, 7 Bosw. (N. Y. Super. Ct.) 601.

[13] Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552; Head v. Providence &c. Co., 2 Cranch (U. S.) 127; 2 L. ed 229; Hannibal &c. Co. v. Marion County, 36 Mo. 294.

the conclusion that the corporation had no power to enter into the contract. It is probably true that an executory contract, made in a mode different from that prescribed, will not be obligatory upon the corporation, but, nevertheless, such a contract is not void and may therefore be ratified.

§ 425 (370). Contracts—What are ultra vires—Generally.—The familiar elementary rule is that the corporate powers are such only as are expressed in the charter, or in the act of incorporation and the articles of association, together with such implied powers as are proper and necessary to the enjoyment of those which are expressly conferred,[14] and acts of the corporation or its agents in excess of such powers will not impose an obligation upon the corporation by express contract.[15] It is, of

[14] Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Jacksonville R. &c. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. ed. 515; Lower v. Chicago &c. R. Co., 59 Iowa 563, 13 N. W. 718; Mobile &c. R. Co. v. Franks, 41 Miss. 494, 511; State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164. As elsewhere shown, however, the word "necessity" as used in this conection does not mean absolutely necessary, but rather reasonably necessary, or convenient, usual and appropriate. See also Central Ohio &c. Co. v. Capital City Dairy Co., 60 Ohio St. 96, 53 N. E. 711, 64 L. R. A. 395; Fort Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. ed. 167; Bedford Belt R. Co. v. McDonald, 17 Ind. App. 492, 46 N. E. 1022, 60 Am. St. 172; Tonawanda R. Co. v. New York &c. R. Co., 42 Hun (N. Y.) 496.

[15] Lucas v. White Line Transfer Co., 70 Iowa 541, 3 N. W. 771, 59 Am. Rep. 449; Knoxville v. Knoxville &c. R. Co., 22 Fed. 758. The true basis of the doctrine of ultra vires and the reason the corporation is not liable upon such a contract is said to be: 1. The interest of the public that the corporation shall not transcend the powers granted. 2. The interest of the stockholders. 3. The obligation of every one entering into a contract with a corporation to take notice of the legal limits of its power. Pittsburgh &c. R. Co. v. Keokuk Bridge Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; McCormick v. Market Nat. Bank, 165 U. S. 538, 17 Sup. Ct. 433, 41 L. ed. 817; California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 381, 42 L. ed. 198. No corporation, either public or private, can exercise any power not expressly conferred or necessarily implied to enable it to carry into effect the purposes for which it was created. First M. E. Church v. Atlanta, 76 Ga. 181; Oregon R. &c. Co. v. Ore-

course, not difficult to state, as a general rule, that contracts beyond or outside of the scope of the powers bestowed on the corporation are ultra vires, but it is not always easy to say just what contracts are beyond the scope of the powers expressly or impliedly conferred upon the corporation. It is, to be sure, not difficult in all cases to conclude that a contract is ultra vires since there are many cases in which the contract is so plainly beyond the corporate power that it may, without doubt or hesitation, be adjudged to be ultra vires. In many instances a careful study of the charter or act of incorporation is necessary in order to determine whether the contract is one the corporation had power to make, in others a bare knowledge of the nature and character of the corporation is all that is required in order to determine whether the contract is beyond the scope of the powers conferred upon the corporation by the legislature. A study of the decided cases will give a clearer conception of the law upon the subject than the statement of general rules can do.

§ 426 (371). **Contracts—Ultra vires—Estoppel.**—It is held in many of the cases that a corporation may be estopped to make the defense in an action on the contract that the contract was ultra vires,[16] but this doctrine is, as we believe, technically if not radically unsound, although it may be, as generally held, that the doctrine of ultra vires will not be so applied as to work a legal wrong or defeat the ends of justice. We do not doubt that a corporation receiving and retaining a benefit under an ultra vires

gonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409; 32 L. ed. 837; Cumberland &c. Co. v. Evansville, 127 Fed. 187, 190, 191, and numerous authorities cited; Chewacla Lime Works v. Dismukes, 87 Ala. 344, 6 So. 122, 5 L. R. A. 100; State v. Atchison & N. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164; Beers v. Dalles City, 16 Ore. 334, 18 Pac. 835. An ultra vires contract cannot, as we have seen, impose an obligation by express contract on the corporation, but property or money received by the corporation, under color of the contract, may be recovered back. See generally note in 70 Am. St. 165-176.

[16] State Board v. Citizens' &c. Co., 47 Ind. 407, 17 Am. Rep. 702; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504. See authorities cited in the notes to the next section which follows. See also post, § 429; and notes in L. R. A. 740, 825, and L. R. A. 1917B, 821.

contract may be compelled to do equity, but we do not see how it is legally possible to hold that a corporation can be estopped to deny that it had no power to make the contract. If a contract is ultra vires in the true sense, that is, a contract entirely beyond and outside of the corporate powers, it cannot be made effective by an estoppel although the party contracting with the corporation may be protected from loss or injury upon equitable principles. Where the contract is not beyond the scope of the corporate powers, but is executed in a mode different from that prescribed by law, or is executed by officers or agents without authority from the corporation, then it may be ratified or the corporation may be bound by an estoppel. Where, however, the contract is in the true sense ultra vires it is void and relief is granted a party against the corporation not upon the ground of estoppel or of ratification of the contract, but upon equitable principles, and in granting relief the courts in effect treat the contract as disaffirmed.[17]

[17] The doctrine, which rests on solid principle, is that declared in Central Transportation Co. v. Pullman &c. Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55, where it was said: "A contract of a corporation which is ultra vires in the proper sense, that is to say, outside of the object of its creation, as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give it validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisite to its existence or to its action, because such prerequisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by the legislature, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws." It was also said: "'A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful

§ 427 (372). Contracts—Ultra vires—Executed and executory contracts.—The authorities discriminate between executed and executory contracts. There is substantial agreement upon the proposition that ultra vires contracts which are wholly executory cannot be enforced against the corporation.[18] but as in-

contract, have always striven to do justice between the parties, so far as could be done, consistently with adherence to the law, by permitting money or property, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such a case, however, the action is not maintained upon the unlawful contract, nor according to its terms." The court cited many cases, among them Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; Chapman v. Douglas, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. ed. 378; Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659; Union Trust Co. v. Illinois Midland &c. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157. This doctrine is sustained by well-reasoned cases. Brunswick &c. Co. v. United Gas &c. Co., 85 Maine 532, 35 Am. St. 385; Long v. Georgia &c. Co., 91 Ala. 519, 8 So. 706, 24 Am. St. 931; Chicago &c. Co. v. People's &c. Co., 121 Ill. 530, 13 N. E. 169, 2 Am. St. 124; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Greenville Compress &c. Co. v. Planters' &c. Co., 70 Miss. 669, 13 So. 879, 35 Am. St. 681; Morris &c. R. Co. v. Sussex R. Co., 20 N. J. Eq. 542, 562; Bank of Chillicothe v. Swayne, 8 Ohio 257, 32 Am. Dec. 207; Steele v. Fraternal Tribunes, 215 Ill. 190, 74 N. E. 121, 106 Am. St. 160; Marble Co. v. Harvey, 92 Tenn. 115, 20 S. W. 427, 36 Am. St. 71; Franco &c. Co. v. McCormick, 85 Tex. 416, 23 S. W. 123, 34 Am. St. 815; Eastern Counties R. Co. v. Hawkes, 5 H. L. C. 331, per Lord Cranworth; Bagshaw v. Eastern Union R. Co., 7 Hare 114, per Wigram, V. C.; Ashbury R. &c. Co. v. Riche, L. R. 7 H. L. C. 653; and other authorities cited in 29 Am. & Eng. Ency. of Law (2d ed.) 54, 55, 56, but some of these cases hold the several contracts to be opposed to public policy, and it is said that the opinions expressed as to the effect of contracts to which this objection cannot be made may therefore be considered as mere dicta. Rorer Rail. 941, 942. See also Muncie Nat. Gas Co. v. Muncie, 160 Ind. 97, 104, 105, 66 N. E. 436, 60 L. R. A. 822; and elaborate note in L. R. A. 1917A, 825, et seq.

[18] 3 Thomp. Corp. (2d ed.), § 2786; Wilkes v. Georgia Pacific R. Co., 79 Ala. 180; Hazelhurst v. Savannah R. Co., 43 Ga. 13. See State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702; Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843; Day v. Spiral Springs Co., 57 Mich. 146, 23 N. W. 628, 58 Am. Rep. 352; Parish v. Wheel-

timated in the preceding paragraph there is conflict as to the effect of such a contract after it has been executed and the party contracting with the corporation has parted with money or property. The performance of an executory ultra vires contract may be enjoined by a dissenting stockholder or other interested party who would be injured if it were carried into effect.[19] Many cases hold that after a contract has been executed, in whole or in part, a new element is introduced into the transaction. It would, they assert, be clearly unjust to permit the members of a corporation to take the benefits of a performance of the contract by the other party and then refuse performance on its part.[20] The fallacy in this reasoning, as it seems to us, is in assuming that a contract may be valid although there was no power whatever to make it, and that unless the contract is upheld, the party will be remediless. The party is not without rem-

er, 22 N. Y. 494; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Simpson v. Building Assn., 38 Ohio St. 349; note in 70 Am. St. 165; 1 Elliott Cont., § 557; and note in L. R. A. 1917A, 752. Such executory contracts as are entirely foreign to the objects and purposes for which the corporation was formed, or which are outside its express or implied powers, are void and cannot be enforced against it. Rock River Bank v. Sherwood, 10 Wis. 230, 78 Am. Dec. 669.

[19] It has been held that a contract for the purchase of steamboats to run in connection with the line may be set aside at the suit of a stockholder. Hoagland v. Hannibal &c. R. Co., 39 Mo. 451; Colman v. Eastern Counties R. Co., 10 Beav. 1. So of a contract to improve a harbor. Munt v. Shrewsbury &c. R. Co., 13 Beav. 1. Or to build the main line by the use of money raised for the construction of a branch line. Bagshaw v. Eastern Union R. Co., 7 Hare 114. So of an ultra vires lease. Board &c. Tippecanoe Co. v. Lafayette &c. R. Co., 50 Ind. 85. See also Central R. Co. v. Collins, 40 Ga. 582; Stewart v. Erie &c. Trans. Co., 17 Minn. 372, 398; March v. Eastern R. Co., 40 N. H. 548, 43 N. H. 515, 77 Am. Dec. 732; Mills v. Central R. Co., 41 N. J. Eq. 1, 2 Atl. 453; Cumberland Valley R. Co.'s Appeal, 62 Pa. St. 218; Stevens v. Rutland &c. R. Co., 29 Vt. 545.

[20] State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702; Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Camden &c. R. Co. v. Mays Landing &c. R. Co., 48 N. J. L. 530, 7 Atl. 523; Oil Creek &c. R. Co. v. Pennsylvania Trans. Co., 83 Pa. St. 160; Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134. See also 3 Thomp. Corp. (2d ed.), §§ 2787, 2788, and cases cited.

edy because the courts decline to hold the contract valid, for it is clearly within the power of the court to do complete justice by compelling the restoration of the property or by awarding damages. We fully agree that in all cases where the corporation has received money or property or the fruits of labor, as a result of a performance of the contract by the other party, it should not be permitted to retain the benefits received without making reparation, but we cannot agree that a contract made where there is an entire absence of power can be enforced. The members of the corporation are held by many of the courts to be estopped.[21]

[21] Argenti v. San Francisco, 16 Cal. 255; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656; State Board of Agriculture v. Citizens' Street R. Co., 47 Ind. 407, 17 Am. Rep. 702; Louisville &c. R. Co. v. Flanagan, 113 Ind. 488, 14 N. E. 370, 3 Am. St. 674; McCluer v. Manchester &c. R. Co., 13 Gray (Mass.) 124, 74 Am. Dec. 624; Hale v. Mutual Fire Ins. Co., 32 N. H. 295, 64 Am. Dec. 370; Cary v. Cleveland &c. R. Co., 29 Barb. (N. Y.) 35; Vought v. Eastern Building &c. Assn., 172 N. Y. 517, 92 Am. St. 761; Texas Western R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; Rutland &c. R. Co. v. Proctor, 29 Vt. 93. See also Oil Creek &c. R. Co. v. Pennsylvania &c. Co., 83 Pa. St. 160; Bigbee Packet Co. v. Moore, 121 Ala. 379, 25 So. 602; Pittsburgh &c. R. Co. v. Allegheny Co., 79 Pa. St. 210, 215; 3 Thomp. Corp. (2d ed.), §§ 2787, 2788, 2789; Articles in 6 Cent. L. J. 5, 12 Cent. L. J. 389; note in L. R. A. 1917A, 825, et seq; Kennedy v. California &c. Bank, 101 Cal. 495, 35 Pac. 1039, 40 Am. St. 69; Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Perkins v. Portland &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Derwey v. Toledo &c. R. Co., 91 Mich. 351, 51 N. W. 1063; Camden &c. R. Co. v. May's Landing &c. R. Co., 48 N. J. L. 530, 7 Atl. 523; Security Nat. Bank v. St. Croix Power Co., 117 Wis. 211, 94 N. W. 74, and other authorities cited in 29 Am. & Eng. Ency. of Law (2d ed.) 57, and in note in 70 Am. St. 170; also White v. Commercial &c. Bank, 66 S. Car. 491, 45 S. E. 94, 97 Am. St. 803, and note. In one case it was held that where two street car companies organized under the general laws of the state, enter into a contract by which the first is to pay the second a certain rental for the use of the latter's track, the lessor cannot, while exercising and enjoying the right, refuse to pay the sum agreed upon on the ground that the contract was ultra vires of its officers. Canal &c. R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1069, 11 So. 702. So it has been held that a corporation which accepts and uses money loaned in good faith on a mortgage upon its property, and pays interest on such money after notice of the mortgage, cannot escape liability on such mortgage by

not only individually, but collectively, to set up the defense to an action on the contract, but as we have said in the preceding section we cannot yield assent to this as a general proposition.

§ 428 (373). Contracts—Ultra vires—Cases discriminated.—We think that it will be found upon an analysis of many of the cases often cited as holding that a corporation may be estopped to aver that it had no power to enter into the contract which is beyond its corporate capacity, that they are not, in fact, cases in which the contract was in the proper sense ultra vires. They are cases of the defective exercise of power, not cases where there is an entire want of power.[22] Some of the cases are really cases

the passage of a resolution disapproving and annulling the president's authority, especially where the mortgage was executed by the president by the authority of the board of directors and no steps were taken to disaffirm the mortgage until long after its execution. Augusta &c. R. Co. v. Kittel, 52 Fed. 63. The cases which follow also oppose the doctrine we favor. In one case it was held that after a corporation has received the fruits which grow out of the performance of an act ultra vires, and the mischief has all been accomplished, it comes with an ill grace then to assert its want of power to do the act or make the contract in order to escape the performance of an obligation it has assumed. Wright v. Hughes, 119 Ind. 324, 21 N. E. 907, 12 Am. St. 412. The same general doctrine is held in other cases. Owen Sound S. S. Co. v. Canadian Pac. R. Co., 17 Ont. R. 691, 40 Am. & Eng. R. Cas. 593. A corporation, having enjoyed the benefits of a contract, cannot plead that it was ultra vires in the absence of fraud. Sherman Center Town Co. v. Morris, 43 Kans. 282, 23 Pac. 569, 19 Am. St. 134; People's Gaslight & C. Co. v. Chicago Gaslight & C. Co., 20 Ill. App. 473; First Nat. Bank of Monmouth v. Brooks, 22 Ill. App. 238; Sheridan Electric Light Co. v. Chatham Nat. Bank, 52 Hun 575, 24 N. Y. St. 622, 5 N. Y. S. 529; Hubbard v. Camperdown Mills, 26 S. Car. 581, 2 S. E. 576. This rule applies where a corporation attempts to deny the authority of an agent or officer. Peck v. Doran & W. Co., 57 Hun 343, 32 N. Y. St. 405, 10 N. Y. S. 401; Lancaster County v. Cheraw & C. R. Co., 28 S. Car. 134, 5 S. E. 338. A railroad company cannot plead that its contract to build and operate a telegraph line was ultra vires as a defense to an action by the builder of the line for his compensation. Pittsburgh &c. R. Co. v. Shaw (Pa.), 14 Atl. 323.

[22] This is true of the case of Bensiek v. Thomas, 66 Fed. 104, and of the cases of Aurora &c. Horticultural Society v. Paddock, 80 Ill. 263; Kent v. Quicksilver Mining Co., 78 N. Y. 159. The reasoning

where the act was performed in violation of the corporate by-laws,[23] or by an agent in excess of his authority, and not cases where the act was wholly and entirely beyond the scope of the powers conferred upon the corporation by the legislature.[24] It may, perhaps, be true in a limited or qualified sense that where the contract is made by an agent who exceeds his authority, or is made in violation of corporate by-laws, that there is a contract ultra vires, but it is not true in the proper or just sense, for it is not a contract made where the corporation itself had no capacity whatever to contract, and it is only to cases where there is an entire absence of power to contract that the doctrine of ultra vires justly applies. Some of the decisions treat cases where the contract in question was made in some mode other than that prescribed by the charter as ultra vires; but this certainly is errone-

of the decision in Sheldon &c. Co. v. Eickemeyer &c. Co., 90 N. Y. 608, is, we venture to say, founded on the erroneous assumption that an ultra vires contract is "but the case of an agent making a contract in excess of his authority," for, as it seems to us, where the corporation itself acts and the contract is entirely outside of the scope of the powers conferred upon the corporation, the case is that of a corporation attempting to make a contract it had no power to make. We believe the conclusion reached in the case upon which we are commenting is right, but think the reasoning fallacious.

[23] Roy &c. Co. v. Scott, 11 Wash. 399, 39 Pac. 679.

[24] In the case of Missouri Pac. R. Co. v. Sidell, 67 Fed. 464, the court pointed out the difference between cases where there is an entire absence of power and cases where the power is abused or not properly exercised. The court cited the cases of Davis v. Old Colony Railroad Co., 131 Mass. 258, 41 Am. Rep. 221; Pennsylvania &c. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. ed. 157; Louisiana v. Wood, 102 U. S. 294, 26 L. ed. 153; Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488. The court quoted with aproval from Davis v. Railroad Co., supra, the following: "There is a clear distinction between the exercise of a power not conferred upon, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in the particular instance, when such abuse or failure is not known to the other contracting parties."

ous, for the defect in such cases is in the execution of a power granted; the power itself is not absent. Other cases cited as affirming that a corporation may be estopped to deny the validity of an ultra vires contract really decide nothing more than that the corporation must restore the property it received or make compensation, and in such cases there is no question of estoppel involved. Still other cases are placed under the doctrine of ultra vires where there was in fact nothing more than a failure to hold a directors' meeting, or give a notice, or do some such act in the mode prescribed by law,[25] but such cases are not justly cases within the doctrine of ultra vires. Whether a contract beyond the power of the corporation is absolutely void or not, however, the practical effect of the difference of opinion is confined, in the main, to the remedy, for in all jurisdictions the courts will seek to do justice, and if the contract is regarded as absolutely void, still if one party has performed it and the other retains the benefit there may be an action upon the implied contract, or, in any event proper relief will be granted by proceeding according to the view taken in the particular jurisdiction.[26]

[25] Farmers &c. Co. v. Toledo &c., 67 Fed. 49. The case cited holds, inter alia, that parties, by unreasonable delay, may lose the right to successfully complain of an irregular or unauthorized act citing Allis v. Jones, 45 Fed. 148; Wood v. Corry Water-Works Co., 44 Fed. 146; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Reed's Appeal, 122 Pa. St. 565, 16 Atl. 100; Fidelity &c. Co. v. West Pennsylvania &c. R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. 911. The distinction referred to is noted in the principal opinion in Calumet &c. Canal &c. Co. v. Conkling, 273 Ill. 318, 112 N. E. 982, L. R. A. 1917B, 814, 818.

[26] Eastern Bldg. &c. Assn. v. Williamson, 189 U. S. 122, 23 Sup. Ct. 527, 47 L. ed. 735; Central R. &c. Co. v. Farmers' L. & T. Co., 116 Fed. 700; Bigbee &c. Packet Co. v. Moore, 121 Ala. 379, 25 So. 602; Atkins v. Shreveport &c. R. Co., 106 La. Ann. 568, 31 So. 166; Harrison v. Annapolis &c. R. Co., 50 Md. 490; L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. 354; Mobile &c. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Tennessee Ice Co. v. Raine, 107 Tenn. 151, 64 S. W. 29; note in L. R. A. 1917B, 1026, et seq. See also Grand River Bridge Co. v. Rollins, 13 Colo. 4, 21 Pac. 897; Eckman v. Chicago &c. R. Co., 169 Ill. 312, 48 N. E. 496, 38 L. R. A. 750; Schrimplin v. Farmers' Assn., 123 Iowa 102, 98 N. W. 613; Hunt v. Hauser Malting Co., 90 Minn. 282, 96 N. W. 85; Interstate Hotel Co. v. Woodward &c. Co., 103 Mo.

§ 429 (374). Contracts—Ultra vires—Illustrative instances.—A charter incorporating a company to build and operate a railroad, does not by implication confer power to purchase and run a line of steamboats,[27] but, of course, such a company may be invested with power to own and operate a line of steamboats in connection with its railroad, and the power to do so, or at least to make traffic arrangements, may be implied from provisions ordinarily found in railroad charters where the boats are run in connection with the railroad at its termini, or across a river, or the like, for the benefit of the public who travel upon the railroad, at least where there seems to be a reasonable necessity therefor.[28] Such a charter does not by implication confer power to engage in the business of trading in coal,[29] nor to purchase and hold for

App. 198, 77 S. W. 114; Pittsburgh &c. R. Co. v. Altoona &c. R. Co., 196 Pa. St. 452, 46 Atl. 431; note in 70 Am. St. 173-175. If fully executed and performed on both sides such ultra vires contracts are usually unassailable and permitted to stand. 3 Thomp. Corp. (2d ed.), § 2785; 8 Elliott Cont. § 557.

[27] Central R. &c. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Gunn v. Central R. &c. Co., 74 Ga. 509; Hoagland v. Hannibal, St. Joseph R. Co., 39 Mo. 451; Colman v. Eastern Counties R. Co., 10 Beav. 1. But authority to contract for the transportation of its passengers beyond its own line will enable it to make a valid contract guaranteeing the profits of a steamboat line connecting with it at its terminus. Green Bay &c. R. Co. v. Union Steamboat Co., 107 U. S. 98, 27 L. ed. 413. But see Colman v. Eastern Counties R. Co., 10 Beav. 1. And a railroad company can purchase and operate such boats as are necessary to carry its traffic from the end of its line across the intervening navigable water to the "ostensible and substantial termini of their route." Wheeler v. San Francisco &c. R. Co., 31 Cal. 46, 89 Am. Dec. 147. Where the road has authority to contract for transportation and delivery of persons and property beyond its own termini, it may run boats from its termini to other points. Shawmut Bank v. Plattsburgh &c. R. Co., 31 Vt. 491; South Wales R. Co. v. Redmond, 10 Conn. B. N. S. 675.

[28] See authorities cited in last note, supra; also Graham v. Macon &c. R. Co., 120 Ga. 757, 49 S. E. 75; Wiggins Ferry Co. v. Ohio &c. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. ed. 1055; Wiggins Ferry Co. v. Chicago &c. R. Co., 73 Mo. 389, 39 Am. Rep. 519; Hackett v. Multnomah R. Co., 12 Ore. 124, 6 Pac. 659, 53 Am. Rep. 327; McAboy's Appeal, 107 Pa. St. 548.

[29] Att'y-General v. Great Northern R. Co., 1 Drew. & Sm. 154. Or Northwestern Union Packet Co. v.

speculative purposes lands not needed for the purposes of the corporation.[30] A railroad cannot contract to extend its line beyond the limits defined in the charter,[31] nor construct branch roads not authorized by its charter,[32] nor make any material change in its route where the charter prescribes what the route shall be,[33] nor expend its funds in the construction of the line essentially different from that for which they were raised;[34] so it has been held that it cannot use corporate funds to improve the navigation of a stream upon which it had erected wharves and warehouses.[35] A railway company has no implied power to build a canal basin,[36] nor to aid improvement, gas, water, or land companies, or the like.[37] Corporate funds cannot be used for lobbying purposes,[38] nor, as a rule, used to purchase stock in

Shaw, 37 Wis. 655, 19 Am. Rep. 781. See also People v. Illinois Cent. R. Co., 233 Ill. 378, 84 N. E. 368, 16 L. R. A. (N. S.) 604, 122 Am. St. 181.

[30] Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369. Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; Waldo v. Chicago &c. R. Co., 14 Wis. 575. A contract whereby one railroad company agrees not to oppose the passage of a law giving land to another company, on condition that the land shall be subsequently divided, is not enforceable. Chippewa &c. R. Co. v. Chicago &c. R. Co., 75 Wis. 224, 44 N. W. 17. A railroad corporation has no power to take by gift lands lying along its route for other than railroad purposes. Case v. Kelley, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513.

[31] Bagshaw v. Eastern Union R. Co., 7 Hare 114. See Stevens v. Rutland &c. R. Co., 29 Vt. 545.

[32] Knight v. Carrolton R. Co., 9 La. Ann. 284; Morris &c. R. Co. v. Central R. Co., 31 N. J. L. 205. But see McAboy's Appeal, 107 Pa. St. 548.

[33] Charities R. Co. v. Hodgens, 77 Pa. St. 187; Rives v. Montgomery &c. R. Co., 30 Ala. 92; Mississippi &c. R. Co. v. Cross, 20 Ark. 443. See Central Plank R. Co. v. Clemens, 16 Mo. 359; Erie R. Co. v. Steward, 170 N. Y. 172, 63 N. E. 118.

[34] See Bagshaw v. Eastern Union Ry., 7 Hare 114, where at the suit of a stockholder, the railway company was enjoined from using, for the completion of its main line, funds raised under authority of an act of parliament to construct a branch line.

[35] Munt v. Shrewsbury &c. R. Co., 13 Beav. 1.

[36] Plymouth R. Co. v. Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

[37] Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899.

[38] Shea v. Mabry, 1 Lea (Tenn.) 319, where the directors were held liable for using the corporate funds for this purpose.

another company.[39] Corporate funds, it is held, may not be donated to an exhibition,[40] nor to a musical concert, even though it is expected that the receipts of the corporation from its business of carrying will be thereby materially increased.[41] The directors

[39] Central R. Co. v. Collins, 40 Ga. 582; Military &c. Assn. v. Savannah &c. R. Co., 105 Ga. 420, 31 S. E. 200; Salomons v. Laing, 12 Beav. 339; Mannsell v. Midland &c. R. Co., 1 Hem. & M. 130. See also Holmes &c. Co. v. Holmes &c. Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448; 3 Thomp. Corp. (2d ed.), § 2811. Though the purchase by a corporation of stock in another corporation is ultra vires, the objection cannot be raised by the stockholders of the company whose stock is so purchased. Oelbermann v. New York &c. R. Co., 7 Misc. 352, 27 N. Y. S. 945. In some states railway corporations are given a limited power to purchase stock in other railway companies. While other states expressly forbid such a purchase. See also Oelbermann v. New York & N. R. Co., 77 Hun 332, 29 N. Y. S. 545.

[40] See Tompkinson v. South &c. R. Co., 56 L. T. R. 812, where such a donation was enjoined at the suit of a stockholder. But see as to permanent location of state fair, State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702.

[41] Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221, where a subscription in aid of the "World's Peace Jubilee and International Musical Festival" at Boston was held not binding upon the corporation although the concert had been held on the faith of the subscription guarantees. In this case, Gray, J., after an exhaustive review of the cases both of this country and England, says: "But when the corporation has actually received nothing in money or property, it cannot be held liable upon an agreement to share in or to guarantee the profits of an enterprise which is wholly without the scope of its corporate powers, upon the mere ground that conjectural or speculative benefits were believed by its officers to be likely to result from the making of the agreement, and that the other party has incurred expenses upon the faith of it. Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Downing v. Mount Washington Road Co., 40 N. H. 230; East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775; MacGregor v. Dover & Deal R. Co., 18 Q. B. 618; Ashbury R. &c. Co. v. Riche, L. R. 7 H. L. 653; Franklin Co. v. Lewiston Inst. for Sav., 68 Maine 43, 28 Am. Rep. 9. See also 3 Thomp. Corp. (2d ed.), § 2116. See, however, State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407, 17 Am. Rep. 702, where the court, in construing a subscription contract, contitioned upon the location of the state fair upon its line, says: "It is not claimed in the case under consideration that there was any statute by which the Street Railway Company was prohibited from entering into the contract in question, or, in other words,

cannot legally use the corporate funds to induce promoters to abandon a proposed rival company,[42] nor to buy land at an exorbitant price of one who, as part consideration, withdraws opposition to the charter,[43] or lends his influence to the scheme.[44]

§ 430 (375). Contracts—Ultra vires—Rule where statute prescribes consequences.—It is generally held that where the legislature specifically prescribes the consequences that shall follow from an act of ultra vires, without making it void, the act is not to be regarded as void.[45] Where the statutory prohibition is

that in making the contract that company violated any statute by which the act was prohibited. All that is claimed is that there was a want of power on the part of the corporation to bind itself by the contract. It is fully shown on the part of the plaintiff that the State Board of Agriculture performed the contract on its part. The Street Railway Company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our opinion the Street Railway Company is not at liberty to assume this position. It has received the profits resulting from the compliance of the plaintiff with the contract. These profits, we are at liberty to presume, have gone to swell the dividends of the stockholders in that corporation. It would be unjust for their company now to escape performance of the contract by which these profits have been realized."

[42] Russell v. Wakefield W. W. Co., L. R. 20 Eq. 474. Nor agree with a competing road that it will not complete its own road. Hartford &c. R. Co. v. New York &c. R. Co., 3 Rob. (N. Y.) 411.

[43] Gage v. New Market R. Co., 18 Q. B. 457. Cases such as the above are usually treated as coming under the doctrine of ultra vires, and many of them with reason, since such contracts as they involve are tainted with the vice of illegality and are also beyond the corporate power. A contract may, it is evident, have more than one defect or vice.

[44] Earl of Shrewsbury v. North Staffordshire R. Co., L. R. 1 Eq. 593.

[45] Pratt v. Short, 79 N. Y. 437, 445, 35 Am. Rep. 531; Lester v. Howard Bank, 33 Md. 558, 3 Am. Rep. 211; Washburn Mill Co. v. Bartlett, 3 N. Dak. 138, 54 N. W. 544; National Bank v. Whitney, 103 U. S. 99; 3 Thomp. Corp. (2d ed.), § 2794. In Chattanooga &c. R. Co. v. Evans, 66 Fed. 809, it is held that non-compliance with a statute requiring certain acts to be done by a railroad company and prescribing a penalty to be imposed upon persons for a violation of the statute does not invalidate a purchase of land by the company.

clearly for the benefit of a designated class of persons and no others, only members of that class can take advantage of a violation of the statute. Where the manifest intention of the statute would be defeated by adjudging an ultra vires contract void it will not be so adjudged.[46]

§ 431 (376). Contracts—Ultra vires—Injunction.—A contract which a corporation has no power to make cannot be enforced by injunction.[47] The doctrine that an ultra vires contract cannot be enforced directly or indirectly by injunction is so clearly sound that there is no room for fair debate, but as to the power to prevent a corporation from entering into such a contract there is perhaps room for debate, since such a contract if entered into is not, as a contract, effective. In our opinion, however, both principle and authority require the conclusion that injunction will lie to restrain a corporation from making such a contract.[48] The modern cases, with good reason, are inclined to extend the remedy by injunction,[49] and it seems to us that sound reason au-

[46] Gold Mining Co. v. National Bank, 96 U. S. 640, 24 L. ed. 648; National Bank v. Matthews, 98 U. S. 621, 235 L. ed. 188; Farmington &c. Bank v. Fall, 71 Maine 49; Duncomb v. New York &c. Co., 84 N. Y. 190. See also Mutual &c. Ins. Co., In re, 107 Iowa 143, 77 N. W. 868, 70 Am. St. 149.

[47] Greenville &c. Co. v. Planters' &c. Co., 70 Miss. 669, 13 So. 879, 35 Am. St. 681; Pearce v. Madison &c. Railroad Co., 21 How. (U. S.) 441, 16 L. ed. 184, citing Pennsylvania Co. v. St. Louis &c. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Cork &c. R. Co., In re, 4 Ch. App. 748; Ashbury &c. Co. v. Riche, L. R. 7 H. L. 653, 672.

[48] Attorney-General v. Chicago &c. R. Co., 35 Wis. 425; Thomas v. Railroad Company, 101 U. S. 71, 25 L. ed. 950; Board v. Lafayette &c. R. Co., 50 Ind. 85; Attorney-General v. Delaware &c. R. Co., 27 N. J. Eq. 631; Stockton v. Central R. Co., 50 N. J. Eq. 489, 25 Atl. 942, 17 L. R. A. 97; Latimer v. Richmond R. Co., 39 S. Car. 44, 17 S. E. 258; Fishmongers Co. v. East India Co., 1 Dick. 163; Agar v. Regents' Canal Coop. Ch. 77; Beman v. Rufford, 6 Eng. L. & Eq. 106; Colman v. Eastern &c. R. Co., 10 Beav. 1; Coats v. Clarence R. Co., 1 Russ. & M. 181; 3 Elliott Contracts, §§ 2547, 2548. See, however, Graham v. Birkenhead &c. R. Co., 6 Eng. L. & Eq. 132; Ffooks v. London &c. Co., 19 Eng. L. & Eq. 7.

[49] Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787; Pomeroy Eq. Juris. § 1357.

thorizes interference to prevent a corporation from entering into a contract that it has no power to make rather than to permit the contract to be made and after it is made contest its validity. The state may, in the proper case, secure relief in equity against a corporation that attempts to exercise a power that it does not possess.[50] Stockholders may maintain injunction to prevent corporate officers from materially deviating from the objects for which the corporation was formed.[51]

§ 432 (377). **Contracts — Ultra vires — Denial of relief — Laches.**—It is held that if there is inexcusable delay in seeking relief the courts will refuse to interpose, although the contract may be ultra vires.[52] The decisions proceed upon the general

[50] Stockton v. Central R. Co., 50 N. J. Eq. 489, 25 Atl. 942, 17 L. R. A. 97; Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 216, 52 Am. St. 407; Attorney-General v. Chicago &c. R. Co., 35 Wis. 425. See Attorney-General v. Great Northern R. Co., 4 DeG. & Sm. 75; Taylor v. Salmon, 4 Myle. & Cr. 134; Ware v. Regents' &c. Co., 3 DeG. & J. 212; River Dun &c. Co. v. North Midland R. Co., 1 Eng. R. & C. Cas. 135; Attorney-General v. ohnson, Wils. Ch. pt. 2, 87; Attorney-General v. Birmingham &c. Co., 4 DeG. & Sm. 490; Attorney-General v. Forbes, 2 Myl. & C. 123; Attorney-General v. Eastern Counties R. Co., 3 Eng. R. & C. Cas. 337; Attorney-General v. Sheffield &c. Co., 3 DeG. M. & G. 304; Attorney-General v. Mid-Kent R. Co., 3 Ch. App. Cas. 100. See People v. North River &c. Co., 121 N. Y. 582, 24 N. E. 834, 9 L. R. A. 33, 18 Am. St. 843; People v. North River &c. Co., 22 Abb. N. Cas. 164, 3 N. Y. S. 401, 2 L. R. A. 33. But compare Attorney-General v. Great Eastern R. Co., 11 Ch. Div. 449; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

[51] Kean v. Johnson, 9 N. J. Eq. 401; Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573; Ware v. Grand Junction R. Co., 2 Russ. & M. 470. See Sparhawk v. Union &c. R. Co., 54 Pa. St. 401. See also Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 1188; Pollock v. Farmers' &c. Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. ed. 759; Gunnison &c. Co. v. Whitaker, 91 Fed. 191; Tippecanoe County v. Lafayette &c. R. Co., 50 Ind. 85; Central R. Co. v. Collins, 40 Ga. 582; Willoughby v. Chicago Junction R. Co., 50 N. J. Eq. 656, 25 Atl. 277, 39 Am. & Eng. Corp. Cas. 153; International &c. R. Co. v. Bremond, 53 Tex. 96. As far back as Dodge v. Woolsey, 18 How. (U. S.) 331, 15 L. ed. 401, it was said that this "is no longer doubted."

[52] St. Louis &c. Co. v. Terre Haute &c. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738; St. Louis &c. Co. v. Terre Haute &c.

doctrine that a party guilty of laches cannot successfully invoke the assistance of the courts. The courts in refusing to grant relief do not affirm the validity of the contract, but leave the parties where it found them because of the laches of the complaint.[53]

§ 433 (378). Contracts—Ultra vires—Who may contest.—A person not a corporate stockholder, or one not having a right to or interest in corporate property, cannot dispute the right of a corporation to make contracts of a certain kind upon the ground that they are ultra vires. Thus, a wharfinger will not be permitted to dispute the right of a railroad company to rent its wharf in competition with his own, by showing that its charter does not authorize it to keep a wharf for rent.[54] A person who is sued for damage done to real estate held by a corporation cannot successfully defend by showing that the charter of the corporation does not permit it to hold such real estate, or that it is not authorized to take and hold land for the purposes for which the real estate in question is acquired.[55] Even with regard to stockholders and officers of the corporation the rule obtains that a person whose rights are in no way infringed by the doing of an ultra vires act cannot found an action or defense upon the doing of that act. Upon this principle, it is held that the title acquired by the vendee of land from a railroad company is good, although it was ultra vires the company's charter to purchase the land in the first instance.[57] And the officers of a corporation who have

Co., 33 Fed. 440; Alexander v. Searcy, 81 Ga. 536, 12 Am. St. 337.

53 In the first case cited the court placed stress upon the principle that where both parties are in fault the courts will not give aid to either of them.

54 New Orleans &c. R. Co. v. Ellerman, 105 U. S. 166, 26 L. ed. 1015. See New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266; Tomlinson v. Bricklayers' Union, 87 Ind. 308; St. Louis Drug Co. v. Robinson, 81 Mo. 18; Gifford v. New Jersey R. Co., 10 N. J. Eq. 171; Oelbermann v. New York &c. R. Co., 7 Misc. 352, 27 N. Y. S. 945; Farmers &c. Bank v. Detroit &c. R. Co., 17 Wis. 372.

55 Farmers Loan &c. Co. v. Green Bay &c. R. Co., 11 Biss. (U. S.) 334, 12 Fed. 773.

57 Walsh v. Barton, 24 Ohio St. 28. See also Mallett v. Simpson, 94 N. Car. 37, 55 Am. Rep. 594.

bought stock for the company cannot plead as a defense to an action for conversion of the stock to their own use, that the original purchase made by them on behalf of the corporation was ultra vires.[58] The rule as asserted by many of the adjudged cases is that, after the corporation has performed its part of the contract, the other party will not be permitted to interpose the plea that it had no power to make such a contract.[59] The rule has been thus stated: "Without deciding whether or not it was within the corporate power of the railway company to become a party to such bond or contract, we are clearly of the opinion that, after full performance by the company of the stipulations of such bond of contract on its part to be done and performed, and after the appellees have received in full the benefits they bargained for, they cannot be permitted to escape or avoid the obligation of their contract upon the ground that the company had possibly exceeded its corporate power, or that such contract, as to it, was possibly ultra vires."[60] We have elsewhere said that we believe that the contract is not enforceable and the right of the party to protection from loss or injury does not rest upon the contract, but upon general equitable principles.

§ 434 (379). Contracts—Ultra vires—Creditors.—Corporate creditors occupy an essentially different position from that oc-

[58] St. Louis Stoneware Co. v. Partridge, 8 Mo. App. 217.

[59] Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Parish v. Wheeler, 22 N. Y. 494; Hamilton &c. Hydraulic Co. v. Cincinnati &c. R. Co., 29 Ohio St. 341. In this case the defendant was permitted to fill up a watercourse in consideration that it would reopen and restore the watercourse when requested. The defendant was held estopped to set up that the ownership and maintenance of the watercourse by the plaintiff was ultra vires. Three years of performance of a contract by which the railway company demised its roads, privileges and franchises for ninety-six years to defendant does not render it so far an executed contract that a party thereto is estopped to deny its validity and to repudiate it. Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 630, 7 Sup. Ct. 24, 30 L. ed. 83. See also 8 Elliott Cont. § 558.

[60] Chicago &c. R. Co. v. Derkes, 103 Ind. 520, 525, 3 N. E. 239. See also Louisville &c. Co. v. Flanagan, 113 Ind. 488, 493, 14 N. E. 370, 3 Am. St. 674; Steam Nav. Co. v. Weed, 17 Barb. (N. Y.) 378.

cupied by the corporation or its stockholders. They have no part in the management of the affairs of the corporation, and receive no direct benefit from a successful prosecution of its enterprises. Their contracts are made in reliance upon the fact that the corporate fund is a primary fund for the payment of the corporate debts. Accordingly the assent of all the shareholders can not render valid, as against the creditors, a contract not within the corporate powers; and a partial performance by the other contracting party cannot ordinarily make the corporation liable to an action that will jeopardize their interests.[61] The position of the creditors is so essentially different from that of the corporation and its shareholders that the rules which apply to one class cannot unqualifiedly apply to the other. The rule asserted in well considered decisions is that in cases where the corporation is insolvent, the claims of parties founded upon an ultra vires contract will be set aside in favor of creditors claiming under valid contracts.[62] The corporate creditors, of course, have no rights to be protected in cases where the corporation is clearly solvent, for in such a case payment of the debt due under an ultra vires contract will not menace its ability to pay its other debts, and they cannot complain of such payment. But where the payment of the claims of creditors founded upon contracts valid in all respects will be endangered by the enforcement of what are called ultra vires contracts the latter class of contracts will not be enforced. Where the contract is ultra vires in the proper sense of the term, then, as we have elsewhere shown, there can be no

[61] National Trust Co. v. Miller, 33 N. J. Eq. 155. See also Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067; 3 Thomp. Corp. (2d ed.), § 2850. But it has been held otherwise where no fraud is charged. Force v. Age-Herald Co., 136 Ala. 271, 33 So. 866.

[62] The receiver of such a corporation may repudiate claims arising out of ultra vires contracts. Abbott v. Baltimore &c. Steam Packet Co., 1 Md. Ch. 542. He may repudiate a transfer of mortgages by the corporation made to secure such claims. Talmage v. Pell, 7 N. Y. 328. The corporation is not estopped to set up the defense of ultra vires in favor of its creditors whose debts were created under lawful power, where it is insolvent, and the object is to prefer such creditors to others claiming under unauthorized contracts. Bank of Chattanooga v. Bank of Memphis, 9 Heisk. (Tenn.) 408.

recovery upon it. The contract itself is void, but there may be in many cases a recovery upon the quantum valebat or quantum meruit. If there is a right to recover on the quantum meruit, for the reasonable value of the property received and appropriated by the corporation, there is reason for doubting whether creditors can defeat the claims of parties having such a right of recovery, for, in such a case, the property received and appropriated becomes part of the corporate assets and increases the security of the creditors. Where there is an executory contract merely there is no difficulty, for it is clear that such a contract cannot be enforced nor damages recovered for its breach. It is held that creditors may be estopped by the fact that they have received the benefits of the unauthorized act and their dealings have been with reference thereto.[63]

§ 435 (380). Contracts—Ultra vires—Non-assenting stockholders.—It is reasoned that as corporations act only by their officers and agents, and are controlled by majorities, and as the interests of the minority stockholders and the creditors are not always respected by the managers, the rule that the corporation is bound by contracts of its agents, is not of universal application. It would seem to be clear upon principle that a stockholder would not be bound by any ultra vires contract entered into by the directors, of which he had no knowledge, even though a benefit accrued to the corporation by reason of the performance of such a contract.[64] There is, however, difficulty in practically applying this general doctrine. If the corporation does actually receive and retain property of value it should be compelled to make just and equitable compensation, although some of the stockholders may assail the transaction. It is, however, quite clear on principle that where the contract is executory a non-assenting stockholder, who promptly assails it, is entitled to relief. But since the books of the company are at all times open for their inspection, it may be presumed that the members of the corpora-

[63] Tone v. Columbus, 39 Ohio St 281, 48 Am. Rep. 438. See also Fogg v. Blair, 133 U. S. 534, 10 Sup Ct. 338, 33 L. ed. 721.

[64] See Bi-Spool &c. Co. v. Acme Mfg. Co., 153 Mass. 404, 26 N E 991; 3 Thomp. Corp. (2d ed.), § 2846, et seq.

tion are cognizant of its acts, and a ratification of such acts will be presumed from acquiescence on their part.[65] It is so difficult to permit a contract to be set aside by a dissenting stockholder without at the same time relieving those by whom it was made, that the courts refuse to entertain his objections on the ground that a contract is ultra vires, unless he moves promptly to prevent its execution. He will not, as a general rule, be heard to express, after the contract is executed, a dissent which he has not made known until it was apparent that the contract would operate against his interests,[66] unless he has done equity or caused equity to be done by the corporation.

§ 436 (381). Prohibited contracts—Effect of prescribing penalties.—Where a contract is illegal because prohibited by legislative enactment, it is not necessarily void if the legislature has specifically provided what the consequences of a violation of the statute shall be. The general rule upon this subject seems to be that where the statute which prohibits the contract expressly prescribes the consequences of its violation the contract is not void, since the consequences expressly prescribed are exclusive.[67]

[65] Thompson v. Lambert, 44 Iowa 239.

[66] Thompson v. Lambert, 44 Iowa 239; Bradley v. Ballard, 55 Ill. 413, 8 Am. Rep. 656. See also Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. ed. 265; article in 13 Am. L. Rev. 661; 3 Thomp. Corp. (2d ed.), § 2832; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959.

[67] See ante, § 430; 2 Elliott Cont. §§ 667-669 (not void where statute is merely a revenue measure). Where a corporation was forbidden by law to issue notes or other evidences of debt, to be loaned or put in circulation as money, the statute declaring that all notes or other securities for the payment of money "made or given to secure the payment of any money loaned or discounted by any incorporated company contrary to the provisions of the [statute] shall be void," it was held that the notes or securities so taken were void, but the money loaned on them could be recovered. The court said: "A prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences, and to exclude any other penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part without sanctioning the illegality, such

But this rule cannot govern where there is simply a general penalty prescribed. Where a penalty is declared, the general rule

action will be entertained." Pratt v. Short, 79 N. Y. 437, 445, 35 Am. Rep. 531. In Edison General Electric Co. v. Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315, 40 Am. St. 910, the Supreme Court of Washington held that although a statute provides a penalty for a foreign corporation doing business without first having registered contracts by such corporation are not thereby rendered void. The court said: "There is some diversity among the cases in the construction of laws of this kind, but the weight of authority seems to establish the doctrine that it is the duty of the courts to look at the whole statute, and therefrom determine as to what was the intent of the legislature. If, by the terms thereof, the act is made unlawful, it will usually be construed to amount to a prohibition of said act, and the imposition of a penalty will also amount to a prohibition if, from the language used, such seems to have been the intent of the legislature. But in the case at bar, while the company is liable to the penalty provided in the statute, there is nothing in the act which in terms prohibits the transaction of business or declares it to be unlawful, and the particular language of the clause which imposes the penalty has no tendency to establish either of said propositions. On the contrary, its language, fairly construed, would seem to contemplate that the company might do business without such registration, but that, if it did it should pay the penalty therein prescribed for the privilege of so doing. The cases cited by appellant, when applied to the facts of this case, have little tendency to sustain its contention. The investigation which we have been able to give the adjudged cases tends to support the statement made by respondent, in its brief, that a provision like the one under consideration has never been held to render contracts void, though entered into without the authority of the statute. Some of the cases cited by appellant contain expressions to the effect that the imposition of a penalty for the performance of an act is equivalent to declaring it unlawful; but an examination of the facts will show that the provisions which they were construing were clothed in far different language than the one under consideration." Where a corporation loans money in excess of the prescribed limit to be loaned to an individual, the corporation can recover the money. "We do not think that public policy requires, or that congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders and all who have an interest in the safety and prosperity of the bank." Gold Min. Co. v. National Bank, 96 U. S. 640, 24 L. ed. 648; Duncomb v. New York &c. R. Co., 84 N. Y. 190. And a provision in the char-

is that a contract to do the forbidden act is void. As is well known the accepted doctrine is that the imposition of a penalty for doing the act operates as such an implied prohibition as to bring the case within this rule.[68] It is sometimes provided that only specified persons shall be entitled to the protection of a special prohibition of the statute, and when this is so only such persons can take advantage of it.[69]

§ 437 (382). Illegal contracts—Generally.—It is hardly necessary to say that a railroad company has no more right to enter into an illegal contract than a natural person or a corporation of any kind. If an act be malum in se or malum prohibitum a railroad company cannot perform it.[70] Where a contract is il-

ter of a corporation prohibiting any director or other officer, under penalty of fine or imprisonment, from borrowing money from the bank, does not exempt a director from liability for money loaned to him in violation of the prohibition. Farmington Sav. Bank v. Fall, 71 Maine 49. Ante, § 430.

[68] O'Donnell v. Sweeney, 5 Ala. 467, 39 Am. Dec. 336; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Sharp v. Teese, 9 N. J. L. 352, 17 Am. Dec. 479; Mitchell v. Smith, 1 Binney (Pa.) 110, 2 Am. Dec. 417; Seidenbender v. Charles, 4 Serg. & Raw. (Pa.) 151, 8 Am. Dec. 682; Ohio L. Ins. &c. Co. v. Merchants' Ins. Co., 30 Tenn. 1, 53 Am. Dec. 742; Wilson v. Spencer, 1 Rand. (Va.) 76, 10 Am. Dec. 491; 8 Elliott Cont. § 665.

[69] Courts often speak of acts and contracts as void, when they mean no more than that some party concerned has a right to avoid them. Legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this: that at the option of those for whose benefit the provision was made it shall be voidable, and have no force or effect as against his interests. * * * If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents, while if the manifest intention is to give protection to determinate individuals who are sui juris, the purpose is sufficiently accomplished, if they are given the liberty of avoiding it." Beecher v. Marquette &c. Co., 45 Mich. 103, 108, 7 N. W. 695, per Cooley, J.; Earle v. Earle, 91 Ind. 27. See also Union Nat. Bank v. Matthews, 98 U. S. 629, 25 L. ed. 188; Roberts v. Lane, 64 Maine 108, 18 Am. Rep. 242; Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

[70] Marshall v. Baltimore &c. R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Pueblo &c. R. Co. v. Taylor, 6 Colo. 1, 45 Am. Dec. 512;

legal and for that reason void, no action can be maintained upon it, for the courts will decline to assist either party in enforcing it.[71] But it is unnecessary to do more than suggest these general rules and add that all of the fundamental rules regarding illegal contracts apply to contracts by railroad companies.

§ 438 (383). Illegal contracts and ultra vires contracts discriminated.—At another place we have directed attention to the difference between contracts that are ultra vires and contracts that are illegal.[72] It is obvious that a contract may be beyond the scope of the corporate powers and yet not be illegal in the proper sense of the term. The term "illegal contract," as we employ it, means a contract forbidden by legislative enactment or condemned by some general rule of law. It is true, of course, that a contract which is against public policy is illegal, but we can see no valid reason for making an independent and distinct class of contracts against public policy, for public policy is settled and determined by general rules of law, so that such a contract is really an illegal one and is, therefore, properly a member of the general class designated by the term illegal contracts. What the term "public policy" means has not been precisely determined by the judicial decisions.[73] Illegal contracts are, in a

Morris &c. R. Co. v. Sussex &c. R. Co., 20 N. J. Eq. 542; Chippewa &c. Co. v. Chicago &c. R. Co., 75 Wis. 224, 44 N. W. 17, 6 L. R. A. 601; Ashbury R. &c. Co. v. Riche, L. R. 7 H. L. C. 653; 3 Thomp. Corp. (2d ed.), §§ 2791, et seq.

[71] Ohio &c. Co. v. Merchants &c. Co., 30 Tenn. 1, 53 Am. Dec. 742; O'Donnell v. Sweeney, 5 Ala. 467, 39 Am. Dec. 336; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Wilson v. Spencer, 1 Rand. (Va.) 76, 10 Am. Dec. 491. See also Minnesota &c. R. Co. v. Way, 34 S. Dak. 435, 148 N. W. 858; Webb v. Tulchire, 3 Ired. (N. Car.) Law 485, 40 Am. Dec. 419; 3 Thomp. Corp. (2d ed.), § 2791.

[72] Ante, § 428; Woodruff v. Erie R. Co., 93 N. Y. 609, 618. The modern cases deny that there is any essential difference between contracts to perform acts malum in se and contracts to do that which is malum prohibitum. Evans v. Trenton, 24 N. J. L. 764.

[73] In Richardson v. Mellish, 2 Bing. 229, 9 E. C. L. 557, Burroughs, J., said: "Public policy is a very unruly horse, and when once you get astride of it you never know where it will carry you. Public policy does not admit of definition and is not easily explained." See generally Bank of United States v. Owens, 2 Pet. (U. S.) 527, 7 L. ed. 508; Providence &c. Co. v. Norris, 2

sense, ultra vires, but they are something more, they are contracts of "an evil tendency." It is hardly necessary to say that a railroad corporation has no more right to enter into an illegal contract than an individual. It is to be remarked, however, that a positive legislative enactment may confer authority to make a contract which, but for the statute, would be regarded as illegal because against public policy.[74]

§ 439 (384). **Classes of illegal contracts.**—We have said that in our judgment a contract void because against public policy is an illegal contract. Some of the cases, however, do not class such contracts as illegal, but make of them a separate and distinct class. We think that illegal contracts, as distinguished from ordinary ultra vires contracts, may be divided into (1) those which are immoral in themselves, and forbidden by law to persons as well as corporations; (2) those which the corporations in question are forbidden to make by statute, and (3) those which public policy forbids them to make.[75] The latter class of contracts, that

Wall. (U. S.) 45, 56, 17 L. ed. 868; Farmers' &c. R. Co. v. White, 5 Colo. App. 1, 31 Pac. 345; Florida &c. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419; Pennsylvania Co. v. Dolan, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. 289; Griswold v. Illinois &c. R. Co. (Iowa), 53 N. W. 295 (reversed on rehearing, in 90 Iowa 265, 57 N. W. 843, 24 L. R. A. 647); Durgin v. Dyer, 68 Maine 143; Smith v. Arnold, 106 Mass. 269; Bishop v. Palmer, 146 Mass. 469, 474, 16 N. E. 299, 4 Am. St. 339; Brown v. New York &c. Co., 75 Hun 355, 27 N. Y. S. 69; Pierce v. Evans, 61 Pa. St. 415; Burkholder v. Beetem, 65 Pa. St. 496; Edgerton v. Earl Brownlow, 4 H. L. Cas. 1.

[74] Donaldson v. Jude, 2 Bibb (Ky.) 57; Brown v. Anderson, 1 T. B. Mon. (Ky.) 198; Vermont &c. R. Co. v. Vermont &c. R. Co., 34 Vt. 1. See also American &c. Union v. Yount, 101 U. S. 352, 25 L. ed. 888. Where there is no legislation it is for the courts to decide whether a contract is or is not "at war with any established interest of society," and, therefore, illegal. Kellogg v. Larkin, 3 Pin. (Wis.) 123, 3 Chand. 133, 56 Am. Dec. 164; Boardman v. Thompson, 25 Iowa 487, 501. Legislation, however, settles questions of policy. Speaking of the power of the legislature in this regard the Supreme Court of the United States said: "Questions of this sort determined there are conclusive here." License Tax Cases, 5 Wall. (U. S.) 462, 469, 18 L. ed. 675. See also Hadden v. Collector, 5 Wall. (U. S.) 107, 18 L. ed. 518; Magee v. O'Neill, 19 S. Car. 170, 45 Am. Rep. 765.

[75] See 3 Thomp. Corp. (2d ed.), § 2136, et seq.

is, contracts against public policy, have been discussed principally in cases where corporations charged with the performance of certain public duties have entered into contracts whereby they are disabled to perform such duties, or the rights of the public are infringed,[76] but the principle has a somewhat wider range.

§ 440 (385). Contracts void because against public policy.— The settled doctrine is that railroads and other corporations which are created with special powers and privileges, and charged with certain duties to the public, are held bound by considerations of public policy to refrain from doing any acts which may disable them from performing their duties to the public.[77] This familiar principle is applied to various classes of cases, but while there is no diversity of opinion as to the principle itself there is some conflict among the cases as to its application. It is held, in accordance with the general principle stated,[78] that a

[76] New York &c. R. Co. v. Winans, 17 How. (U. S.) 30, 39, 15 L. ed. 27; Pearce v. Madison &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Thomas v. West Jersey Co., 101 U. S. 71, 25 L. ed. 950; Branch v. Jesup, 106 U. S. 468, 478; 1 Sup. Ct. 15, 27 L. ed. 279; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Pittsburgh &c. R. Co. v. Keokuk &c. Bridge Co., 131 U. S. 371, 384, 9 Sup. Ct. 770, 33 L. ed. 157; Central Trans. Co. v. Pullman P. Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Hazelhurst v. Savannah &c. R. Co., 24 Ga. 13; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 5; New England Express Co. v. Maine Central R. Co., 57 Maine 188. See also 3 Thomp. Corp. (2d ed.), § 2792.

[77] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; Central Trans. Co. v. Pullman Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Daniels v. Hart, 118 Mass. 543; Abbott v. Johnstown &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; West Virginia &c. Co. v. Ohio &c. Co., 22 W. Va. 600, 46 Am. Rep. 527, and see Indiana authorities collected and cited in Muncie Gas Co. v. Muncie, 160 Ind. 97, 104, 66 N. E. 436, 60 L. R. A. 822. A corporation can not disable itself by contract from performing its public duties, or, by agreement, compel itself to make public accommodation subordinate to its private interests. Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979; Davis v. Southern Pac. Co., 235 Fed. 731; Chreste v. Louisville &c. R. Co., 167 Ky. 75, 180 S. W. 49, L. R. A. 1917B, 1123, and note.

[78] Oregon R. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Winchester &c. Tpk. Co.

railroad cannot mortgage, lease or sell its railroad, nor any property essential to the operation of its railroad,[79] in the absence of authority from the state.[80] So contracts by which it is under-

v. Vimont, 5 B. Mon. (Ky.) 1; State v. Morgan, 28 La. Ann. 482; Daniels v. Hart, 118 Mass. 543; Southern Pac. R. Co. v. Esquibel, 4 N. Mex. 337, 20 Pac. 109; Black v. Delaware &c. Canal Co., 22 N. J. Eq. 130, 399. But see Memphis &c. R. Co. v. Dow, 19 Fed. 388; Kelly v. Trustees &c., 58 Ala. 489; Miller v. Rutland &c. R. Co., 36 Vt. 452, 488, holding that it may mortgage its property to purchase necessary rails, without which it could perform none of its public duties.

[79] Peters v. Lincoln &c. R. Co., 2 McCrary (U. S.) 275, 12 Fed. 513; Thomas v. Railroad Co., 101 U. S. 71, 25 L. ed. 950; Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Board &c. v. Lafayette &c. R. Co., 50 Ind. 85, 110; Middlesex R. Co. v. Boston &c. R. Co., 115 Mass. 347; Freeman v. Minnesota &c. R. Co., 28 Minn. 443, 10 N. W. 594; Pierce v. Emery, 32 N. H. 484; Abbott v. Johnstown &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572. See opinion of Chief Justice Ruger, in Woodruff v. Erie R. Co., 93 N. Y. 609, 618; Brooker v. Maysville &c. R. Co., 119 Ky. 137, 83 S. W. 117; Quigley v. Toledo R. &c. Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992, and note. But it has been held that it may, under certain circumstances, sell a terminal switch to the owner of the land on which it is laid. Oman v. Bedford &c. Stone Co., 134 Fed. 64, citing Jones v. Newport News &c. R. Co., 55 Fed. 736, and South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. ed. 448. See also Bacon v. Boston &c. R. Co., 83 Vt. 421, 76 Atl. 128.

[80] In Maine it is held to be the policy of the state to permit railroads to mortgage their property at will. Kennebec &c. R. Co. v. Portland &c. R. Co., 59 Maine 9. See also Woodruff v. Erie R. Co., 93 N. Y. 609, 618. Mr. Charles Francis Adams, president of the Union Pacific Railroad, in an address at Boston, on December 15, 1888, said: "I am very sure now, as I have been for the last twenty years, and as I long ago expressed myself, that a great consolidated corporation, or even a trust, can be held to a far stricter responsibility to the law than numerous smaller and conflicting corporations." Mr. Justice Brewer, in United States v. Western Union Tel. Co., 50 Fed. 28, 42, said: "It may be true, as contended, and, not disturbed by the common hue and cry about monopoly I am disposed to believe that it is true—that the real interests of the public are subserved by the consolidation of the various transportation systems."

taken to stifle competition between parallel roads, which would, in the natural order of things, be competing lines, are illegal and void.[81] One road will not be permitted to contract for the purchase of stock of a competing road, with a view to gaining control of it, and so preventing competition between the two roads.[82]

[81] Cleveland &c. R. Co. v. Closser, 126 Ind. 348, 26 N. E. 159, 9 L. R. A. 754, 22 Am. St. 593; Chicago &c. R. Co. v. Wabash &c. R. Co., 61 Fed. 993; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Morrill v. Boston &c. R. Co., 55 N. H. 531; Stockton v. Cent. &c. R. Co., 50 N. J. Eq. 52, 24 Atl. 964, 17 L. R. A. 97; Hooker v. Vandewater, 4 Denio (N. Y.) 349, 47 Am. Dec. 258; Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; Morris Run Coal Co., v. Barclay Coal Co., 68 Pa. St. 173, 8 Am. Rep. 159; Gibbs v. Consolidated Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. ed. 979. In announcing the opinion of the court in this case Chief Justice Fuller said: "In the instance of business of such a character that it presumably cannot be restrained to any extent whatever without prejudice to the public interests, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy." Texas &c. R. Co. v. Southern Pacific R. Co., 41 La. Ann. 970, 6 So. 888, 17 Am. St. 445; Gulf &c. R. Co. v. State, 72 Tex. 404, 1 L. R. A. 849. See United States v. Trans-Missouri Freight Assn., 58 Fed. 58; and note to Harding v. American Glucose Co., 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. 189, 235, 249-255.

[82] Central R. Co. v. Collins, 40 Ga. 582; De La Vergne &c. Co. v. German &c. Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. ed. 65; Louisville &c. R. v. Kentucky, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. ed. 849; People v. Chicago &c. Co., 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am St. 319; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475, 494; Elkins v. Camden &c. R. Co., 36 N. J. Eq. 5. See also Milbank v. New York &c. R. Co., 64 How. Prac. (N. Y.) 20; Pennsylvania R. Co. v. Commonwealth (Pa.), 29 Am. & Eng. R. Cas. 145, 154; Great Northern R. Co. v. Eastern Counties R. Co., 21 L. J. Ch. 837. An insolvent construction company contracted to build a railway for a corporation, and received nearly all of the latter's stocks, bonds, and assets as security for its outlay. Without beginning the work the construction company transferred all the stock to the persons managing another railway already in operation, among whom were the president and many of its directors, the funds of the latter corporation being used in purchasing the stock of the construction company. So that the stock of both the construction company and the projected road was controlled by the same management as the road then in operation, and ran for nearly the same distance, and in the same general direction, as the pro-

§ 441 (386). Contracts against public policy—Location of stations and tracks—True principle requires, as it seems to us, that contracts for the location of depots and stations should be held illegal where they are made for the advancement of mere private interest, and are prejudicial to the public interest. Where, however, there is contravention of the public interest, we can see no valid reason for condemning such a contract. We believe that whether public interests are or are not sacrificed to purely private interests is a question to be determined upon the facts of the particular case. The cases which hold that subscriptions upon condition that the road shall be built upon a designated line are valid,[83] as well as cases which uphold municipal aid to railroad companies, cannot be supported if it be conceded that all contracts to locate a road on a designated line, or build stations at a particular place are void. It has been held that contracts requiring a railroad company to establish its depot at a certain point are against public policy, and not enforceable.[84] There is, however, conflict of authority upon this question.[85] Contracts

jected line, which would be a competitor. The court held that the evident purpose and effect of the transaction was to violate by indirection the section of the Georgia constitution prohibiting the purchase of the stock of one corporation by another, and any contract between them tending to lessen competition in their respective businesses or to encourage monopoly, and that equity would interfere and seize the assets of the insolvent construction company, which stood in the position of derelict trustees. Langdon v. Branch, 37 Fed. 449.

[83] Martin v. Pensacola &c. R. Co., 8 Fla. 370; Evansville &c. Co. v. Shearer, 10 Ind. 244; Burlington &c. R. Co. v. Boestler, 15 Iowa 555; McMillan v. Maysville &c. R. Co., 54 Ky. 218, 61 Am. Dec. 179; Bucksport &c. Co. v. Brewer, 67 Maine 295; Taggart v. Western Md. R. Co., 24 Md. 563, 89 Am. Dec. 760; Detroit &c. Co. v. Starnes, 38 Mich. 698; North Mo. R. Co. v. Winkler, 29 Mo. 318; O'Neal v. King, 3 Jones (N. Car.) 517; Ashtabula &c. R. Co. v. Smith, 15 Ohio St. 328; Spartanburg &c. R. Co. v. De Graffenreid, 12 Rich. L. (S. Car.) 675; Rhey v. Edensburg &c. Co., 27 Pa. St. 261.

[84] Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; Florida Cent. R. Co. v. State, 31 Fla. 482, 13 So. 103, 20 L. R. A. 419, 34 Am. St. 30. But see Atlantic &c. R. Co. v. Thomas, 60 Fla. 412, 53 So. 510; Scholten v. St. Louis &c. R. Co., 101 Mo. App. 516, 73 S. W. 915.

[85] Bestor v. Wathen, 60 Ill. 138; Marsh v. Fairbury &c. Co., 64 Ill. 414, 16 Am. Rep. 564; Louisville &c. R. Co. v. Sumner, 106 Ind. 55,

made to influence the location of the route of a projected road are held to be illegal by some of the courts.[86] In our opinion,

5 N. E. 404, 55 Am. Rep. 719; Cedar Rapids &c. R. Co. v. Spafford, 41 Iowa 292; Williamson v. Chicago &c. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206; Kansas Pac. R. Co. v. Hopkins, 18 Kans. 494; Vicksburgh &c. R. Co. v. Ragsdale, 54 Miss. 200; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; Currier v. Concord R. Co., 48 N. H. 321; Parrott v. Atlantic &c. R. Co., 165 N. Car. 295, 81 S. E. 348, Ann. Cas. 1915D, 265; Texas &c. R. Co. v. Robards, 60 Tex. 545, 48 Am. Rep. 268; International &c. Co. v. Dawson, 62 Tex. 260; Chapman v. Mad River &c. R. Co., 6 Ohio St. 119. And as already stated in a preceding section we think the better rule sustained by the weight of authority is that such a contract is not necessarily invalid if it does not conflict with public interests. Ante, § 417. But a provision in such a contract that another depot should not be established within certain limits is illegal and void. St Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; St. Louis &c. R. Co. v. Mathers, 104 Ill. 257; Williamson v. Chicago &c.. R. Co., 53 Iowa 126, 4 N. W. 870, 36 Am. Rep. 206. See also Mobile &c. R. Co. v. People, 132 Ill. 559, 24 N. E. 643, 22 Am. St. 556; Enid Right of Way &c. Co. v. Lile, 15 Okla. 328, 82 Pac. 810.

[86] Woodstock Iron Co. v. Richmond &c. Co., 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819. In announcing the opinion of the court in the case cited, Mr. Justice Field said: "The business of the extension company was one in which the public was interested. Railroads are for many purposes public highways. They are constructed for the convenience of the public and property. In their construction, without necessary length between designated points, in their having proper accommodations, and in their charges for transportation, the public is directly interested. * * * All arrangements, therefore, by which directors or stockholders or other persons may acquire gain by inducing corporations to disregard their duties to the public, are illegal and lead to unfair dealing, and, this being against public policy, will not be enforced by the courts. In this case, the extension company, to which the duty of locating and constructing the railroad between its termini was intrusted, in agreeing, for a consideration offered by a third party, to disregard that duty, and locate and construct the road by a longer route than was required, not only committed a wrong upon the railroad company by imposing unnecessary burdens upon it, to meet which larger charges for transportation might be called for, but also a wrong upon the public." Bestor v. Wathen, 60 Ill. 138; St. Louis &c. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Fuller v. Dame, 18 Pick. (Mass.) 472; Holladay v. Patterson, 5 Ore. 177. But see

however, a contract to locate a railroad upon a designated line cannot be adjudged void as a matter of law without regard to extrinsic facts. Such a contract may or may not be void, depending upon the facts of the particular case. If the public interests are not prejudiced, and there is no corrupt conduct, such contracts are not illegal, but if the public interests are sacrificed, the charter violated, or corrupt influences exerted, the contract should be adjudged illegal. A stipulation in a contract that no side track shall be built by the railroad company in a certain town may be sufficient to render the entire contract illegal and void.[87]

Farrington v. Stuckey, 7 Ind. Ter. 364, 104 S. W. 647, 165 Fed. 325; McKell v. Chesapeake &c. R. Co., 186 Fed. 39; Davis v. Williams, 121 Ala. 542, 25 So. 704; McCowen v. Pew, 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800; Riley v. Louisville &c. R. Co., 142 Ky. 67, 133 S. W. 971, 35 L. R. A. (N. S.) 636, and other cases cited in note; Ann. Cas. 1912D, 230n.

[87] Pueblo &c. R. Co. v. Rudd, 5 Colo. 270; Pueblo &c. R. Co. v. Taylor, 6 Colo. 2. In this case the court said: "Railroad companies are held to be quasi public corporations and agencies, their directors, acting in the double capacity as agents for the company and trustees for the public, clothed with an important public trust. These roads subserve public purposes to such an extent that the public may impose upon itself the burden of taxation to aid in their construction (St. Joseph & Denver City R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357), and the lawful exercise of the rights of eminent domain in the taking of private property for the purpose of their construction is put solely upon the ground of public use. When, therefore, the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. It logically follows that the public has a right to say that such companies shall not be permitted to make any contract which would prevent them from accommodating the public, where entitled to it in the matter of transportation and travel. In the case of the St. Joseph &c. R. Co. v. Ryan, 11 Kans. 602, 15 Am. Rep. 357, which arose upon a contract containing a stipulation that the railroad company would not have or use any other depot within three miles of the depot agreed to be established by the contract the court says: 'Railroads are public agencies and perform a public duty. They are agencies. created by the public with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and

§ 442 (387). **Contracts void as against public policy—General conclusions.**—It may be laid down as a general rule that any contract by which the rights of the public are infringed is void as against public policy; but the decisions as to what are public rights and what is the public policy upon which those rights are founded, depend so much upon the peculiar circumstances of each case that it is not an easy matter to state a general rule that will justly govern any given contract.[88] A contract which

cannot be enforced. They are under obligations to employ skillful and competent engineers and other competent employes to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to number and quality of cars and coaches, and the number of trains, and a contract not to furnish such facilities will not be tolerated. * * * Upon the same principle it is the duty of a railroad company to furnish reasonable depot facilities. The number and location of the depots, so as to constitute reasonable depot facilities vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is a contravention of this duty.' In addition to the foregoing, the same doctrine is laid down in the following, among other cases: Marsh v. Fairbury and Northwestern R. Co., 64 Ill. 414, 16 Am. Rep. 564; St. Louis, Jacksonville & Chicago R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Pacific R. Co. v. Seely 45 Mo. 212, 100 Am. Dec. 369; Fuller v. Dame, 18 Pick. (Mass.) 472; Holladay v. Patterson, 5 Ore. 177. Upon both principle and authority, we think it beyond serious question that the condition in this contract, whereby it was sought to prevent a neighboring town through which the railroad passed from having the facilities of even a side track, and to prevent the railroad company from the exercise of discretion in providing such facilities for the public, is illegal and void, by reason of its clear contravention of the public interests, and the duty of such company in their relations to the public." See also Chicago &c. R. Co. v. Southern Ind. R. Co., 38 Ind. App. 234, 70 N. E. 843, and see generally as to the doctrine of this section ante § 417; 1 Elliott Cont., § 581.

[88]In proof of this statement of the text we refer to the conflict of authority as to whether a railroad company may make a valid contract with a telegraph company to allow no other telegraph company to construct a line along its road. The following authorities hold that, under the circumstances of those cases, it may. Western Union Tel Co. v. Atlantic, &c. Tel. Co., 7 Biss. (U. S.) 367; Fed. Cas. Co. 17445; Western Union Tel. Co. v. Chicago, &c. R. Co., 86 Ill. 246, 29 Am. Rep. 28. The case of Western Union Tel Co. v. Burlington, &c. R. Co., 3

on its face assumes to bind the parties to an act hostile to the public interest may, doubtless, be adjudged void as a matter of law. But it cannot be justly said that every contract providing for the construction of a railroad upon a given line, or for the building of a station at a particular place is opposed to the interests of the public. It may well be that such a contract will promote and not prejudice the public welfare. So, too, it may be true that such a contract in no manner violates the provisions of the corporate charter, but on the contrary, justly aids in carrying those provisions into effect. In such cases, or in cases of a similar character, there is no valid reason for adjudging the contract void. We believe that a contract providing for the location of a station at a given place should be regarded with something akin to suspicion and that it should be carefully scrutinized, but we do not think that it should be regarded as illegal per se without looking to attendant circumstances or regarding extrinsic evidence.[89] As we have substantially said, such a contract may be regarded as per se illegal where a corrupt purpose is disclosed by its terms, or where it appears from its provisions that public interests will be unduly prejudiced, but we do not believe that such a contract is under all circumstances to be regarded as illegal. We know that the general rule is that the validity of a contract is to be determined not by considering whether it does injury in the particular case, but whether it is such as might be injurious.[90] But we do not believe that the rule applies to all contracts belonging to the class of which we are speaking, for such contracts are not always opposed to the public interests. The cases which hold that officers cannot contract for their own benefit to secure a particular location are not in point, for they rest upon a different principle; nor are the cases which hold that a contract to pay a person a sum of money to secure the location at a particular place, since such cases are different from those

McCrary (U. S.) 130, 11 Fed. 1, holds that it may not. See Atlantic, &c. Tel. Co. v. Union Pac. R. Co., 1 McCrary (U. S.) 541, 1 Fed. 745.

[89] Ante, § 417.

[90] Holladay v. Patterson, 5 Ore. 177, 180; Oscanyan v. Arms Co., 103 U. S. 261, 274, 26 L. ed. 539; Providence Tool Co. v. Norris, 2 Wall. (U. S.) 48, 56, 17 L. ed. 868; Elkhart County Lodge v. Crary, 98 Ind. 238, 49 Am. Rep. 746.

in which there is a direct and open agreement with the railroad company.[91] Where a party under a contract to build a railroad enters into an agreement to deviate from the line fixed, it is entirely just to adjudge such an agreement void, but such an agreement is essentially different from one openly and directly made with the railroad company.[92] The doctrine we have ventured to advocate is contrary to a number of the decisions, but there are well-reasoned cases which give our views full support.[93]

§ 443 (388). Contracts void as against public policy—Illustrative cases.—A contract by which a railway corporation undertakes to convey to a telegraph company such exclusive rights in that portion of its right of way not occupied by its tracks as to prevent the erection of a competing line thereon is invalid.[94] An

[91] The case of Fuller v Dame, 18 Pick. (Mass.) 472, was that of a person agreeing for a designated sum to secure the location at a particular place, and is not, when justly interpreted, against the doctrine of the text. It seems to us that some of the courts have given an effect to the case cited far beyond that which can be fairly assigned it. A doctrine has been deduced from it which it does not declare.

[92] The agreement held void in Woodstock, &c. Iron Co. v. Richmond, &c. Co. 129 U. S. 643, 9 Sup. Ct. 402, 32 L. ed. 819, was between a construction company and a landowner, so that the decision cannot be regarded as opposing the statements of the text.

[93] Louisville R. Co. v. Sumner, 106 Ind. 55, 5 N. E. 404, 55 Am. Rep. 719; Taylor v. Cedar Rapids, &c. R. Co., 25 Iowa 371; First National Bank v. Hendrie, 49 Iowa 402, 31 Am. Rep. 153; Williamson v. Chicago, &c. R. Co. 53 Iowa 126, 4 N. W 870, 36 Am. Rep. 206; McClure v. Mo. River R. Co., 9 Kans. 373; Swartout v. Michigan, &c. R. Co., 24 Mich. 389; Harris v. Roberts, 12 Nebr. 631, 12 N. W. 89, 41 Am. Rep. 779.

[94] Pacific Postal Tel. Co. v. Western Union Tel. Co., 50 Fed. 493, 50 Am. & Eng. R. Cas. 665; Western Union Tel. Co. v. Burlington, &c. R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1; Western Union Tel Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781; Union Trust Co. v. Atchison, &c. R. Co., 8 N. Mex. 327, 43 Pac. 701. The first case cited was a proceeding by a bill in equity for an injunction to prevent the Western Union Telegraph Company from constructing and operating a telegraph line on the right of way of the Seattle, Lake Shore and Eastern Railway Company between certain stations. The plaintiff based its claims upon a contract entered into by the defendant's grantor, which provided as follows: "The railway company hereby grants right of way for said

agreement, which, by its terms, gives the exclusive right to a railway corporation in or through a certain tract of land, in so

line of telegraph along the route of its road, and upon its grounds, * * * and the railway company hereby agrees that it will not grant right of way along its road for the construction of the line of any other telegraph company." Judge Hanford said: "The argument is that the contract is a conveyance, and that it vests in the complainant the exclusive right to the entire strip of land for telegraph purposes during the term specified, which right amounts to an interest in the land, and is a legal estate. * * * If the contract, in explicit terms, granted such an interest in the premises as the plaintiff claims, I should have to hold it to be ultra vires and void, for the reason that the laws of the territory of Washington, in force when it was made, did not authorize a railway corporation to transfer land acquired for railroad purposes, by lease, so as to divest itself of its duties and obligations to the public as to the use of such property. * * * Telegraph lines are to serve the public, and wherever they are connected with a railroad as incidental to the railway business, the rights of the public respecting the same must be governed by the principles applicable to other branches of the service; and the public policy which underlies the numerous decisions of the courts of this country denying the right of a railway corporation to divest itself of responsibility and invest another with its powers and functions, touches directly the question in this case as to the right of one corporation to transfer to another an exclusive right for telegraph purposes to the occupancy and control of property acquired as a necessary means of serving the public. A contract made by a railway company, whereby it attempts to create a monopoly in the use of its property for the transmission of news and intelligence, is just as invalid as a contract would be whereby a railway corporation should attempt to confer upon one individual or corporation an exclusive right to have any particular commodity transported as freight over its railway. Whether this contract be regarded as an intended conveyance of an interest in the property or as a covenant affecting the title to the right of way, or as a contract creating simply a personal liability, it is not such a contract as a court of equity can uphold or decree to be specifically performed; and at least as against the defendant the Western Union Telegraph Company, it is void, except in so far as it confers upon the plaintiff the right to maintain unmolested its telegraph line and conduct its business without interruption." It has been laid down as a general rule that contracts, the object of which is to secure to the obligee a monopoly or an exclusive use for public purposes of land held by other corporations or by a priv-

far as it attempts to exclude other railway corporations from acquiring a right of way over the same tract, upon land not appropriated or required for its use by the company, is against public policy and void.[95] A contract by which a corporation, chartered to perform certain duties to the public, agrees that it will not perform those duties at all for a term of years, is void.[96] A stipu-

ate owner if subject to the right of eminent domain, are void. See American Rapid Tel. Co. v. Connecticut Tel. Co., 49 Conn. 352, 44 Am. Rep. 237; Western Union Tel. Co. v. American Tel. Co., 19 Am. L. Reg. (N. S.) 173; Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708; Western Union Tel. Co. v. St. Joseph, &c. R. Co., 1 McCrary (U. S.) 565, 3 Fed. 430; Western Union Tel. Co. v. Burlington, &c. R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1; Western Union Tel. Co. v. Baltimore, &c. Tel. Co., 22 Fed. 133; Western Union Tel. Co. v. Baltimore, &c. Tel. Co., 23 Fed. 12; Western Union Tel. Co. v. American U. Tel. Co., 9 Biss. (U. S.) 72, Fed. Cas. No. 17444; Western Union Tel. Co. v. American Tel. &c. Co., 65 Ga. 160, 38 Am. Rep. 781; Skrainka v. Scharringhausen, 8 Mo App. 522; Western Union Tel. Co. v. Atlantic, &c. Tel. Co., 5 Nev. 102. In Fort Worth St. R. Co v. Queen City R. Co., 71 Tex. 165, 9 S. W. 94, the court in construing a contract by which a railroad company owning a tract of land upon which its depot is located undertakes to give to a horse railway company an exclusive right to build its road to the depot over the land, held that such a contract is not a monopoly, but an easement granted by the owner of the fee, and can be taken for public use only by due process of law, but that the rights of the company cannot be divested by any act of the original grantors.

[95] Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 4 N. W. 469, 6 L. R. A. 111. See also Western Union Tel. Co. v. Postal Tel. Co., 217 Fed. 533 (exclusive right given by railroad company to telephone company.) But compare Cumberland Tel. &c. Co. v. State, 100 Miss. 102, 54 So. 670, 39 L. R. A. (N. S.) 277; Home Tel. Co. v. Sarcovie Light &c. Co., 236 Mo. 114, 139 S. W. 108, 36 L. R. A. (N. S.) 124.

[96] Central Trans. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Gibbs v. Consolidated Gas. Co., 130 U. S. 396, 408, 8 Sup. Ct. 553, 32 L. ed. 979; Oregon Steam Nav. Co. v. Winsor, 20 Wall. (U. S.) 64, 22 L. ed. 315. This principle applies to all cases where the corporation assumes to contract that it will not perform the duties imposed upon it, no matter what the form of the contract may be, but it finds, perhaps, its most frequent illustration and application in cases where corporations assume to transfer their property by way of lease. See Leases, Ch. XVIII.

lation in a contract by which a railroad common carrier seeks to protect itself from liability for the negligence of itself or its servants will not be enforced by the courts.[97] And a contract by which a common carrier undertakes to carry for one person or corporation to the exclusion of all others,[98] or to carry for them on more favorable terms than are accorded others, thereby fostering a monopoly and destroying the business of those less favored[99] is contrary to public policy and void.[1]

§ 444. Contract rendered unenforceable by statute subsequently passed—Rights and remedies.—It sometimes happens

[97] Railroad Company v. Lockwood, 17 Wall. (U. S.) 357, 21 L. ed. 627. This topic is considered in treating of liability of employer to employe. See also 8 Elliott Cont. §§ 765, 766, 777, 3214, 3219.

[98] New England Express Co. v. Maine Central R. Co., 57 Maine 188; Sandford v. Railroad Co., 24 Pa. St. 378, 64 Am. Dec. 667; Dinsmore v. Louisville, &c. R. Co., 2 Flip. (U. S.) 672, 2 Fed. 465; Southern Express Co. v. Memphis, &c. R. Co., 2 McCrary (U. S.) 570, 8 Fed. 799, holding that a discrimination against an express company is unlawful.

[99] Scofield v. Railway Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am. Rep. 846; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 37 N. J. L. 531 18 Am. Rep. 754; 13 Am. Rep. 457; Stewart v. Lehigh Valley R. Co., 38 N. J. L. 505. See also note in 74 Am. St. 250; Hays v. Pennsylvania Co., 12 Fed. 309; State v. Cincinnati, &c. R. Co., 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319, and compare Scofield v. Lake Shore, &c. R. Co., 43 Ohio St. 571, 3 N. E. 907, 54 Am Rep. 846; Kansas Pac. R. Co. v Bayles, 19 Colo. 348, 35 Pac. 744. Every common carrier must carry for all to the extent of his capacity, without undue or unreasonable discrimination either in charges or facilities. Atchison, &c. R. Co. v. Denver, &c. R. Co., 110 U. S. 667, 674, 4 Sup. Ct. 185, 28 L. ed. 291.

[1] But it is held that a common carrier which charges no more than a reasonable sum for carrying may charge one person more than it does another. Munhall v. Pennsylvania R. Co., 92 Pa. St. 150; Johnson v. Pensacola, &c. R. Co., 16 Fla. 623, 667; Fitchburg R. Co. v. Gage, 12 Gray (Mass.) 393; Houston, &c. R. Co. v. Rust, 58 Tex. 98. See also Manchester, &c. R. Co. v. Concord R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582. The granting of a rebate contrary to the provisions of the interstate commerce law does not render the bill of lading void, so that no action can be maintained against the carrier for loss of the goods by negligence. Merchants' Cotton Press, &c. Co. v. Insurance Co. of North America, 151 U. S. 368, 14 Sup Ct. 367, 38 L. ed. 195.

that a contract, such as that of a carrier to give an annual pass for life, or the like, is rendered impossible of performance by reason of a statute passed after the contract was made. It has been expressly held that such a contract is rendered unenforceable by the interstate commerce act.[2] In such a case it seems that the party benefited by such a contract when he has given a valuable consideration therefor and the consideration to be rendered him has thus failed, or partially failed, ought to have some remedy; but, on the other hand, the railroad company ought not to be mulcted in damages for obeying the law rendering its further performance impossible. The only decisions we have found directly in point upon this phase of the subject seem to be diametrically opposed to each other. In one of them the latter view was taken and it was held that a landowner who had conveyed land to the company in consideration of an annual pass for life could neither have the conveyance rescinded, where the land had materially increased in value, nor hold the railroad company liable in damages.[3] But in the other case the court took the view that this was unjust to the landowner and held that he was entitled to damages in cash for the value of the property less the value of what he had already received under the contract.[4]

[2] Louisville &c. R. Co. v. Mottley, 219 U. S. 467, 31 Sup. St. 265, 55 L. ed. 297, 34 L. R. A. (N. S.) 671. See also as to state statutes, State v. Martyn, 82 Nebr. 225, 117 N. W. 719, 23 L. R. A. (N. S.) 217; State v. Union Pac. R. Co., 87 Nebr. 29, 126 N. W. 859, 31 L. R. A. (N. S.) 657 (but in these cases the statute was already in force).

[3] Lowley v. Northern Pac. R. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559. See American Mercantile Exchange v. Blunt, 102 Maine 128, 66 Atl. 212, 10 L. R. A. (N. S.) 414, 120 Am. St. 463n, and other cases cited in note; also note in 41 L. R. A. (N. S.) 559, 3 Elliott Cont. § 1901.

[4] Louisville, &c. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848. The statement in the other case that the railroad company ought not to be "mulcted in damages" seems to beg the question or to be an undue assumption because holding it liable for the balance of the consideration which it agreed to pay for what it has already received and holds can hardly be called mulcting it in damages.

CHAPTER XVII.

REAL ESTATE.

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§ 450 (389). What railroad property is real estate.—There is no contrariety of opinion as to the nature of land and "annexed permanent immovable structures," for that kind of property is so clearly real estate that there is no room for doubt as to its character.[1] The question of difficulty most often encountered is as to the nature of what is commonly called "rolling stock," that is, locomotives, cars and the like. These things are essential to the operation of a railroad and it is difficult to conceive the existence of a railroad without incorporating in the conception locomotives and cars. Locomotives and cars are not, to borrow a term from logic, accidents, but inseparable incidents. There is reason supporting the cases which adjudge that the rolling stock is personal

[1] Palmer v. Forbes, 23 Ill. 301; Hunt v. Bullock, 23 Ill. 320. See Front &c. Co. v. Johnson, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693; Neilson v. Iowa &c. R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; St. Louis &c. Co. v. Donahue, 3 Mo. App. 559, Appendix; Northern Pac. R. Co. v. Carland, 5 Mont. 146, 3 Pac. 134; McIlvain v. Hestonville, &c. R. Co., 5 Phila. (Pa.) 13; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843; note in 66 L. R. A. 33 et seq. Iron rails laid on roadbed are held to be real estate unless made personal property by agreement. Hunt v. Bay State, &c. Co., 97 Mass. 279. Statutes frequently provide that such things shall be deemed real estate. Union Trust Co. v. Weber, 96 Ill. 346; Quincy R. Bridge Co. v. Adams County, 88 Ill. 615; Neary v. Philadelphia, &c. R. Co., 7 Houst. (Del.) 419, 9 Atl. 405. Or, on the other hand, personal property for the purpose of taxation or the like. Missouri, &c. R. Co. v. Labette County, 9 Kans. App. 545, 59 Pac. 383; Richmond v. Richmond, &c. R. Co., 21 Grat. (Va.) 604; note in 66 L. R. A. 35. And it is held that property which may be regarded either as a fixture ordinarily constituting part of the real estate or as personalty may be considered as the one or the other according to the agreement of the parties. Webster Lumber Co. v. Keystone, &c. Co., 51 W. Va. 545, 42 S. E. 632, 66 L. R. A. 33. See also upon the general subject, Bishop v. McKillian, 124 Cal. 321, 57 Pac. 76, 71 Am. St. 68; Western, &c. R. Co. v. Deal, 90 N. Car. 110.

property, but, on the other hand, there is reason supporting the cases which adjudge it to be real estate. The weight of authority is that where the statute does not otherwise provide, rolling stock is personal property and not real estate,[2] but upon this question there is a direct conflict. Whether rolling stock is or is not real estate often depends in a great measure upon the statute. Where the question is not influenced by statute the weight of authority is that it is personal property,[3] but there has been much diversity of opinion.[4] The right of way of a railroad com-

2 Judge Minor is very decided in his opinion that rolling stock is personal property. He says: "As the rolling stock is not attached to the realty, it seems to be an extraordinary anomaly to treat it as constituting a part thereof, merely because the road can not be operated without it. With equal reason a cart, a plough, a mule, a wheelbarrow or a spade might be deemed part of a farm, inasmuch as a farm can not be operated without such appliances." Minor's Inst. (top) 609. The conclusion of the justly respected and able author is sustained by the weight of authority, but, with sincere deference, we venture to say that the fact that the things he mentions are not attached to the land is not sufficient to characterize them as personal property. The character of property is by no means always determined by the answer to the question whether it is or is not attached to the land. As shown in the argument of Mr. Carpenter, elsewhere quoted from, many things are regarded as real estate although not permanently annexed to the land. Farrar v. Stackpole, 6 Greenl. (Maine) 154, 19 Am. Dec. 201; Rogers v. Cox, 96 Ind. 157, 49 Am. Dec. 152, and cases cited; Gile v. Stevens, 13 Gray (Mass.) 146, 7 Am. Dec. 132; Rogers v. Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694; Colegrave v. Dias Santos, 2 B. & C. 76; Siford's Case, 11 Coke 46; House v. House, 10 Paige Ch. 158.

3 Ante, § 41; Williamson v. New Jersey, &c. R. Co., 29 N. J. Eq. 311; Randall v. Elwell, 52 N. Y. 521, 11 Am. Rep. 747; Hoyle v. Plattsburg, &c. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Stevens v. Buffalo, &c. R. Co., 31 Barb. (N. Y.) 590; Chicago, &c. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458. See generally Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619; Meyer v. Johnston, 53 Ala. 237, 353; Louisville, &c. R. Co. v. State, 25 Ind. 177, 87 Am. Dec. 358; Neilson v. Iowa, &c. R. Co., 51 Iowa 184, 1 N. W. 434, 33 Am. Rep. 124; Boston &c. R. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; State Treas. v. Somerville, &c. R. Co., 28 N. J. L. 21; Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Grand Trunk, &c. R. Co. v. Eastern Township Bank, 10 Lower Canada Jur. 11.

4 Pennock v. Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Minnesota Co. v.

pany is real estate,[5] or at least an easement or interest in land rather than personal property.

§ 451 (390). Statutory authority requisite.—The rule is well established that a railroad corporation cannot acquire and hold lands for any purposes except such as are authorized by statute.[6] It is, however, not necessary that the authority to acquire or hold real estate should be expressly conferred. It may be implied.

§ 452 (391). Power to acquire real estate—Implied power—Generally.—The rule as generally expressed is that a railroad company has the implied power to acquire and hold such real estate as is reasonably necessary to enable it to perform its corporate duties and exercise its corporate functions. Where there is no statute specifically defining the power of the company to hold real estate, the question is to be solved by ascertaining what is reasonably necessary to enable it to accomplish the purpose for which it was organized. The object for which the corporation was created is, of course, to be determined from the statute authorizing its existence. This object being ascertained, then

St. Paul Co., 2 Wall. (U. S.) 609, 17 L. ed. 886; Railroad Co. v. James, 6 Wall. (U. S.) 750, 18 L. ed. 854; Farmers' &c. Co. v. St. Joseph, &c. R. Co., 3 Dill. (U. S.) 412, Fed. Cas. No. 4669; Scott v. Clinton, &c. R. Co., 6 Biss. (U. S.) 529, Fed. Cas. No. 12527; Palmer v. Forbes, 23 Ill. 301; Titus v. Mabee, 25 Ill. 257; Phillips v. Winslow, 18 B. Mon. (Ky.) 431; Morrill v. Noyes, 56 Maine 458, 96 Am. Dec. 486; State v. Northern, &c. R. Co., 18 Md. 193; Farmers', &c. Co. v. Hendrickson, 25 Barb. (N. Y.) 484; Farmers', &c. Co. v. Commercial Bank, 11 Wis. 207. See also Hammock v. Loan & T. Co., 105 U. S. 77, 26 L. ed. 1111; Booth v. Central Sav. Bank, 58 Colo. 519, 146 Pac. 240.

[5] Atlantic, &c. R. Co. v. Leseur, 2 Ariz. 428, 19 Pac. 157, 1 L. R. A. 244; President, &c. v. Sipe, 11 Ind. 67; Timmons v. Switzer, 11 Ind. 363; Vaughn v. Dayton, 12 Ind. 561; New Albany, &c. R. Co. v. Huff, 19 Ind. 444; Louisville, &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Northern Pac. R. Co. v. Carland, 5 Mont. 146, 3 Pac. 134; Ante, § 6.

[6] Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513; Coleman v. San Rafael Turnpike Co., 49 Cal. 517; Taber v. Cincinnati, &c. R. Co., 15 Ind. 459; Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369; New York, &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Overmyer v. Williams, 15 Ohio 26; Eldridge v. Smith, 34 Vt. 484; Waldo v. Chicago, &c. R. Co., 14 Wis. 575; Eastern Counties R. Co. v. Hawkes, 5 H. L. Cas. 331; Wallace v. Moore, 178 N. Car. 114, 100 S. E. 237, 238 (citing text).

it follows that such incidental powers as are reasonably necessary to enable the corporation to accomplish the object for which it was created vest in it by necessary implication. Analogous cases adjudge that the power of a corporation is not confined to authority to do that which is absolutely or indispensably essential to the performance of the acts and duties specified in the statute from which it derives its power,[7] but extends to such things as are reasonably and fairly necessary. The law, however, has always jealously regarded the power of corporations to hold real estate and the courts are reluctant to enlarge the power by implication. It has been again and again affirmed that there is serious danger to be apprehended from corporate acquisition of land, and that the power should be carefully limited.[8] It is, therefore, true that the cases relating to implied powers where ordinary business contracts or acts performed in conducting ordinary corporate affairs are involved can hardly be taken as safe guides for the government of cases where the question is as to the power of a railroad company to acquire and hold real estate.[9]

§ 453 (392). **Implied power to acquire—General rule.**—The general rule that a corporation has the right to take and hold real estate reasonably necessary to the purpose of its creation is asserted by many of the courts. There is no substantial diversity of opinion.[10] This is implied as an incident of the principal

7 Brown v. Winnisimmet Co., 11 Allen (Mass.) 326; Smith v. Nashua, &c. R. Co., 27 N. H. 86, 94, 59 Am. Dec. 364; Buffett v. Troy, &c. R. Co., 40 N. Y. 168, 36 Barb. (N. Y.) 420; 3 Thomp. Corp (2nd ed.), § 2381.

8 The statutes enacted by the British parliament and by the legislatures of some of the American states evidence the opposition to the policy of allowing corporations to become owners of real estate. The public grant of land by the United States and by the states to railroad companies is a departure from the ancient policy of the law.

9 In Case v. Kelly, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513, it was held that a railroad company could only receive and hold lands for the defined purposes of the road. See also Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

10 Old Colony, &c. R. Co. v. Evans, 72 Mass. 25, 66 Am. Dec. 394; Callaway, &c. Co. v. Clark, 32 Mo. 305; Ossipee, &c. Co. v. Canney, 54 N. H. 295; Asheville Division, &c. v. Aston, 92 N. Car. 578; Page v. Heineberg, 40 Vt. 81, 94 Am.

power granted.[11] But as corporate grants are always strictly construed, the right to acquire and hold real estate cannot be extended by liberal construction.[12] If it appears from the express provisions of the statute that to deny the power to hold real estate would defeat the object for which the corporation was created, then, in the absence of countervailing provisions, the power to hold real estate will be implied. In the case of a railroad corporation the implied power is broad enough to authorize the acquisition of land for any structures that are reasonably necessary for the proper construction and operation of the road.[13]

§ 454 (393). Implied power—Illustrative instances.—A railroad company may acquire land for the erection of engine houses and shops for the repair of cars and engines used on the road.[14] It may buy and hold property for docks and warehouses reasonably necessary for the storage of property entrusted to it for carriage.[15] It may buy land for freight and passenger depots and

Dec. 378; State v. Madison, 7 Wis. 688; 2 Kent's Comm. 227; 1 Bl. Comm. 475, 478; 8 Thomp. Corp. § 2365.

[11] The question as to the right to hold real estate is, as is well known, a question between the sovereign and the corporation. The title which the corporation obtains even where it has no authority to own the land is a peculiar one. It does, it seems, acquire a title, but, of course, not a complete one. It is held that "a corporation might purchase and take title to the real estate, its title, however, like that of an alien, being defeasible at the pleasure of the commonwealth." Leazure v. Hillegas, 7 Sergt. & R. (Pa.) 313; Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. ed. 382; Hickory Farm, &c. Co. v. Buffalo, &c. R. Co., 32 Fed. 22; Hamsher v. Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Goundie v. Northampton Water Co., 7 Pa. St. 233.

[12] Eversfield v. Mid-Sussex, &c. R. Co., 1 Giff. 153, 3 DeG. & J. 286; Dodd v. Salisbury, &c. R. Co., 1 Giff. 158, 5 Juris. (N. S.) 782; Bostock v. North Staffordshire, &c. R. Co., 5 DeG. & S. 584, 4 El. & B. 798.

[13] Chicago, &c. R. Co. v. Wilson, 17 Ill. 123; Low v. Galena, &c. R. Co., 18 Ill. 324; Bangor, &c. R. Co. v. Smith, 47 Maine 34; New York, &c. R. Co., In re, 46 N. Y. 546, 7 Am. Rep. 385. See also Knowles v. Texas, &c. Trac. Co. (Tex. Civ. App.), 121 S. W. 232.

[14] Southern Pac. R. Co. v. Raymond, 53 Cal. 223; Hannibal, &c. R. Co. v. Muder, 49 Mo. 165; Virginia, &c. R. Co. v. Elliott, 5 Nev. 358; State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409.

[15] Lawrence v. Morgan's &c. R. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265.

the necessary approaches thereto,[16] for the building of turnouts and side tracks to accommodate the business of the company.[17] It may acquire land in order to procure materials for the economical construction of the road.[18] It has been held that it may buy land in order to furnish gravel to persons who are to transport it over the company's road, thereby adding to its revenues.[19] It may acquire land for the purpose of erecting thereon a dinner house for its employes.[20] It may provide offices for the transac-

[16] Protzman v. Indianapolis, &c. R. Co., 9 Ind. 467, 68 Am. Dec. 650; Graham v. Connersville, &c. R. Co., 36 Ind. 463, 10 Am. Rep. 56; Reed v. Louisville Bridge Co., 8 Bush (Ky.) 69; Hamilton v. Annapolis, &c. R. Co., 1 Md. 553; Mansfield, &c. R. Co. v. Clark, 23 Mich. 519; Weir v. St. Paul, &c. R. Co., 18 Minn. 155; Hannibal, &c. R. Co. v. Muder, 49 Mo. 165; New York Cent. &c. R. Co., In re, 77 N. Y. 248; Giesy v. Cincinnati, &c. R. Co., 4 Ohio St. 308; Cumberland Valley R. Co. v. McLanahan, 59 Pa. St. 23; South Carolina, &c. R. Co. v. Blake, 9 Rich. L. (S. Car.) 228; Nashville, &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348. A railroad company may use the land acquired by it for a right of way in any manner which contributes to the safe and efficient operation of the road, and does not interfere with the rights of adjacent property, and the erection of a freight depot and other structures thereon is not a misuser. Elyton Land Co. v. South & North Ala. R. Co., 95 Ala. 631, 10 So. 270. We cite some cases where the land was acquired by condemnation, since they serve to show the general scope of the term corporate purposes.

[17] Protzman v. Indianapolis, &c. R. Co., 9 Ind. 467; Toledo, &c. R. Co. v. Daniels, 16 Ohio St. 390; Cleveland, &c. R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

[18] Overmeyer v. Williams, 15 Ohio 26. See also Georgia Pac. R. Co. v. Wilks, 86 Ala. 478, 6 So. 34; Mallett v. Simpson, 94 N. Car. 37, 55 Am. Rep. 594. But see New York, &c. R. Co. v. Gunnison, 1 Hun (N. Y.) 496. See in general New York, &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; McClure v. Missouri River R. Co., 9 Kans. 373; Land v. Coffman, 50 Mo. 243; Lake Shore, &c. R. Co. v. Cincinnati, &c. R. Co., 30 Ohio St. 604; Blunt v. Walker, 11 Wis. 334, 78 Am. Dec. 709.

[19] Old Colony, &c. R. Co. v. Evans, 72 Mass. 25, 66 Am. Dec. 394. It has been suggested that a railway company may supply a chapel or theater for the benefit of its workmen. East Anglian R. Co. v. Eastern Counties R. Co., 11 C. B. 775. There is reason, in our judgment, for holding that railway companies may, within reasonable limits, provide for the comfort and welfare of their employes.

[20] United States, &c. Co. v. Wabash, &c. R. Co., 32 Fed. 480; Gudger v. Richmond, &c. R. Co., 106 N. Car. 481, 11 S. E. 515; Texas, &c. R. Co.

tion of its business, although such offices are located in a foreign state, and it has been held that it may buy mines under some circumstances.[21]

§ 455 (394). **Power to acquire real estate—Instances of denial of power.**—We have called attention to the fact that the power to acquire property by purchase is broader than the power to acquire it by the virtue of the right of eminent domain,[22] and it is obvious that cases bearing on the power to acquire by condemnation cannot be accepted as safe guides where the question is as to the power to obtain land by purchase. But those cases do serve to mark the general nature of the power, so that it is proper to cite them in this connection, as we are here discussing the general power to acquire land. It is held that a railroad company cannot acquire land by condemnation for the construction of a temporary track while the main track is building,[23] but it seems

v. Robards, 60 Tex. 545, 48 Am. Rep. 268. See also Abraham v. Oregon, &c. R. Co., 37 Ore. 495, 60 Pac. 899, 64 L. R. A. 391, 82 Am. St. 779; Jacksonville, &c. R. Co. v. Hooker, 160 U. S. 514, 40 L. ed. 515; State v. Illinois Cent. R. Co., 246 Ill. 188, 92 N. E. 814; Chicago, &c. R. Co. v. Board, 48 Wis. 666, 5 N. W. 3; Milwaukee, &c. R. Co. v. Board, 29 Wis. 116.

[21] Lyde v. Eastern, &c. R. Co., 36 Beav. 10, 17. See Attorney-General v. Great Northern, &c. R. Co., 6 Jurist N. S. 1006. But compare Wilks v. Georgia Pac. R. Co., 79 Ala. 180. It probably can not do so in ordinary cases under the present law. See generally Attorney-General v. Great Eastern, &c. R. Co., L. R. 11 Ch. D. 449, 505; Western Union, &c. Co. v. Rich, 19 Kans. 517, 27 Am. Rep. 159; Moses v. Boston, &c. R. Co., 24 N. H. 71, 55 Am. Dec. 222; Smith v. Nashua, &c. R. Co., 27 N. H. 86, 95, 59 Am. Dec. 364; New York, &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Holmes v. Eastern Counties, &c. R. Co., 3 K. & J. 675; Flanagan v. Great Western, &c. R. Co., 7 Eq. 116; Shrewsbury, &c. R. Co. v. Stour Valley, &c. R. Co., 2 De G. M. & G. 866; East, &c. Docks R. Co. v. Dawes, 11 Hare 363; Cother v. Midland R. Co., 2 Phill. 469.

[22] The rights acquired by purchase are regarded as more complete than those acquired by condemnation. Thus where a railroad company acquires land upon which to build its road by purchase of the fee, it is not bound, in its dealings with such land, by restrictions upon its authority to use its "right of way." Calcasieu Lumber Co. v. Harris, 77 Tex. 18, 13 S. W. 453.

[23] Currier v. Marietta, &c. R. Co., 11 Ohio St. 228; Gray v. Liverpool, &c. R. Co., 9 Beav. 391.

to us that the doctrine of the cases cited goes too far. We think that where a temporary track is essential to the proper construction of the main line or to its operation, it is competent for the company to acquire land for that purpose. It has been held not competent for a railroad company to condemn land for the erection of dwellings for the workmen employed by it.[24] It is clear that a railroad company has no implied power to acquire lands by eminent domain or otherwise for speculative purposes, or to prevent competition, or to aid in collateral enterprises remotely connected with the road.[25]

§ 456 (395). **Title to real estate is in the company.**—Title to real estate acquired by a railroad company vests in the company and not in its stockholders. The stockholders have an interest in corporate property, which interest is represented by their shares of capital stock, but they are not the owners of the real estate of the company. The corporation while composed of its shareholders is a distinct legal entity having an individuality of its own.[26] It is of itself a person although it is the creature of statute. We do not mean to say that the term "corporations" always includes natural persons, but so far as the ownership of property is concerned a corporation such as a railroad company is a person. Conveyances of corporate real estate must be executed by the company,[27] and, ordinarily, actions for injuries to its

[24] State v. Mansfield, 23 N. J. L. 510, 57 Am. Dec. 409; Nashville, &c. R. Co. v. Cowardin, 11 Humph. (Tenn.) 348; Eldridge v. Smith, 34 Vt. 484. But see Ante, § 354, note 20.

[25] McClure v. Missouri, &c. R. Co., 9 Kans. 373; Baltimore, &c. R. Co. v. Union R. Co., 35 Md. 224, 6 Am. Rep. 397; Pacific R. Co. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369; Rensselaer &c. R. Co. v. Davis, 43 N. Y. 137; New York, &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Iron R. Co. v. Ironton, 19 Ohio St. 299; Vermont, &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1. See also Case v. Kelley, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. ed. 513; Boston, &c. R. Co. v. Coffin, 50 Conn. 150; Beasley v. Aberdeen, &c. R. Co., 145 N. Car. 272, 59 S. E. 60; Delaware, &c. R. Co. v. Tobyhanna Co., 232 Pa. St. 76, 81 Atl. 132; Chicago, &c. R. Co. v. Mason, 23 S. Dak. 564, 122 N. W. 601.

[26] Rand v. Hubbell, 115 Mass. 461, 15 Am. Rep. 121; Regina v. Arnaud, 16 L. J. Q. B. 50.

[27] Ante, § 339. There are cases of a very peculiar nature in which equity will enforce a conveyance

property must be prosecuted by the corporate entity. There are cases where, upon the wrongful refusal of the corporation to act, equity will interfere for the protection of the stockholders, but these cases form exceptions to the general rule.

§ 457 (396). **Title once vested not divested because property subsequently becomes unnecessary.**—Where property at the time of its acquisition is reasonably necessary for the legitimate corporate purposes the fact that the necessity subsequently ceases does not always make the holding wrongful nor divest the title. The question of the right to hold property acquired by a railroad company must, as a rule, be determined by the situation and condition at the time of its acquisition, and complete title once acquired is not taken away by future events. There is no wrong in holding real estate where a complete title is rightfully obtained, although changes wrought by subsequent action, taken under authority of law, may have the effect to render the property not necessary to the attainment of corporate objects or the exercise of corporate functions. But the general doctrine stated does not ordinarily apply where the property is acquired by virtue of the right of eminent domain and the fee is not taken. If, however, the law authorizes the taking of the fee and a fee is taken, it is not divested by the fact that it has ceased to be necessary to the accomplishment of corporate objects.[28] If an absolute title vests, no matter how acquired, the company, it is obvious, secures an indefeasible estate.

§ 458 (397). **Effect of conveyance to corporation of land it has no power to hold.**—A conveyance to a corporation of land it has no power to hold is voidable at the suit of the state, but it is not void.[29] Such a conveyance is so far effective that it vests in the

made by individual stockholders, but they are exceedingly rare. American, &c. Co. v. Taylor, &c. Co., 46 Fed. 152; Society, &c. v. Abbott, 2 Beav. 559.

[28] Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378. See also Humbert v. Trinity Church, 24 Wend. (N. Y.) 587. See however as to reversion where right of way is only an easement. McLemore v. Memphis, &c. R. Co. (Tenn.), 69 S. W. 338; Missouri Pac. R. Co. v. Bradbury, 106 Mo. App. 450, 79 S. W. 966. And compare Williams v. Johnson, 208 Mass. 544, 95 N. E. 90.

[29] In National Bank v. Matthews, 98 U. S. 621, 627, 25 L. ed. 188, it

corporation a title which will empower it to convey the land, provided the conveyance is made prior to a judgment against it in a proceeding by the state. The authorities declare the title acquired by the corporation to be similar to that obtained by an alien in a jurisdiction where aliens are forbidden to hold land.[30]

§ 459 (398). Right of foreign corporation to hold real estate.—It was adjudged in an early case by the Supreme Court of the United States that a corporation of one state cannot be the owner of land in another state without the assent of the state in which the land lies.[31] But the corporation may hold such lands, if it

was said: "Where a corporation is incompetent by its charter to take a title to real estate a conveyance to it is not void, but voidable, and the sovereign alone can object. It is valid until assailed by a direct proceeding instituted for that purpose." See, to the same effect National Bank v. Whitney, 103 U. S. 99, 26 L. ed. 443; Swope v. Leffingwell, 105 U. S. 3, 26 L. ed. 939; Fortier v. New Orleans, &c. Bank, 112 U. S. 439, 5 Sup. Ct. 234, 28 L. ed. 764; Reynolds v. Crawfordsville, &c. Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. ed. 733; Smith v. Sheeley, 12 Wall. (U. S.) 358, 361, 20 L. ed. 430; Myers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562; Long v. Georgia Pac. R. Co., 91 Ala. 519, 8 So. 706, 24 Am. St. 931; Plummer v. Chesapeake, &c. R. Co., 143 Ky. 102, 136 S. W. 162, 33 L. R. A. (N. S.) 362; 3 Thomp. Corp. § 2390, et seq. But the rule that no one but the state can question it is not entirely without exceptions in unusual cases, and it has been held that an executory contract may be rescinded where the corporation has no power to take the property. Coleman v. San Rafael, &c. Co., 49 Cal. 517. See however where contract is executed. 3 Thomp. Corp. (2nd ed.) § 2400.

[30] Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. 93, 33 L. ed. 317, citing Cross v. DeValle, 1 Wall. (U. S.) 1, 13, 17 L. ed. 515; Governeur v. Robertson, 11 Wheat. (U. S.) 332, 8 L. ed. 614; National Bank v. Matthews, 96 U. S. 621, 628, 25 L. ed. 188; Phillips v. Moore, 100 U. S. 208, 25 L. ed. 603. See also Leazure v. Hillegas, 7 Sergt. & R. (Pa.) 313; Goundie v. Northampton Water Co., 7 Pa. St. 233; Hickory Farm, &c. Co. v. Buffalo, &c. R. Co., 32 Fed. 22; Hamsher v. Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Russell v. Texas, &c. R. Co., 68 Tex. 646, 5 S. W. 686; Hubbard v. Worcester Art Museum, 194 Mass. 280, 80 N. E. 490, 9 L. R. A. (N. S.) 689, 693, and see note to this case as last reported referring to cases on both sides as to whether others may question the power of a corporation to take by bequest or devise.

[31] Runyan v. Coster, 14 Pet. (U. S.) 122, 10 L. ed. 382; Cowell v. Colorado, &c. Co., 100 U. S. 55, 25

has power from the state that created it,[32] unless the right is denied by the state in which the land is situated.[33] In one of the cases it is held that in favor of a grantee a foreign corporation will be presumed to have power to hold real estate under the laws of the state by which it was incorporated.[34] The state in which the land lies may impose such limitations and restrictions upon the right of a foreign corporation to acquire and hold land situated within its borders as it deems proper.[35] The doctrine of most of the cases is that an individual cannot successfully assail the right of a foreign corporation to hold land.[36]

L. ed. 547; Carroll v. East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; United States, &c. Co. v. Lee, 73 Ill. 142, 24 Am. Rep. 236; Barnes v. Suddard, 117 Ill. 237, 7 N. E. 477; Pennsylvania Co., &c. v. Bauerle, 143 Ill. 459, 33 N. E. 166.

32 Metropolitan Bank v. Godfrey, 23 Ill. 579; Diamond, &c. Co. v. Powers, 51 Mich. 145, 16 N. W. 314. See Blair v. Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Ohio, &c. Co. v. Merchants', &c. Co., 30 Tenn. 1, 53 Am. Dec. 742, 8 Thomp. Corp. §§ 6685-6688.

33 New York, &c. Dock v. Hicks, 5 McLean (U. S.) 111, Fed. Cas. No. 10204; Northern Transportation, &c. Co. v. Chicago, 7 Biss. (U. S.) 45, Fed. Cas. No. 10324; New Hampshire, &c. Co. v. Tilton, 19 Fed. 73; Lathrop v. Commercial Bank, 38 Ky. 114, 33 Am. Dec. 481; Thompson v. Waters, 25 Mich. 214, 12 Am. Rep. 243; Lumbard v. Aldrich, 8 N. H. 31, 28 Am. Dec. 381; White v. Howard, 46 N. Y. 144; Lancaster v. Amsterdam, &c. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Alward v. Holmes, 10 Abbott (N. Car.) 96; Baltimore, &c. S. Co. v. McCutchen, 13 Pa. St. 13; State v. Boston, &c. R. Co., 25 Vt. 433; Claremont Bridge Co. v. Royce, 42 Vt. 730.

34 Tarpey v. Deseret, &c. Co., 5 Utah 494, 17 Pac. 631. See New Hampshire, &c. Co. v. Tilton, 19 Fed. 73; Realty Co. v. Appolonio, 5 Wash. 437, 32 Pac. 219.

35 Diamond, &c. Co. v. Powers, 51 Mich. 145, 16 N. W. 314. Even if absolute prohibition would be an interference with interstate commerce, requiring a railroad company to become incorporated in the state in which the land lies is not such an unlawful interference or regulation. Plummer v. Chesapeake, &c. R. Co., 143 Ky. 102, 136 S. W. 162, 33 L. R. A. (N. S.) 362.

36 Lancaster v. Amsterdam, &c. Co., 140 N. Y. 576, 24 L. R. A. 322; Bank of Toledo v. International Bank, 21 N. Y. 542; Methodist, &c. Church v. Pickett, 19 N. Y. 482. See also Hickory Farm Oil Co. v. Buffalo, &c. R. Co., 32 Fed. 22; note to Hanna v. Kelsey Realty Co. (145 Wis. 276), in 33 L. R. A. (N. S.) 355, with which compare Plummer v. Chesapeake, &c. Ry. Co., 143 Ky. 102, 136 S. W. 162, 33 L. R. A. (N. S.) 362.

§ 460 (399). The power to acquire property by grant broader than the power to acquire by condemnation.—The authorities with good reason discriminate between the power to acquire property by grant and the power to obtain by the exercise of the right of domain. Statutes conferring the authority to condemn property are, as is well known, strictly construed, and their operation is seldom enlarged by implication. Where property is seized by virtue of the eminent domain, it is taken against the owner's will, while in the case of a grant he voluntarily conveys to the company. Property legitimately connected with the purpose of the corporation may be rightfully acquired, although the connection be remote. It is not essential, in case of purchase, that the property be immediately connected with the corporate purpose; it is sufficient if it be reasonably necessary to the convenience of the company and those dealing with it. They may acquire land by purchase for many purposes that would not be sufficient to warrant the seizure under the right of eminent domain, especially where that right is limited to the extent that it is in some of the statutes. Refreshment stands, dining places, bookstalls, and like conveniences, may be provided by railroad companies for the use of travelers and, as we believe, employes, and as there is power to provide such things there is also power to acquire land for such purposes. But the power to acquire by purchase does not necessarily imply the power to seize under the right of eminent domain.

§ 461 (400). Acquisition of the fee by private grant.—A railroad company may acquire a fee in lands by grant, unless forbidden by statute or by some rule of law.[37] Where there is authority to receive and hold real estate by private grant, and there is neither an express nor an implied limitation upon the authority, a fee may be taken. But where there is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the

[37] Holt v. Somerville, 127 Mass. 408; State v. Brown, 27 N. J. L. 13; Hill v. Western, &c. R. Co., 32 Vt. 68. See also Nicoll v. New York &c., R. Co., 12 N. Y. 121; Cross v. Seaboard Air Line R. Co., 172 N. Car. 119, 90 S. E. 14; 3 Thomp. Corp. (2nd ed.) § 2368.

company, but vests such an estate, usually an easement, as is requisite to effect the purpose for which the property is required. Where the grant is of "surplus real estate,"[38] as it is often called, that is of real estate not forming part of the railroad or its appendages, a deed effective to vest a fee in a natural person will vest that estate in a railroad company. The acquisition of land for a corporate purpose, such as the use in constructing and operating a railroad, conveys the property for the time the company has a right to operate the road, but unless the fee is clearly granted we suppose that the title does not extend beyond that period.[39] It is held that even though the corporation is chartered for a limited period, it may take a conveyance of lands in fee in so far that it can convey the fee to another, although for the purpose of enjoyment, its estate must necessarily be limited to the term of its corporate existence.[40] It has been

[38] Mulliner v. Midland, &c. R. Co., 11 Ch. Div. 611. See, as to the authority to hire out property not needed by the company, Forrest v. Manchester, &c. R. Co., 30 Beav. 40; Hartford F. Ins. Co. v. Chicago, &c. R. Co., 175 U. S. 91, 44 L. ed 84; Brown v. Winnisimmet Co., 11 Allen (Mass.) 326.

[39] Norton v. Duluth Transfer R. Co., 129 Minn. 126, 151 N. W. 907, Ann. Cas. 1916E, 760 and cases cited in note.

[40] Nicoll v New York, &c. R. Co., 12 N. Y. 121; Rives v. Dudley, 3 Jones Eq. (N. Car.) 126. See also Morrill v. Wabash, &c. R. Co., 96 Mo. 174, 9 S. W. 657. The charter of the Tonawanda R. Co. (Laws N. Y. 1832, 241) limited its existence to fifty years, and authorized the company to acquire lands by eminent domain "for the use or accommodation of such railroad or its appendages;" and "to appropriate so much of such lands as may be necessary to its own use for the purposes contemplated by this act." It also conferred the "right to construct and during its existence to maintain and continue a railroad." It was held that the use of the land taken was not limited to the fifty years of corporate existence, but was to continue as long as it should be devoted to such public purposes; and that, as this company was afterwards consolidated by legislative act with another company, the owners of the fee cannot recover the land at the expiration of the fifty years. Davis v. Memphis, &c. R. Co., 87 Ala. 633, 6 So. 140; Miner v. New York, &c. R. Co., 46 Hun (N. Y.) 612. Since a corporation organized under the general railroad act (2 Rev. St. N. Y. 7th ed. 1569) ceases to exist within five years after its articles of association are filed, unless it begins the construction of its road, a grant to such a cor-

doubted, however, whether the doctrine of the cases referred to can be sustained. It may well be held that where the statute gives a right to renew or extend the term of the corporate existence the grant extends to that time, for the law in force at the time of the execution of the contract enters into it as a silent but important factor; but where there is an express limit to the term of the corporate existence, there is some reason for questioning whether it can be justly held that the grant extends beyond that period when an absolute fee is not expressly granted. A grant to a corporation is a grant for the purpose specified in the charter, and when the right of the corporation to use the property ceases there is at least some reason for saying that the estate terminates.[42] We are not speaking of "surplus real estate," nor of deeds where there is an express conveyance of an absolute fee, but of cases where from the situation and agreement of the parties it satisfactorily appears that the land was granted for use in constructing and operating the road, and not absolutely and unconditionally. Where the fee is acquired it may, of course, be transferred, and so, in general, may any other estate.[43] But it is to be understood that, as to the conveyance of property essential to enable the company to perform the duties imposed upon it by law, the right to transfer does not exist unless conferred by statute, for, as we have elsewhere shown, a railroad company cannot disable itself from discharging its duty by transferring its property, except in cases where the transfer is authorized by statute.[44]

poration ten years after its organization, and before it had constructed any road conveys no title. Greenwood Lake, &c. R. Co. v. New York &c. R. Co., 55 Hun 606, 8 N. Y. S. 26.

[42] See however People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368, 46 L. ed. 592; Detroit Citizens' St. R. Co. v. Detroit, 64 Fed. 634, 26 L. R. A. 673; Brown v. Schleier, 118 Fed. 984. That a fee may be conveyed in such a case seems to be well settled, but the question is one of construction as to whether it does in the particular case.

[43] Pollard v. Maddox, 28 Ala. 321; Harrison v. Lexington, &c. R. Co., 9 B. Mon. (Ky.) 470; New Jersey, &c. R. Co. v. Van Syckle, 37 N. J. L. 496.

[44] The subject of acquisition of the right of way by purchase is

§ 462 (401). **Acquisition of title by adverse possession.**— There can be no doubt that title to surplus real estate may be acquired in a proper case by limitation. The company may upon the same principle acquire an easement by adverse possession.[45] We suppose that where the possession consists in the use of the lands as a right of way an easement and not the fee would be acquired.[46] The general rule is that where an easement is claimed by user the easement can be no broader than the use. The extent of the easement in such a case is to be determined by the actual use and possession. Upon the general principle stated it is held that adverse use of railroad tracks for more than twenty years is not shown if it appears that the particular tracks,

discussed in the chapter entitled "Purchase of right of way."

[45] Sherlock v. Louisville, &c. R. Co., 115 Ind. 22, 17 N. E. 171. Where a railroad company, with the consent of a land-owner, staked off a strip of ground as a right of way, and entered thereon and occupied so much thereof as was needed for the construction of its road, and remained in possession thereof under claim of title to the entire strip, exercising over it such acts of ownership as the nature of the property permitted for twenty years, the railroad company acquired a title to the entire strip laid off. Hargis v. Kansas City, &c. R. Co., 100 Mo. 210, 13 S. W. 680. See also Florida Southern R. Co. v. Loring, 51 Fed. 932; Texas, **&c. R. Co. v. Scott, 77 Fed. 726;** Illinois Cent. R Co. v. Noyes, 252 Ill. 178, 96 N. E. 830; Waggoner v. Wabash R. Co., 185 Ill. 154, 56 N. E. 1050; Newcastle v. Lake Erie, &c. R. Co., 155 Ind. 18, 57 N. E. 516; Fortune v. Chesapeake, &c. R. Co. (Ky.), 58 S. W. 711.

[46] Organ v. Memphis, &c. R. Co., 51 Ark. 235, 11 S W. 96, 39 Am. & Eng. R. Cas. 75. Texas quoted in La Crosse v. Cameron, 80 Fed. 264, 275. See also Consumers' Gas T. Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020; Peoria, &c. R. Co. v. Attica, &c. R. Co., 154 Ind. 218, 56 N. E. 210. In Texas, &c. R. Co. v. Wilson, 83 Texas 153, 18 S. W. 325, 51 Am. & Eng. R. Cas. 364, it was held that if the company was a mere trespasser it could not acquire title. The court cited Hays v. Texas, &c. R. Co., 62 Texas 397. But see Texas, &c. R. Co. v. Gaines (Tex. Civ. App.), 27 S. W. 266. As to what acts are sufficient to constitute possession, see Emery v. Raleigh, &c. R. Co., 102 N. Car. 209, 9 S. E. 139, 11 Am. St. 727, 37 Am. & Eng. R. Cas. 253. See generally American Bank Note Co. v. New York, &c. R. Co., 50 Am. & Eng. R. Cas. 292; Chicago, &c. R. Co. v. Galt, 133 Ill. 657, 23 N. E. 425, 44 Am. & Eng. R. Cas. 43; Erie, &c. R. Co. v. Rousseau, 17 Ont. App. 483, 46 Am. & Eng. R. Cas. 539.

the use of which constituted a nuisance, had been laid a much shorter time than that, although other tracks had been used a longer time.[47] The quantity of land taken under a grant is determined from the terms of the deed or from the attendant circumstances and not simply from actual user. Thus it is held in Pennsylvania that a railroad company authorized to take for its right of way a strip not exceeding sixty feet in width is, in the absence of any designation of its boundaries, presumed to have taken the full sixty feet, though the road be located in a street less than sixty feet wide, and the company in the construction of its road does not take actual possession of the land outside of the street.[48] But where the railroad claims under a grant or release of the right of way by a private landowner, in which the width is not specified, the width of the strip conveyed may be shown by proof of the contemporaneous acts and declarations of the parties.[49]

[47] Thompson v. Pennsylvania R. Co., 45 N. J. Eq. 870, 14 Atl. 897, 19 Atl. 622, on appeal, Pennsylvania R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. 622.

[48] Jones v. Erie, &c. R. Co., 144 Pa. St. 629. In Indiana it has been held that the court will presume, from the fact that a railroad appropriated a right of way under the general railroad law, that it took the full width (100 feet) which that law authorized it to take. Campbell v. Indianapolis, &c. R. Co., 110 Ind. 490, 11 N. E. 482. And the same is true where the land was taken possession of under a special charter. Indianapolis, &c. R. Co. v. Rayl, 69 Ind. 424; Prather v. Western Union Tel. Co., 89 Ind. 501. To the same effect see Duck River Valley, &c. R. Co. v. Cochrane, 3 Lea (Tenn.) 478; Day v. Railroad Co., 41 Ohio St. 392. But compare Peoria, &c. R. Co. v. Attica &c. R. Co., 154 Ind. 218, 56 N. E. 210; Jones v. Erie, &c. R. Co., 169 Pa. St. 333, 32 Atl. 535, 47 Am. St. 916.

[49] Indianapolis, &c. R. Co. v. Reynolds, 116 Ind. 356, 19 N. E. 141; Indianapolis, &c. R. Co. v. Lewis, 119 Ind. 218, 21 N. E. 660. If the grant of a right of way by a private land-owner does not specify the width of the strip granted, the railroad company will only acquire a right to such land as is actually taken and used. Fort Wayne, &c. R. Co., v. Sherry, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48; Vicksburg, &c. R. Co. v. Barrett, 67 Miss. 579, 7 So. 549. Where a right of way is granted, "with right to use such additional land as may be necessary for the construction and maintenance" of the road, the company is bound only to use ordinary care in constructing its road; and the necessity for taking additional

§ 463 (402). Possession of land—To what right referred.—Where there is a right to take land for a designated purpose and the land is used for that purpose, the possession will be referred to that right.[50] From this doctrine, which we regard as well-founded, it follows that a railroad company, in taking possession of land, will ordinarily take an easement and not the fee, for the reason that the right to take an easement is the right to which possession must be referred. The fee is not acquired by possession unless the right to which the possession is referable authorizes the acquisition of a fee.[51] A corporation cannot, by exceeding its power, enlarge its rights.

land is to be determined by ordinary care. Gulf, &c. R. Co. v. Richards, 83 Tex. 203, 18 S. W. 611. Staking off the full width permitted by law, with the land-owner's permission, and the subsequent occupation of so much as the needs of the road required, under claim of title to the whole, gives a railroad company a right of way of the width originally staked off. Hargis v. Kansas City, &c. R. Co., 100 Mo. 210.

[50] Proprietors, &c. v. Nashua, &c. R. Co., 104 Mass. 1, 6 Am. Rep. 181.

[51] Peirce v. Boston, &c. R. Co., 141 Mass. 481, 6 N. E. 96 In speaking of the use and occupancy of property, the court said: "The manner in which it shall be used for the designated purposes is in the discretion of the corporation and is no concern of the land-owner. Even if the corporation exceeds its franchise in the manner of such occupancy, it does not thereby disseize the owner of the fee. If a railroad corporation fits its station-house with conveniences for furnishing lodging and food necessary for the comforts of its passengers, it does not claim the fee of the land, allowing others than passengers to use them. It is not a claim in the fee of the land that it does not distinguish between the public and its passengers in the use of the refreshment tables, news stand or telegraph office kept there. The building is none the less a stationhouse, and the fitting it for use and providing conveniences for passengers and the public alike, is an incident of its use for the business of the corporation, and, in doing it, the corporation asserts no right except to maintain a station-house and what it deems incidental to that. It may exceed its corporate rights in the use of the station-house, but it does not thereby claim the fee in the land on which it stands." In Consumers' Gas. T. Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020, 1021, the text is cited with approval and it is held that a railroad company which enters and holds possession without color of title acquires only an easement.

§ 464 (403). Right of company where land is owned in fee.—Where a railroad company becomes the owner of land in fee simple it generally has all the ordinary rights of a natural person, except in so far as those rights are abridged by statutory provisions. The difficulty is to determine when the title of the company is in fee, for, as we have seen, a conveyance which would convey an absolute fee to a natural person does not always convey such an estate to a railroad company, since the situation of the parties and attendant circumstances may exert an important influence, as, for instance, where a deed is made of land for a right of way and the company is not authorized to take a fee, or perhaps where the term of the corporate existence is limited to a specified term of years. In all such cases the law is to be considered as an element of the contract, for the law is always a part of the contract unless excluded by valid stipulations,[52] so that a conveyance, although apt words for the creation of a fee, and such as would create a fee if the transaction were between natural persons, are used, will not invariably vest a fee in the corporation. Some of the courts make a distinction between cases where there is a grant of the fee for a right of way and cases where the right of way is acquired under the eminent domain. Thus in one case it was held that a statute prohibiting a railroad company from erecting buildings on its right of way did not apply where the right of way was acquired by grant.[53]

§ 465 (404). Effect of conveyance of property the company is not authorized to acquire.—As we have seen, a railroad company does acquire a title to land conveyed to it, even when it may not be authorized to hold such property, although the title is a peculiar one. As it acquires a title it possesses something which it may convey in a proper case, so that, in cases where it does convey, the question is as to the title its grantee takes under the deed. The adjudged cases hold, and with reason, that the conveyance carries to the grantee a full and valid title.[54] The

[52] Foulks v. Falls, 91 Ind. 315, 321; Long v. Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87.

[53] Calcasieu, &c. Co. v. Harris, 77 Texas 18, 13 S. W. 453, 43 Am. & Eng. R. Cases 570.

[54] Walsh v. Barton, 24 Ohio St. 28; Ragan v. McElroy, 98 Mo. 349, 11 S. W. 735.

conveyance cannot, it is obvious, have such an effect, however, unless made before the state has assailed the right of the company to hold the land.

§ 466 (405). **Questioning the right to hold real estate.**—The rule that the right to hold land can only be questioned by the state is a familiar one.[55] The legislature may, of course, authorize an individual having an interest or suffering an injury to assail the right of a railroad company to hold land. But where there is no legislation modifying the rule the right to hold land can be successfully challenged only by a proceeding in the name of the state in the nature of a quo warranto. The attack must be direct and not collateral. Upon this principle it is held that a party against whom a railroad company seeks an injunction to restrain interference with land of which it is in possession by grant cannot successfully defend upon the ground that the railroad company had no power to acquire the land.[56]

[55] Cowell v. Colorado Springs Co., 100 U. S. 55; 25 L. ed. 547; Jones v. Habersham, 107 U. S. 174, 27 L. ed 401; Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317; Mackall v. Chesapeake, &c. Co., 94 U. S. 308, 24 L. ed. 161; Van Wyck v. Knevals, 106 U. S. 360, 21 L. ed. 201; Plummer v. Chesapeake, &c. R. Co., 143 Ky. 102, 136 S. W. 162, 33 L. R. A. (N. S.) 362; Toledo, &c. R. Co. v. Johnson, 49 Mich. 148, 13 N. W. 492; Fayette Land Co. v. Louisville, &c. R. Co., 93 Va. 274, 24 S. E. 1016. See generally Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548; Truckee, &c. Co. v. Campbell, 44 Cal. 89; Denver, &c. R. Co. v. Denver, &c. Co., 2 Colo. 673; Cincinnati, &c. R. Co. v. Danville, &c. R. Co., 75 Ill. 113; Osborn v. People, 103 Ill. 224; North v. State, 107 Ind. 356, 8 N. E. 159; Keene v. Van Reuth, 48 Md. 184; Northeastern Tel. &c. Co. v. Hepburn, 72 N. J. Eq. 7, 65 Atl. 747; Freeland v. Pennsylvania, &c. Co., 94 Pa. St. 504; Pixley v. Roanoke, &c. Co., 75 Va. 320. But see for exceptional cases such as those where the corporation seeks the aid of the court to perfect its title. South &c. R. Co. v. Highland Ave., &c R. Co., 119 Ala. 105, 24 So. 114; Seattle Gas, &c. Co. v. Citizens, &c. Co., 123 Fed. 588; Scott v. Farmers, &c. Bank (Tex. Civ. App.), 66 S. W. 485.

[56] Kansas City, &c. R. Co. v. Kansas City, &c. Co., 118 Mo. 599, 34 S. W. 478. See also Russell v. Texas, &c. R. Co., 68 Tex. 646, 5 S. W. 686; Southern Pac. R. Co. v. Orton, 6 Sawy. (U. S.) 157, 32 Fed. 457.

§ 467 (406). **Enjoining purchase of real estate where no power to receive and hold.**—The familiar and long-settled rule stated in the preceding section does not preclude a stockholder from enjoining the purchase of property which the company has no power to receive and hold. It is one thing to prevent the expenditure of corporate funds for an unauthorized purpose and quite another to question the right to hold property already acquired by the corporation. There is, therefore, sound reason for discriminating between the two classes of cases.[57]

§ 468 (407). **Executory contract of purchase not enforceable where there is no power to hold the land.**—The general principle that an individual cannot question the power of a corporation to hold real estate, except in cases where the statute authorizes the question to be so raised,[58] does not apply to a case where a corporation seeks to enforce a contract for real estate which it has no power to hold.[59] A corporation cannot invoke judicial aid where the purpose of the suit or action is to secure property of which the law does not permit it to become the owner. It would be strange, indeed, if a corporation could obtain a judgment or decree investing it with land which the law commands it not to take, since such a judgment or decree would make the court the agent of a party in violating the law. "Better is the condition of the defendant" in such a case.

§ 469 (408). **Estoppel of parties to deeds to deny corporate existence.**—The well-known general rule is that a person who contracts with a corporation is estopped to deny that it is a corporation, and this rule applies to a grantor who conveys land to a corporation.[60] It may be true that where there is no statute

[57] See Hough v. Cook Land Co., 73 Ill. 23, 24 Am. Rep. 230; Pollock v. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. ed. 759.

[58] Martindale v. Kansas City &c. R. Co., 60 Mo. 508.

[59] Case v. Kelly, 133 U. S. 21, 13 Am. & Eng. R. Cas. 70, 33 L. ed. 513. See also South, &c. R. Co. v. Highland Ave., &c. R. Co., 119 Ala. 105, 24 So. 114; Pacific R. Co. v. Seeley, 45 Mo. 212, 100 Am. Dec. 369. But see as to selling and recovering price, Natoma Water, &c. Co. v. Clarkin, 14 Cal. 544; Jones v. Habersham, 107 U. S. 174, 21 L. ed. 401.

[60] Close v. Glenwood Cemetery,

authorizing the organization of a corporation of such a general class or nature as that named as grantee there cannot be an estoppel, but if there can be a corporation of the general class or nature then the grantor will be estopped. In other words, if there can be a de facto corporation the doctrine of estoppel will effectively operate. An estoppel cannot arise, however, where there is a clear and explicit statute governing the subject and its provisions are such as to preclude the operation of an estoppel.[61]

§ 470 (409). **Deed to company not in existence.**—The doctrine of many of the cases is that as a deed is a contract there must be two parties, and hence there must be a grantee.[62] This doctrine has been applied to deeds to corporations not having a legal existence.[63] There is reason for holding that where it appears that there is no statute authorizing the creation of any such corpora-

107 U. S. 466, 27 L. ed. 408; Swartout v. Michigan, &c. R. Co., 24 Mich. 389. In Winget v. Quincy Building Assn., 128 Ill. 67, 21 N. E. 12, it is held that there is an estoppel, even if the statute be unconstitutional.

[61] Workingmen's Bank v. Converse, 29 La. Ann. 369.

[62] Harriman v. Southam, 16 Ind. 190; Lyles v. Lescher, 108 Ind. 382, 9 N. E. 365; Hall v. Leonard, 1 Pick. (Mass.) 27; Huss v. Stephens, 51 Pa. St. 282; Stephens v. Huss, 54 Pa. St. 20. See Hogan v. Page, 2 Wall. (U. S.) 605, 17 L. ed 854; Russell v. Topping, 5 McLean (U. S.) 194, Fed. Cas. No. 12163; Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543; German, &c. Assn. v Scholler, 10 Minn. 331; Douthitt v. Stinson, 63 Mo. 268; Morris v. Stephens, 46 Pa. St. 200; Gage v. Newmarket, &c. R. Co., 18 Q. B. 457; 4 Elliott Cont., § 3846.

[63] In Harriman v. Southam, 16 Ind. 190, the court held that a deed to a corporation which had no existence was a nullity and did not estop the grantor, but in Snyder v. Studebaker, 19 Ind. 462, 81 Am. Dec. 415, the earlier case was overruled and it was held that the grantor was estopped to deny the existence of the corporation to which the deed was made. See Russell v. Topping, 5 McLean (U. S.) 194, Fed. Cas. No. 12163; German, &c. Assn. v. Scholler, 10 Minn. 331; Douthitt v Stinson, 63 Mo. 268; Jackson v. Cory, 8 Johns (N. Y.) 385; 3 Elliott Ev. § 1940. The court, in the case of Provost v. Morgan, &c. R. Co., 42 La. Ann. 809, 8 So. 584, 46 Am. & Eng. R. Cas. 535, reaches a correct conclusion upon the facts, but we doubt the soundness of some of the broad statements contained in the opinion. See 2 Am. Law Reg. & Rev. 296.

tion as the one named in the deed the grant is ineffective, but where there is a statute authorizing the organization of such corporation, with power to make such a contract, it seems to us that the deed cannot be regarded as void or even voidable in all cases. If there is a statute under which such a corporation may exist, the doctrine of estoppel may well be applied in many instances. A deed may be valid if the corporation be one de facto.[64] There is some diversity of opinion as to whether a deed executed before the formation of a corporation which is subsequently organized is valid.[65] Our opinion is that such a deed may be valid where the parties all know that a corporation is to be organized, intend that the deed shall be effective when the corporation comes into existence, and the corporation is organized, as all the parties intended it should be.[66] If a deed is delivered in escrow to be held until the formation of the proposed corporation, it will be valid if the corporation is formed as contemplated and a delivery made to it after its organization.[67]

[64] Myers v. Croft, 13 Wall. (U. S.) 291, 20 L. ed. 562; Smith v. Sheeley, 12 Wall. (U. S.) 358 20 L. ed. 430. As we have elsewhere shown such a deed does not pass title, and as no one but the state can question the right to exercise corporate powers or hold property a deed to a de facto corporation cannot be treated as a nullity.

[65] Clifton Heights &c. Co. v. Randell, 82 Iowa 89, 47 N. W. 905; Philadelphia, &c. Assn. v. Hart, 4 Wheat. (U. S.) 1, 4 L. ed. 499; Rotch's Wharf Co. v. Judd, 108 Mass. 224. See also post, § 1151.

[66] Rathbone v. Tioga, &c. Co., 2 Watts & S. (Pa.) 74. But see Douthit v. Stimson, 63 Mo. 268. We do not believe, however, that where there is no statute authorizing the organization of such a corporation as that contemplated a deed would be valid. Subscriptions to a contemplated corporation may be valid and upon the same principle a deed may be valid.

[67] In the case of Spring Garden Bank v. Hulings Lumber Co., 32 W. Va. 357, G S. E. 243, 3 L. R. A. 583, the court conceded the rule to be that if there is no grantee in esse the deed would be inoperative, citing Hulick v. Scovil, 4 Gilm. (Ill.) 159; Harriman v. Southam, 16 Ind. 190, and Russell v. Topping, 5 McLean (U. S.) 194, Fed. Cas. No. 12163, but held that a delivery in escrow made the deed operative. In the course of the opinion the court quoted from the opinion in Rotch's Wharf Co. v. Judd, 108 Mass. 224, 228, the following: "The acceptance of the deed will be presumed as soon as the plaintiffs (the corporation) were com-

§ 471 (410). Formal execution of conveyances and agreements relating to real estate.—The ancient and well-known rule is that where the statute prescribes a specific mode for the execution of corporate contracts that mode must be substantially pursued,[68] but it does not follow that in all cases the failure to pursue the prescribed rule will render the contract voidable. Where no specific mode is prescribed the company may contract in the usual mode. Where the law requires a seal then the contract, in order to be effective, should be attested by the seal of the corporation, but even in cases where a seal is required the conveyance may be upheld, although no seal is attached. If its enforcement be required by the general principles of equity the absence of a seal will not defeat the title of the grantee. The requirement of the statute of frauds that conveyances of land shall be under seal applies to corporations, and deeds conveying real estate should be under the corporate seal, but while such an unsealed deed does not satisfy the statute there may often be such circumstances connected with the execution as will operate to estop the corporation from alleging its invalidity. A deed defectively executed is voidable, not void, for as the general power to exe-

petent to take it." Concord Bank v. Bellis, 10 Cush. (Mass.) 276; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64, 70, 6 L. ed. 552. The case of Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. ed. 780, was also cited. In support of the rule that it is the duty of the court to uphold rather than destroy deeds the court cited Sherwood v. Whiting, 54 Conn. 330, 8 Atl. 80, 1 Am. St. 116; Shed v. Shed, 3 N. H. 432; African, &c. Church v. Conover, 27 N. J. Eq. 157; Flagg v. Eames, 40 Vt. 16, 94 Am. Dec. 363.

[68] Beatty v. Marine, &c. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; note to Leggett v. New Jersey Mfg. Co., 1 N. J. Eq. 541, 23 Am. Dec. 742. The courts are generally reluctant to adjudge a contract ineffective because of a defect in the mode of executing it. Some of the courts hold that the rule that contracts must be executed in the mode prescribed applies only to executory contracts. Pixley v. Western Pacific, &c. R. Co., 33 Cal. 183, 91 Am. Dec. 623; Foulke v. San Diego, &c R. Co., 51 Cal. 365; Cincinnati v. Cameron, 33 Ohio St. 336. See Rumbough v. Southern, &c. R. Co., 106 N. Car. 461, 11 S. E. 528; Curtis v. Piedmont, &c. Co., 109 N. Car. 401, 13 S. E. 944. In the absence of statutory restrictions a corporation may make every kind of a deed. See also note in 23 Am. Dec. 742 et seq.

cute deeds exists the act of the corporation in executing it is not ultra vires. A defectively executed deed may be made good by ratification. Where the statute requires conveyances of land to be under seal, corporate deeds must be under the seal of the corporation.[69] Where there is an agreement and part performance, although the agreement may not be such as to satisfy the statute of frauds, the grantee may enforce the contract substantially under the same rules as those which govern similar contracts between individuals. An agreement to convey land, although not under the corporate seal, may usually be enforced where the rules which apply to contracts between natural persons entitle the party to enforce a contract of a similar nature.[70] A distinction is made between an agreement to convey or lease land and the deed or lease, and it is held that although the deed in the one case must be executed under seal an unsealed agreement is effective.[71]

§ 472 (411). Contracts under corporate seal—Effect as evidence.—An agreement evidenced by the corporate seal is prima facie evidence that the instrument was executed by the corporation.[72] Where the seal is affixed to an instrument which is within the power of the corporation to execute, that is, where there is not an entire absence of power to execute it, the presumption is that it was duly executed by the corporation. But, of course, a

[69] Crawford v. Longstreet, 43 N. J. L. 325. A valuable collection of authorities upon the subject of the effect of the statute upon the execution of leases will be found in Mr. Freeman's note to Wallace v. Scoggins, 17 Am. St. 752. See also 3 Thomp. Corp. (2nd. ed.) § 2437.

[70] Banks v. Poitiaux, 3 Rand. (Va.) 136, 15 Am. Dec. 706; Legrand v. Hampden, &c. College, 5 Munf. (Va.) 324.

[71] Conant v. Bellow's Falls, &c. Co., 29 Vt. 263.

[72] Mickey v. Stratton, 5 Sawyer (U. S.) 475, Fed. Cas. No. 9530; Crescent City, &c. R. Co. v. Simpson, 77 Cal. 286, 19 Pac. 426; Union, &c. Co. v. Bank, 2 Colo. 226; Reed v. Bradley, 17 Ill. 321; Indianapolis, &c. R. Co. v. Morganstern, 103 Ill. 149; Morse v. Beale, 68 Iowa 463, 27 N. W. 461; Burrill v. Nahant Bank, 2 Metc. (Mass.) 163, 35 Am. Dec. 395; Missouri, &c. Works v. Ellison, 30 Mo. App. 67; Leggett v. New Jersey, &c. Co., 1 N. J. Eq. 541, 23 Am. Dec. 728; Boyce v. Montauk, &c. Co., 37 W. Va. 73, 16 S. E. 501.

seal will not give even prima facie validity to the instrument where it appears from an inspection of the instrument itself that the contract in question is ultra vires in the proper sense of the term. If the person who affixes the seal has no authority to do so the seal will not make the contract effective.[73] Where the signatures of the officers are shown to be genuine the authenticity of the seal will be presumed.[74]

§ 473 (412). **Acceptance of deed.**—A deed may be accepted by parol.[75] A parol acceptance of a deed binds the grantee accepting it to a performance of the covenants and conditions written in the deed.[76] The statute of frauds cannot be made available to defeat the performance of the agreements which the deed contains. The authorities in most jurisdictions establish the doctrine that the person for whose benefit the promise is made may enforce it.[77]

§ 474 (413). **Distinction between a donation of lands and a sale.**—The courts make a distinction between a donation of land

[73] In Luse v. Isthmus, &c. R. Co., 6 Ore. 125, 25 Am. Rep. 506, the president affixed the seal to a mortgage of one of the company's locomotives, and it was held that he had no authority to use the seal. The court cited Fink v. Canyon, &c. Co., 5 Ore. 301; Hoyt v. Thompson, 5 N. Y. 320. See also Norris v. Dains, 52 Ohio St. 215, 39 N. E. 660, 49 Am. St. 716. A somewhat similar ruling was made in Gibson v. Goldthwaite, 7 Ala. 281, 42 Am. Dec. 592.

[74] Solomon's Lodge v. Montmollin, 58 Ga. 547; Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357; Susquehanna, &c. Co. v. Gen. Ins. Co., 3 Md. 305, 56 Am. Dec. 740; Evans v. Lee, 11 Nev. 194; Josey v. Wilmington, &c. R. Co., 12 Rich. L. (S. Car.) 134; Barned's Banking Co., Re, L. R. 3 Ch. 105.

[75] Smith's Appeal, 69 Pa. St. 474; Tripp v. Bishop, 56 Pa. St. 424; Swisshelm v. Swissvale, &c. Co., 95 Pa. St. 367. So, as elsewhere shown, acceptance may often be presumed. See also 1 Elliott Ev. § 108. See post, § 478. See generally as to delivery and acceptance, 3 Thomp. Corp. (2nd ed.) §§ 2440, 2441; 4 Elliott Cont. §§ 3910, 3915, 3916, 3917.

[76] Harlan v. Logansport, &c. R. Co., 133 Ind. 323, 32 N. E. 930; Lake Erie, &c. R. Co. v. Priest, 131 Ind. 413, 31 N. E. 77.

[77] Lawrence v. Fox, 20 N. Y. 268; Moore v. Ryder, 65 N. Y. 438; Douglass v. Wells, 57 How. Prac. (N. Y.) 378; Stevens v. Flannagan, 131 Ind. 122, 30 N. E. 898.

to a railroad company and a sale of land to it.[78] The distinction exerts an important influence in many cases. Where property is purchased the estate of the purchasing company is, ordinarily, greater than it is in cases where the land is acquired by condemnation, so the use to which property acquired by purchase may be devoted is often less limited than it is in cases where the acquisition is by virtue of the power of eminent domain, and so, too, the power to purchase property for a corporate purpose is much less fettered than the power to acquire it by proceedings to condemn.[79]

§ 475 (414). Deeds of company — By whom executed. — Where the statute expressly designates the officers or agents by whom deeds shall be executed its provisions should be followed. We do not mean to say that a deed executed by other officers or agents would be void, for deeds executed within the corporate power are not void, although executed by other officers or agents than those designated by statute. Such deeds may be ratified and so, too, they may become practically effective where there are present the requisite elements of an estoppel. A deed executed by officers other than those designated by the statute is not an ultra vires act. Where the power to perform the acts exists, the fact that it is not performed by the proper officers is a defective or improper execution of a power, but it is nothing more. There is a clear distinction between the defective execution of a power and an act beyond the scope of the powers of the corporation. A railroad company having power to convey property may, in the absence of statutory provisions, convey it by such officers or agents as it may select.[80] There is no conflict upon the general question, and the doctrine is so well settled that we deem it unnecessary to cite many authorities.

[78] Roberts v. Northern Pacific, &c. R. Co., 158 U. S. 1, 39 L. ed. 873; Northern Pacific R. Co. v. Roberts, 42 Fed. 734. See, as to donation, Bravard v. Cincinnati, &c. R. Co., 115 Ind. 1, 17 N. E. 183.

[79] Ante, § 460.

[80] Morris v. Keil, 20 Minn. 531; Bason v. King's, &c. Co., 90 N. Car. 417. See also 3 Thomp. Corp. (2nd ed.) § 2437.

§ 476 (415). **Construction of deeds to railroad companies—Generally.**—Deeds, conveying to a railroad company what is called "surplus real estate," that is, real estate not essential to the construction or operation of the road are to be construed by substantially the same rules as those which govern the construction of ordinary private grants, but conveyances granting to the company property essential to the construction and operation of the road are, in many respects, so peculiar that the ordinary rules for the construction of deeds do not always supply the means of solving questions which arise in cases involving the construction and effect of such conveyances. Many deeds convey land for "a right of way," and the extent of the estate conveyed by such a deed is to be determined by ascertaining what constitutes a right of way. In an Iowa case the landowner conveyed, by deed of quitclaim, "a right of way for all purposes connected with the construction, use or occupation of said railroad," and it was adjudged that the grantee could not take sand from the land for use in the erection of a roundhouse, and that the grantor might take sand for any purpose, provided he did not interfere with the legitimate use of the land by the company.[81] The decision in the case cited may be supported upon the theory that the words "right of way" are controlling, and are not modified or limited by the words with which they are associated. It cannot be supported upon the theory that the construction of a roundhouse is not a purpose connected with the construction, use and operation of a railroad. Providing a place for sheltering the locomotives used in operating the road is executing a purpose reasonably connected with the construction and use of the road.[82] The rulings in similar cases authorize and support this conclusion.[83]

[81] Vermilya v. Chicago, &c. R. Co., 66 Iowa 606, 24 N. W. 234, 55 Am. Rep. 279, 23 Am. & Eng. R. Cas. 108. It has been held that a right of way deed to so much land as might be occupied by the railroad, its banks, ditches and works includes only the land occupied for such purposes, but that the way might be widened from time to time when necessary, not to exceed the width of the right of way authorized by charter. Hendrix v. Southern R. Co., 162 N. Car. 9, 77 S. E. 1001.

[82] New York, &c. R. Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385; Hannibal, &c. R. Co. v. Muder, 49 Mo. 165.

[83] Grand Trunk R. Co. v. Richard-

The necessity which will authorize a railroad company to receive and hold land need not be an absolute one, nor need it appear that the land is indispensable to the construction or operation of the road, but it is sufficient if there is a reasonable necessity for taking and holding the land,[84] so that where a conveyance is made granting such property as is necessary for the construction and operation of the road, it conveys such property and estate as is reasonably necessary for the construction or operation of the road. The term "right of way," it has been held, describes the tenure and not the land granted.[85] We suppose, however, that the term "right of way" may sometimes mean the land occupied by the company,[86] but ordinarily, perhaps, it cannot be regarded as descriptive of the real estate conveyed. The meaning of the term may be controlled by associated words and sometimes by the circumstances under which the deed is executed.[87]

son, 91 U. S. 454, 23 L. ed. 356; Strohecker v. Alabama, &c. R. Co., 42 Ga. 509; Chicago, &c. R. Co. v. Wilson, 17 Ill. 123; Spofford v. Bucksport, &c. R. Co., 66 Maine 26; Old Colony, &c. R. Co. v. Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Mallett v. Simpson, 94 N. Car. 37, 55 Am. Rep. 594; Cumberland, &c. R. Co. v. McLanahan, 59 Pa. St. 23; Lyde v. Eastern, &c. R. Co., 36 Beav. 10.

[84] Worcester v. Western R. Co., 4 Metc. (Mass.) 564; State v. Hancock, 35 N. J. L. 537; State v. Commissioners, &c., 23 N. J. Law 510, 57 Am. Dec. 409; Curtis v. Leavitt, 15 N. Y. 9.

[85] Atlantic, &c. R. Co. v. Lesueur, 2 Ariz. 428, 19 Pac. 157, 37 Am. & Eng. R. Cas. 368. In the case cited, in speaking of the argument of counsel, the court used this language: "It is said that the term right of way is used to describe the land granted; that is, that these are words of description rather than of tenure. We can not concur with this view, and no authority can be found which so holds." See Louisville, &c. R. Co. v. Maxey, 139 Ga. 541, 77 S. E. 801.

[86] See ante, § 6.

[87] Reidinger v. Marquette, &c. R. Co., 62 Mich. 29, 28 N. W. 775, 14 Am. & Eng. Corp. Cas. 394; Hall v. Ionia, 38 Mich. 493. A deed of right of way for "so long as the same is used for railway purposes" usually conveys only an easement which may be lost by abandonment. Louisville, &c. R. Co. v. Maxey, 139 Ga. 541, 77 S. E. 801; Vandalia R. Co. v. Topping, 62 Ind. App. 657, 113 N. E. 421; Norton v. Duluth Transfer R. Co., 129 Minn. 126, 151 N. W. 907, Ann. Cas. 1916E, 760, and other cases there cited in note; Illinois Cent. R. Co. v. Centerville Tel. Co., 135 Tenn. 198, 186 S. W. 90. But a deed for a right of way may convey a fee

§ 477 (416). Deeds to railroad companies—Construction of —Conditions.—The acceptance of a deed containing conditions imposes upon the company accepting it the duty of performing such covenants and conditions.[88] Thus a condition in a deed granting land to a railroad company for a right of way, "providing the same does not interfere with buildings," and providing also that in the event that the right of way shall interfere with buildings the grantee shall pay damages, is binding upon the grantee.[89] In one case it was held that where the conveyance contained a condition requiring the company to construct cattle guards at crossings the grantor might enforce specific performance of the contract or enforce a lien for the expense of constructing proper cattle guards.[90] A condition that the grantee shall fence is operative upon the grantee although there is nothing more than a parol acceptance of the deed.[91] The result to which the authorities lead is this: a railroad company cannot be permitted to enjoy the easement and yet refuse to perform the conditions of the contract which created the easement or vested the estate conveyed in the grantee.[92] The con-

where the language shows such an intention. Note in Ann. Cas. 1916E, 764.

[88] Cambridge v. Charlestown, &c. R. Co., 7 Metc. (Mass.) 70. See also Harlan v. Logansport, &c. R. Co., 133 Ind. 323, 32 N. E. 930; Louisville, &c. R. Co. v. Power, 119 Ind. 269, 21 N. E. 751; Chattanooga, &c. R. Co. v. Davis, 89 Ga. 708, 15 S. E. 626; Gray v. Chicago, &c. R. Co., 189 Ill. 400, 59 N. E. 950.

[89] Rathbone v. Tioga, &c. Co., 2 Watts & S. (Pa.) 74.

[90] Dayton, &c. R. Co. v. Lewton, 20 Ohio St. 401. In Davies v. St. Louis, &c. R. Co., 56 Iowa 192, 9 N. W. 117, it was held that the grantor has a vendor's lien if the grantee fails to pay the purchase money. See, on the general subject, Kansas Pacific R. Co. v. Hopkins, 18 Kans. 494.

[91] Midland, &c. R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, 21 Am. St. 189, 43 Am. & Eng. R. Cas. 578. See generally Louisville, &c. R. Co. v. Power, 119 Ind. 269, 21 N. E. 751.

[92] Donald v. St. Louis, &c. R. Co., 52 Iowa 411, 3 N. W. 462; Midland, &c. R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, 21 Am. St. 189, 43 Am. & Eng. R. Cas. 578; Duffy v. New York, &c. R. Co., 2 Hilton (N. Y.) 496; Atlantic Dock Co. v. Leavitt, 50 Barb. (N. Y.) 135; Huston v. Cincinnati, &c. R. Co., 21 Ohio St. 235; Pittsburgh, &c. R. Co. v. Bosworth, 46 Ohio St. 81, 38 Am. & Eng. R. Cas. 290. See also Semple v. Cleveland, &c. R. Co., 172 Pa. St. 369, 33 Atl. 564; Gratz v. Highland Scenic R. Co., 165 Mo. 211, 65 S. W. 223; Knoxville, &c. R. Co. v. Beeler,

dition must, of course, be a valid one, for an illegal condition has no effect.[93]

§ 478 (417). Grants—Beneficial—Presumption of acceptance.—The general rule is that where a grant to a railroad company is beneficial no formal acceptance is required, and that in the absence of countervailing facts an acceptance of a beneficial grant will be presumed.[94] If the statute requires an acceptance to be evidenced in a prescribed mode there must, as a rule, be an acceptance in the mode prescribed; in other words, there must be a substantial compliance with the provisions of the statute. The rule is that deeds will be upheld where it can be justly and reasonably done, and presumptions in favor of their effectiveness are generally made.

§ 479 (418). Incidents pass with principal thing granted.—Where there is a grant of a principal thing all the necessary incidents essential to the enjoyment of the principal thing usually pass to the grantee.[95] Where there is a grant of land for use by a railroad company in operating its road the grant conveys the right to use the land for that purpose and the grantee cannot recover damages for injuries caused by a reasonably careful operation of the road.[96] The principle asserted in the cases to

90 Tenn. 548, 18 S. W. 391; Post, § 1161, et seq. For illustrative cases of conditions subsequent see Latham v. Illinois Cent. R. Co., 253 Ill. 93, 97 N. E. 254; Lexington, &c. R. Co. v. Moore, 140 Ky. 514, 131 S. W. 257; Bridgers v. Beaman, 159 N. Car. 521, 75 S. E. 798.

93 St. Louis, &c. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122; Lynn v. Mount Savage, &c. R. Co., 34 Md. 603; Kettle River, &c. R. Co. v. Eastern, &c. R. Co., 41 Minn. 461, 43 N. W. 469, 40 Am. & Eng. R. Cas. 449; Hammond v. Port Royal, &c. R. Co., 15 S. Car. 10.

94 Bangor, &c. R. Co. v. Smith, 47 Maine 34; Charles River Bridge v. Warren Bridge, 7 Pick. (Mass.) 344; Rathbone v. Tioga, &c. R. Co., 2 Watts & S. (Pa.) 74. See also 4 Elliott Cont. § 3916.

95 Reidinger v. Marquette, &c. R. Co., 62 Mich. 29, 28 N. W. 775, 29 Am. & Eng. R. Cas. 611; Babcock v. Western, &c. Corp., 9 Metcf. (Mass.) 553, 43 Am. Dec. 411. See also Louisville, &c. R. Co. v. French, 100 Tenn. 209, 43 S. W. 771, 66 Am. St. 752.

96 Chicago, &c. R. Co. v. Smith, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558, citing Chicago, &c. R. Co. v. Springfield, &c. R. Co., 67 Ill. 142;

which we have referred is one of practical importance and leads to material results. It prevents a grantor from successfully asserting a claim for damages for injuries from noise, smoke and the like, resulting from the proper operation of the road, and it precludes him from successfully prosecuting an action for a nuisance, although annoyance from smoke, noise and similar things necessarily incident to the operation of the road is suffered by him.[97] But the grant does not exonerate the company from liability for injury caused by its negligence; nor, it may be said in passing, do the damages assessed in condemnation proceedings cover loss caused by the negligence of the company.

§ 480 (419). Effect of designating in the deed the purpose for which land is granted.—The designation of the purpose for which the land is granted is often regarded as creating a condition subsequent and as defining and limiting the title of the grantee.[98] But a mere statement of the purpose for which the conveyance is made does not necessarily, nor, perhaps, ordinarily, have this effect unless there is something else in the deed, or something in the nature of the purpose, or other circumstances so indicating.[99] The effect of a deed is not, as a

Keithsburg, &c. R. Co. v. Henry, 79 Ill. 290; Norris v. Vermont, &c. R. Co., 28 Vt. 99. See also Chicago, &c. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341; Lafayette, &c. v. New Albany, &c. Co., 13 Ind. 90, 74 Am. Dec. 246; Swinney v. Fort Wayne, &c. R. Co., 59 Ind. 205; Lafayette, &c. Co. v. Murdock, 68 Ind. 137; Indiana, &c. R. Co. v. Allen, 113 Ind. 308, 15 N. E. 451, 3 Am. St. 650; White v. Chicago, &c. R. Co., 122 Ind. 317, 23 N. E. 782. Post, vol. 2, §§ 1170, 1281.

[97] Dunsmore v. Central R. Co., 72 Iowa 182, 33 N. W. 456; Cosby v. Owensboro, &c. R. Co., 10 Bush (Ky.) 288; Randle v. Pacific, &c. R. Co., 65 Mo. 325; Struthers v. Dunkirk, &c. R. Co., 87 Pa. St. 282.

[98] Ottumwa, &c. R. Co. v. McWilliams, 71 Iowa 164, 32 N. W. 315, 29 Am. & Eng. R. Cas. 544; Norton v. Duluth Transfer R. Co., 129 Minn. 126, 151 N. W. 907, Ann. Cas. 1916E, 760, and cases cited; Robinson v. Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522, 30 Am. & Eng. R. Cas. 299. See generally Gadberry v. Sheppard, 27 Miss. 203; Adams v. Logan Co., 11 Ill. 336; Harris v. Shaw, 13 Ill. 456; Wiggins Ferry Co. v. Ohio, &c. R. Co., 94 Ill. 83; Morrill v. Wabash, &c. R. Co., 96 Mo. 174, 9 S. W. 657; State v. Brown, 27 N. J. L. 13.

[99] See Scovill v. McMahon, 62

rule, to be determined from a single clause, but the whole instrument must be considered. It is to be read by the light of surrounding circumstances,[1] and give such effect as the parties intended it should have.[2]

§ 481 (420). **Covenants that run with the land.**—Many covenants peculiar to conveyances to railroad companies run with the land. If the covenant is a direct and not a collateral one it runs with the land and binds remote grantees.[3] The weight of

Conn. 378, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. 350; Noyes v. St. Louis, &c. R. Co. (Ill.), 21 N. E. 487; Brady v. Gregory, 49 Ind. App. 355, 97 N. E. 452; Lake Erie, &c. R. Co. v. Ziebarth, 61 Ind. 228, 33 N. E. 256; Kilpatrick v. Baltimore, 81 Md. 179, 31 Atl. 805, 27 L. R. A. 643, 48 Am. St. 509; 4 Elliott Cont. § 3875.

[1] It has been held that a deed for a nominal consideration, to railroad companies, which recites that the conveyance is "for the erection and maintenance thereon of the freighthouses which said companies or either of them * * * and for such other general railroad purposes as may be necessary"—conveys absolute title, and is not conditioned upon the erection of said freighthouses, so as to enable the grantor to have it canceled upon failure to erect them. Noyes v. St. Louis, &c. R. Co. (Ill.), 21 N. E. 487. See also 4 Elliott Cont. § 3875.

[2] Louisville, &c. R. Co. v. Koelle, 104 Ill. 455, 11 Am. & Eng. R. Cas. 301; Hadden v. Shoutz, 15 Ill. 582; Koelle v. Knecht, 99 Ill. 396; Newaygo, &c. Co. v. Chicago, &c. R. Co., 64 Mich. 114, 30 N. W. 910, 29 Am. & Eng. R. Cas. 505. In Lockwood v. Ohio River R. Co., 103 Fed. 243, it is said that an agreement prepared by the company should be construed most strongly against it in case of ambiguity and doubt.

[3] Fresno, &c. Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. 112; Hazlett v. Sinclair, 76 Ind. 488, 40 Am. Rep. 254, and authorities cited; Midland, &c. R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, 21 Am. St. 180, 43 Am. & Eng. R. Cas. 578; Scott v. Stetler, 128 Ind. 385, 27 N. E. 721; Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335; Burbank v. Pillsbury, 48 N. H. 475; Blain v. Taylor, 19 Abb. Prac. (N. Y.) 228; Countryman v. Deck, 13 Abb. N. Cas. (N. Y.) 110; Easter v. Little Miami, &c. R. Co., 14 Ohio St. 48; Pittsburgh, &c. Co. v. Bosworth, 46 Ohio St. 81, 38 Am. & Eng. R. Cas. 290; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175. See generally as to what covenants do and what do not run with the land, Mobile, &c. R. Co. v. Gilmer, 85 Ala. 422, 5 So. 138; Lyford v. North Pac., &c. R. Co., 92 Cal. 93, 28 Pac. 103; Chappell v. New York, &c. R. Co., 62 Conn. 195, 24 Atl. 997; Elizabethtown, &c. R. Co. v. Wright, 21 Ky. L. 128, 50 S.

authority is that a covenant to fence runs with the land.[4] A parol agreement to maintain a fence, however, does not run with the land.[5]

§ 482 (421). **Merger of preliminary agreement in deed.**—The general rule is that a preliminary agreement providing for the conveyance of land is merged in the deed.[6] This rule applies to a contract made with a railroad company for the conveyance of land.[7] The rule is a familiar one and is one of great practical importance in cases where the question relates to the grant of a right of way.

§ 483 (422). **Bonds for conveyance—Specific performance.**—A railroad company acting within the scope of its authority may take a bond, often called "a title bond," for the conveyance

W. 1105; Baird v. Erie R. Co., 210 N. Y. 225, 104 N. E. 614; Hammond v. Port Royal, &c. R. Co., 16 S. Car. 573; Post, § 1167.

[4] Pittsburgh, &c. R. Co. v. Bosworth, 46 Ohio St. 81, 38 Am. & Eng. R. Cas. 290; Midland, &c. R. Co. v. Fisher, 125 Ind. 19, 24 N. E. 756, 8 L. R. A. 604, 21 Am. St. 189, 43 Am. & Eng. R. Cas. 578; Countryman v. Deck, 13 Abb. N. Cas. (N. Y.) 105; Post, §§ 1167, 1635, 1703.

[5] Vandegrift v. Delaware, &c. R. Co., 2 Houst. (Del.) 287; Kentucky Central, &c. R. Co. v. Kenney, 10 Ky. L. 251, 8 S. W. 201, 20 Am. & Eng. R. Cas. 458; Wilder v. Maine Central R. Co., 65 Maine 332, 20 Am. Rep. 698; Morss v. Boston, &c. R. Co., 2 Cush. (Mass.) 536; Pitkin v. Long Island, &c. R. Co., 2 Barb. Ch. (N. Y.) 221, 47 Am. Dec. 320; Day v. New York Central R. Co., 31 Barb. (N. Y.) 548. See also St. Louis, &c. R. Co. v. Todd, 36 Ill. 409; Thomas v. Hannibal, &c. R. Co., 82 Mo. 538.

[6] Phillbrook v. Emswiler, 92 Ind. 590; Houghtaling v. Lewis, 10 Johns. (N. Y.) 297; Bailey v. Snyder, 13 Sergt. & R. (Pa.) 160; Frederick v. Campbell, 13 Sergt. & R. (Pa.) 136; Smith v. Evans, 6 Binney (Pa.) 102, 6 Am. Dec. 436; Haggerty v. Fagan, 2 Penrose & W. (Pa.) 533; Twyford v. Wareup, Cases temp. Finch. 310; Williams v. Morgan, 15 Q. B. 782.

[7] Waldron v. Toledo, &c. R. Co., 55 Mich. 420, 21 N. W. 870, 20 Am. & Eng. R. Cas. 348; Druse v. Wheeler, 22 Mich. 439. But there are some limitations, qualifications, or exceptions to the general rule, such, for instance, as showing the true consideration of a deed, or the purpose or object of the parties in regard to it, in a proper case. 8 Elliott Cont. §§ 1629, 1633-1641, et seq; note in L. R. A. 1916E, 221. See also Doan v. Cleveland, &c. R. Co., 54 Ind. App. 620, 98 N. E. 321, 100 N. E. 95.

of land. If the bond is sufficiently specific and certain, presents the necessary equitable elements and the conditions on the part of the company are performed, specific performance will be decreed.[8] The rule which requires contracts to be specific and certain will defeat a specific performance where the price is not agreed upon but is left to be fixed by an umpire.[9] If, however, the price has been definitely and finally fixed by the umpire, specific performance may be decreed.[10] There must be such a consideration as the court can justly regard as equitable; but where the contract recites that the agreement to build the road forms part of the consideration, the fact that the land agreed to be conveyed is much more valuable than the price named will not defeat the suit.[11] It has been held that the fact that the road has not been completed within the time limited by the statute will not avail the obligor as a defense for the reason that only the state can make that question,[12] but the failure may, as it seems to us, be of such a character as to render it inequitable to enforce the contract, and if that be so, then, upon well-established principles, specific performance will not be decreed.[13]

[8] Byers v. Denver, &c. R. Co., 13 Colo. 552, 22 Pac. 951; Chicago, &c. R. Co. v. Swinney, 38 Iowa 182; Boston, &c. R. Co. v. Babcock, 3 Cush. (Mass.) 228; Walker v. Eastern, &c. R. Co., 6 Hare 594; Sanderson v. Cockermouth, &c. R. Co., 11 Beav. 497. As to what is a sufficient description of the land, see Ottumwa, &c. R. Co. v. McWilliams, 71 Iowa 164, 32 N. W. 315, 29 Am. & Eng. R. Cas. 544, citing Pursley v. Hayes, 22 Iowa 11, 92 Am. Dec. 350; Barlow v. Chicago, &c. R. Co., 29 Iowa 276; Beal v. Blair, 33 Iowa 318; Spangler v. Danforth, 65 Ill. 152; Telford v. Chicago, &c. R. Co., 172 Ill. 559, 50 N. E. 105; Hurley v. Brown, 98 Mass. 545, 96 Am. Dec. 671; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110. See also Post, §§ 1155, 1156.

[9] Milnes v. Gery, 14 Vesey 400. See Tillett v. Charing Cross Co., 26 Beav. 419.

[10] Brown v. Bellows, 4 Pick. (Mass.) 179.

[11] Ottumwa, &c. R. Co. v. McWilliams, 71 Iowa 164, 32 N. W. 315, 29 Am. & Eng. R. Cas. 544. But fraud will justify the court in refusing specific performance. Grand Tower, &c. R. Co. v. Walton, 150 Ill. 428, 37 N. E. 920.

[12] Ross v. Chicago, &c. R. Co., 77 Ill. 127. See Atlantic, &c. R. Co. v. St. Louis, 66 Mo. 228.

[13] Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105; Clarke v. Rochester, &c. R. Co., 18 Barb. (N.

§ 484 (423). **Presumption that there is power to hold the land.**—Where a corporation is authorized to hold land for certain purposes, a conveyance of land to it will ordinarily be presumed to be for some purpose within the corporate powers, unless the contrary is clearly shown.[14] The presumption cannot obtain where it appears upon the face of the deed and from a reference to the statute that the company had no power to acquire and hold the property, but there are very few cases in which the presumption will not be made.

§ 485 (424). **Power to convey real estate.**—A railroad company has power to convey lands of which it is the owner, except where some rule of law or some statute prohibits it from conveying its property. It is to be remembered, however, that the rule to which we have often referred, prohibiting a railroad company from disabling itself from performing its duties, operates as a limitation upon the power or disposition. The power of a railroad company is, therefore, not so unfettered as that of a purely private corporation. The right to convey its surplus land, that is, land not essential to enable it to perform its corporate duties, is substantially the same as that of a strictly private business corporation. A private business corporation has general power to convey,[15] and it follows from what we have said that as to surplus property the power of railroad companies is one of a general nature.

Y.) 350; Webb v. Direct London, &c. R. Co., 9 Hare 129; Gooday v. Colchester, &c. R. Co., 17 Beav. 132; Edwards v. Grand Junction, &c. R. Co., 1 Myl. & C. 650 (13 Eng. Ch. 559); Hawkes v. Eastern, &c. R. Co., 1 DeG., M. & G. 737; Wycombe, &c. R. Co. v. Donnington Hospital, L. R. 1 Ch. 268.

[14] Gilmer v. Stone, 120 U. S. 586, 30 L. ed. 734; Ohio, &c. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Brewer, &c. Co. v. Boddie, 181 Ill. 622, 55 N. E. 49; McCarty v. St. Paul, &c. R. Co., 31 Minn. 278, 17 N. W. 616; Yates v. Van DeBogert, 56 N. Y. 526.

[15] White Water, &c. Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Miners', &c. Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300; Aurora, &c. Co. v. Paddock, 80 Ill. 263; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Dupee v. Boston, &c. Co., 114 Mass. 37; Barry v. Merchants', &c. Co., 1 Sandf. Ch. (N. Y.) 280; Newark v. Elliott, 5 Ohio St. 113; 8 Thomp. Corp. § 2415; Patent, &c. Co., In re, L. R. 6 Ch. 83.

§ 486 (425). Dedication of land for use as a highway.—A railroad corporation may dedicate to public use a highway across lands owned by it and used for its railroad tracks.[16] Indeed, it is a general rule that either public or private corporations may make dedications unless they are forbidden by their charter or the governing statute.[17] Thus, where the Northern Pacific Railroad Company made an addition to a town on a section of land granted to it by congress, and sold lots with reference to a recorded plat thereof, it was held that a street which was shown on the plat as extending across the railroad track must be regarded as dedicated to the public use, that this was not ultra vires as an alienation of its right of way so as to interfere with the purpose of the grant made by congress, and that it had no right to block the street by the erection of a depot at that point.[18] So, where a railroad company for eighteen years permitted the public to use a crossing as a street, parted its trains to let vehicles through, allowed it to be improved as a street, and made a map showing the existence of such a street, it was held that a valid dedication was shown and that the

16 Southern Pac. Co. v. Pomona, 144 Cal. 339, 77 Pac. 929 (citing text); Central R. Co. v. Bayonne, 52 N. J. L. 503, 20 Atl. 69; Hast v. Piedmont, &c. R. Co., 52 W. Va. 396, 44 S. E. 155, 156 (citing text). See also Matthews v. Seaboard Air Line R., 67 S. Car. 499, 46 S. E. 335, 336, 65 L. R. A. 286 (citing text). In the West Virginia case above cited, however, it is further held that to bind the corporation beyond revocation it must be made by the directors or be ratified by them or by such public use for such time and under such circumstances as to justify the inference of such ratification. See also Williams v. New York, &c. R. Co., 39 Conn. 509.

17 Green v. Canaan, 29 Conn. 157; Elliott Roads and Streets (3rd ed.), § 160, citing, as to private corporations, Williams v. New York, &c. Co., 39 Conn. 509; Grand Surrey Canal v. Hall, 1 M. & Gr. 392. The rule stated in the text-book above referred to was approved in Lake Erie, &c. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103.

18 Northern Pac. R. Co. v. Spokane, 56 Fed. 915. But compare Northern Pac. R. Co. v. Townsend, 190 U. S. 267, 47 L. ed. 1044, as to the Northern Pacific Railroad Company's right of way not being subject to adverse possession or alienation prior to the act of June 24, 1912, the effect of which act is considered in Union Pac. Ry. Co. v. Laramie Stockyards Co., 23 U. S. 90, 58 L. ed. 179.

company was estopped from denying the existence of the street, especially as persons had bought lots and built houses on both sides of the street upon the faith that it extended across the company's right of way.[19] In another case it was held that the dedication of a portion of its land by a railroad company to the public as a highway was not ultra vires, and that its uninterrupted use as a highway for four years by the public was sufficient to show a complete dedication and acceptance.[20]

§ 487 (426). Disposition of property corporation has no power to receive and hold—Escheat.—The question as to what disposition shall be made of property purchased by a company which it has no power to receive and hold is an interesting one. Whether the property shall escheat to the state upon judgment in a proceeding by the state assailing the right of the company to hold it, may, of course, be controlled by statute, but if there be no statute then the question is to be determined upon general principles. We suppose that if there is a statute providing that it shall escheat to the state, creditors dealing with the corporation, as well as stockholders, must take notice of the statute and must know, as matter of law, that they cannot successfully assert a right to the property. In considering the effect of a dissolution we have discussed the cases bearing upon the question and stated the general doctrine relating to the disposition of property upon the dissolution of the corporation.[21] In Pennsylvania the question came before the court, and it was held that the property did not escheat to the state but went to the stockholders.[22] And in a recent Kentucky case

[19] Lake Erie, &c. R. Co. v. Boswell, 137 Ind. 336, 36 N. E. 1103.

[20] People v. Eel River, &c. R. Co., 98 Cal. 665, 33 Pac. 728.

[21] Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; McCoy v. Farmer, 65 Mo. 244; Owen v. Smith, 31 Barb. (N. Y.) 641; Heath v. Barmore, 50 N. Y. 302.

[22] Commonwealth v. New York, &c. R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634; Commonwealth v. New York, &c. R. Co., 114 Pa. St. 340, 7 Atl. 756. See also Sioux, &c. Co. v. Trust Co., 82 Fed. 124; Detroit Citizens' St. R. v. Detroit, 64 Fed. 628; Brown v. Schleier, 118 Fed. 981; Keith v. Johnson, 109 Ky. 421, 59 S. W. 487; Miner v. New York, &c. R. Co., 123 N. Y. 242, 25 N. E. 339. See generally Heman v. Britton, 88 Mo. 549; Hightower v.

it is held that one who, in good faith and for a valuable consideration, buys land from a corporation before any action is brought by the state to establish an escheat to which it is subject because the corporation has held it when unnecessary to its purposes, in violation of the constitution, acquires an indefeasible title to such land.[23]

Thornton, 8 Ga. 486, 52 Am. Dec. 412; St. Louis, &c. Coal Co. v. Sandival, &c. Co., 116 Ill. 170, 5 N. E. 370; Wheeler v. Pullman, &c. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Burrall v. Bushwick R. Co., 75 N. Y. 211; Asheville, &c. Co. v. Aston, 92 N. Car. 578.

[23] Louisville School Board v. King, 32 Ky. L. 687, 107 S. W. 247, 15 L. R. A. (N. S.) 379, distinguishing Commonwealth v. Chicago, &c. Ry. Co., 30 Ky. L. 673, 99 S. W. 596.

CHAPTER XVIII.

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542. Fraudulent leases.
543. Unauthorized lease—Injunction.

§ 490 (427). **Power to lease—Generally.**—The legislative power respecting the creation of railroad corporations is of such a plenary nature that statutes may be enacted authorizing one company to lease its road, equipments and appurtenances to another company. The whole subject is in the main a legislative one. Where there is no constitutional provision interdicting it the authority to lease may be conferred by a special act, but where the constitution of the state requires that all laws for the organization and government of corporations shall be general and not special or local, the authority to execute a lease of a railroad and its equipments must be conferred by a general law. The authority to lease the road is to be discriminated from the authority to lease property not forming part of the railroad or essential to its operation for a railroad company authorized to own and hold property not forming part of its line of railroad or essential to the operation thereof, is, as to such property, invested with the rights of an ordinary owner of land, and as such owner may lease or sell it.[1] Property form-

[1] Hartford F. Ins. Co. v. Chicago, &c. R. Co., 175 U. S. 91, 99, 44 L. ed. 84; Chicago, &c. R. Co. v. Union Pac. R. Co., 47 Fed. 15, 51 Fed. 309; Pierce v. Emery, 32 N. H. 484. See also Louisiana, &c. R. Co. v. State,

ing part of the railroad, or essential to its operation, is not held as property is held by ordinary owners, but is held under the grant to the corporation for the purpose of enabling it to perform its corporate duties and functions, and, as the law forbids a railroad corporation from conveying or transferring such of its property as would disable it from performing such duties and functions it has no power to transfer by way of lease property essential to enable it to perform such functions or duties.

§ 491 (428). **What the legislature may prescribe.**—Within the limitations imposed by the constitution the legislature may prescribe by whom and to whom leases may be executed. The legislative determination, where no constitutional provision is violated, is conclusive. The legislative judgment (when expressed in a valid enactment), as to the parties to whom leases may be made,[2] as to the terms and conditions of leases, and as to the duties and obligations of parties thereto cannot be reviewed by the courts. If the power, which the legislature assumes to exercise, is vested in it by the organic law, it is mas-

75 Ark. 435, 88 S. W. 559; St. Louis, &c. R. Co. v. Hale, 82 Ark. 175, 100 S. W. 1148; State v. New Orleans, &c. Co., 109 La. Ann. 64, 33 So. 81; Michigan Cent. R. Co. v. Bullard, 120 Mich. 416, 79 N. W. 635. But see Hobart-Lee Tie Co. v. Stone, 135 Mo. App. 438, 117 S. W. 604, where the lease operated to discriminate in favor of one shipper. We are not, however, considering this phase of the subject in the text, but are referring to contracts having no such objectionable features.

[2] Where the statute authorized a lease to another company, but gave no express authority to lease to an individual, it was held that such a lease was neither malum in se nor malum prohibitum, that it was not void as contrary to public policy, and that, after the individual lessee had operated the road under the lease, he could not defend against an action to recover the stipulated rent. Woodruff v. Erie R. Co., 93 N. Y. 609. But the decision referred to is of doubtful soundness. See Abbott v. Johnstown, &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Cox v. Terre Haute, &c. R. Co., 133 Fed. 371. Where the legislature amended a domestic railroad charter and authorized the company to lease its property to another railroad free from responsibility for the lessee's torts, it was held that such amendment did not relieve the lessor from the application of a subsequent law imposing such liability, based on legislative authority to alter, suspend or repeal corporate charters. Brown v. Louisiana, &c. R. Co., 256 Mo. 522, 165 S. W. 1060.

ter of its own discretion and is the exclusive judge of all questions of expediency or policy.

§ 492 (429). Power to lease not an implied one—Legislative authority requisite.—As the power to lease property essential to the operation of a railroad is not an implied or incidental power, it would seem to necessarily follow that it does not exist except by virtue of an effective statute. The rule that a railroad company cannot execute a lease is generally placed upon the ground of public policy, but it is frequently said that in the absence of a statute there is no power to execute a lease. One who asserts that a railroad corporation has power to lease its railroad or property essential to the operation thereof must show an effective legislative enactment granting the power to lease, otherwise his assertion will be unavailing.[3]

§ 493 (430). The power to lease—General rule.—Whatever difference of opinion there may be as to the grounds upon which the rule rests, the rule itself is firmly established. That rule, as asserted in very numerous cases, is that a railroad corpora-

[3] It seems that there are really two grounds upon which the prevailing doctrine may be supported, namely, the rule of public policy, and the rule that corporate charters are to be strictly construed and corporations possess only such powers as their charters confer. In St. Louis, &c. Co. v. Terre Haute, &c. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738, the court, speaking of the contract between the two corporations, said: "In short, by this contract one railroad company undertook to transfer its whole railroad and equipments and its privileges and franchises to maintain and operate the road to another company for a term of 999 years in consideration of the payment from time to time by the latter to the former of a portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither of the companies had power to enter into unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other." See also Chicago, &c. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, 79, citing text; 3 Thomp. Corp. (2nd ed.) § 2480.

tion cannot, without express legislative permission, lease its road, franchises and equipments to another corporation and transfer to its lessee the privilege of operating the road.[4] It cannot, by way of lease, transfer a corporate franchise or privilege to another company nor impose upon another its own corporate duties except in cases where the statute so provides.[5]

§ 494 (431). **The foundation of the rule.**—It seems to us, as we have said, that the rule forbidding a railroad company from

[4] Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950; Pennsylvania R. Co. v. St. Louis, &c. R. Co., 118 U. S. 290, 30 L. ed. 83; Oregon R, &c. Co. v. Oregonian, &c. R. Co. 130 U. S. 1, 32 L. ed. 837; Oregon R., &c. Co. v. Oregonian R. Co., 145 U. S. 52, 36 L. ed. 620; Briscoe v. Southern Kansas, &c. R. Co., 40 Fed. 273; Hamilton v. Savannah, &c. Co., 49 Fed. 412; Earle v. Seattle, &c. R. Co., 56 Fed. 909; Pittsburgh, &c. R. Co. v. Columbus, &c. R. Co., 8 Biss. (U. S.) 456, Fed. Cas. No. 11197; Memphis, &c. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. 69; Memphis, &c. R. Co. v. Grayson, 88 Ala. 572, 7 So. 122, 16 Am. St. 69; Hays v. Ottawa, &c. R. Co., 61 Ill. 422; Wabash, &c. R. Co. v. Payton, 106 Ill. 534, 46 Am. Rep. 705; Grand Tower, &c. Co. v. Ullman, 89 Ill. 244; Board Comrs. Tippecanoe Co. v. Lafayette, &c. R. Co., 50 Ind. 85; Middlesex R. Co. v. Boston, &c. R. Co., 115 Mass. 347; Norwich, &c. R. Co. v. Worcester, 147 Mass. 518, 18 N. E. 409; State v. Atchison, &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164; Mills v. Central R. Co., 41 N. J. Eq. 1; People v. Albany, &c. R. Co., 77 N. Y. 232; Abbott v. Johnstown, &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107; Stewart & Foltz's Appeal, 56 Pa. St. 413; Pittsburgh, &c. R. Co. v. Allegheny Co., 63 Pa. St. 126; Harmon v. Columbia, &c. R. Co., 28 S. Car. 401, 5 S. E. 835, 13 Am. St. 686; Frazier v. East Tenn., &c. R. Co., 88 Tenn. 138, 12 S. W. 537; International, &c. R. Co. v. Underwood, 67 Tex. 589, 4 S. W. 216; International, &c. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679; Ricketts v. Chesapeake, &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. 901, 1 Lewis' Am. R. & Corp. 455, 25 Am. St. 901; Fisher v. West Virginia, &c. R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758; Nelson v. Vermont, &c. R. Co., 26 Vt. 717, 62 Am. Dec. 614; Great Northern R. Co. v. Eastern Counties R. Co., 12 Eng. L. & Eq. 224; East Anglian, &c. R. Co. v. Eastern, &c. R. Co., 11 Com. B. 775; 3 Thomp. Corp. (2nd ed.) § 2480.

[5] Text cited in Chicago, &c. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, 79; also cited in Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 317; Georgia R. &c. Co. v. Haas, 127 Ga. 187, 56 S. E. 313, 119 Am. St. 327.

leasing its railroad may be rested on two grounds. The rule, however, is usually put upon the ground that public policy forbids one company from transferring its railroad to another. It is unquestionably true that a railroad corporation has no power to relieve itself of the duties and obligations which it owes to the public by a voluntary surrender of its property and franchises.[6] A railroad company cannot escape its charter obligations by an abandonment of its road, or the like, for that public policy forbids,[7] and there is no reason why the same general principle should not apply to transfers by way of lease.

§ 495 (432). Power to accept a lease.—The principle which underlies the doctrine that a railroad company cannot lease its railroad without direct legislative authority supports the rule that a railroad company cannot, without legislative auhority, take a grant or lease of the property and franchises of another company.[8] The power to accept franchises granted to another

[6] Palmer v. Utah, &c. R. Co., 2 Idaho 290, 16 Pac. 553, 36 Am. & Eng. R. Cas. 443; Balsley v. St. Louis, &c. R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; Harmon v. Columbia, &c. R. Co., 28 S. Car. 401, 5 S. E. 835, 13 Am. St. 686; Gulf, &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156; International, &c. R. Co. v. Moody, 71 Tex. 614, 9 S. W. 456; Ricketts v. Chesapeake, &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. 901. See also Evansville, &c. R. Co. v. Evansville, &c. R. Co., 50 Ind. App. 502, 513, 98 N. E. 649; Quigley v. Toledo, &c. R. Co., 89 Ohio St. 68, 105 N. E. 185. The obligation of one of two contracting railroads to fulfill the duties of its charter by completing the unbuilt part of its road is inconsistent with a contract for a long time—such as twenty years—by which it contracts to deliver all its traffic over that part of its road to another company. Des Moines, &c. R. Co., v. Wabash &c. R. Co., 135 U. S. 576, 10 Sup. Ct. 736, 34 L. ed. 243, 43 Am. & Eng. R. Cas. 694.

[7] The principle to which we refer is illustrated by such cases as State v. Dodge City, &c. R. Co., 53 Kans. 377, 36 Pac. 755, 42 Am. St. 295, 61 Am. & Eng. R. Cas 631; People v. Louisville, &c. R. Co., 120 Ill. 48, 10 N. E. 657; Evansville, &c. R. Co. v. Evansville, &c. R. Co., 50 Ind. App. 502, 98 N. E. 649; State v. Sioux City &c. R. Co., 7 Nebr. 357; Erie, &c. Railroad Co. v. Casey, 26 Pa. St. 287. See generally Railroad Commissioners v. Portland, &c. R. Co., 63 Maine 269, 18 Am. Rep. 208; Gates v. Railroad, 53 Conn. 333, 5 Atl. 695; Pierce v. Emery, 32 N. H. 484; People v. New York, &c. R. Co., 28 Hun (N. Y.) 543.

[8] Oregon R., &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct.

company is not an implied or incidental power. Public policy forbids that one company should, without legislative sanction, assume the duties imposed by law upon another corporation.[9]

§ 496 (433). Statutes asserted to confer power to lease are not aided by construction.—The power to lease is not, as a rule, favored by the courts, at least they are not inclined to adjudge that it exists unless the statue in clear terms confers it. The power to lease does not exist unless it clearly appears that the legislature intended to confer it upon the corporation. Construction will be strict, not liberal, as against a party who asserts that the corporation has power to lease its railroad and equipments.[10] The power to transfer property essential to the

409, 32 L. ed. 837; St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738; Pennsylvania, &c. R. Co. v. St. Louis, &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; State v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271. See also Central Transportation Co. v. Pullman's, &c. Co., 139 U. S. 24, 35 L. ed. 55. We mean by the statement in the text that one corporation cannot take, by lease, property of another corporation in cases where the property assumed to be leased is essential to the performance of corporate duties by the company which undertakes to execute the lease, but we do not mean that corporate property other than that of the character indicated may not be leased.

[9] In Georgia R., &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 317, the text is cited with approval and the court says: "To make this lease valid the lessor must have had the power to make the lease, and the lessee the power to accept it, for if the lease was beyond the power of either it was as invalid as if beyond the power of both."

[10] Oregon R., &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Thomas v. West Jersey, &c. R. Co., 101 U. S. 71, 25 L. ed. 950. In the first case cited the court commented upon the doctrine that corporate charters are to be strictly construed, referred to the cases Charles River Bridge v. Warren River Bridge, 11 Pet. 420, 9 L. ed. 773; Dubuque, &c. R. Co. v. Litchfield, 23 How. (U. S.) 66, 16 L. ed. 500, and Turnpike Co. v. Illinois, 96 U. S. 63, 24 L. ed. 651, and, in the course of the opinion, said: "One of the most important powers with which a corporation can be invested is the right to sell out its whole property, together with the franchises under which it operated, or the authority to lease its property for a long term of years. In the case of a railroad company these privileges, next to the privilege to

operation of a railroad is one of great importance and the policy of the law has always been against such transfers, so that there is strong reason for the conclusion that the power must be clearly and expressly conferred.

§ 497 (434). Statutes strictly construed—Illustrative instances.—A power conferred upon a corporation to consolidate with other roads,[11] or to sell its road,[12] or to acquire other lines of railroad by purchase,[13] or to make contracts with another railroad company for the use of its road,[14] does not necessarily

build and operate its railroad, would be the most important which could be given it, and this idea would impress itself upon the legislature. Naturally, we should look for the authority to do these things in some express provision of the law. We would suppose that if the legislature saw fit to confer such rights it would do so in terms which could not be misunderstood." See also Quigley v. Toledo R., &c. Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992. But compare Northern Pac. R. Co. v. Wisconsin, &c. R. Co. 117 Minn. 217, 135 N. W. 984.

[11] St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738; Archer v. Terre Haute, &c. R. Co., 102 Ill. 493; Board, &c. v. Lafayette, &c. R. Co., 50 Ind. 85; Mills v. Central R. Co., 41 N. J. Eq. 1; State v. Vanderbilt, 37 Ohio St. 590.

[12] Oregon, &c. R. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 35 L. ed. 837; Pennsylvania Co. v. St. Louis, &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Thomas v. West Jersey, &c. R. Co., 101 U. S. 71. 25 L. ed. 950.

[13] Mills v. Central R. Co., &c., 41 N. J. Eq. 1.

[14] St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738. See also Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107. The power conferred by the New York act of 1839 upon a railroad corporation to contract with another for the use of their respective roads in such manner as the contract may prescribe has been held to involve the power to make a lease for a term of years. Beveridge v. New York Elev. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Woodruff v. Erie R. Co., 93 N. Y. 609. By the laws of New York, 1839, c. 218, providing that "it shall be lawful hereafter for any railroad corporation to contract with any other railroad for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract," a railroad company is authorized to lease its road and franchise to another railroad company, though the roads of the lessor and and lessee are parallel and competing lines, and their merger or con-

include authority to lease its road. A general statute authorizing the formation of a corporation for any lawful purpose does not authorize a railroad company to insert in its articles of association authority to make such a lease.[15]

§ 498 (435). Statutes—Construction of.—While the construction of statutes conferring the power to execute leases is, as against the power, always strict, still the legislative intention is not to be defeated by an unreasonably strict construction.[16] The grant of a principal power will carry with it such necessary incidental powers as are requisite to effectuate it. In ac-

solidation is prohibited by the laws. New York Consol. Laws (1917), c. 59, § 52; Gere v. New York, &c. R. Co., 19 Abb. N. Cas. 193.

[15] Oregon R., &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837. In announcing the opinion of the court in this case Mr. Justice Miller said: "Another important consideration to be observed, peculiarly applicable to the acts of corporations formed by the corporations themselves, declaring what business they are about to pursue, and the powers which they purpose to exercise in carrying it on, is that while the thing to be done may be lawful, in a general way, there are and must be limitations upon the means by which it is to be done or the purpose carried out, which the articles cannot remove or violate. A company might be authorized by its articles to establish a large manufactory in a particular locality, and might be held to be a valid incorporation with sufficient powers to prosecute the business described; but such articles although mentioning the particular place, would not empower the company in the exercise of the power thus conferred to carry on a business injurious to the health or comfort of those living in that vicinity. Instances might be multiplied in which powers described in general terms as belonging to the objects of the parties who thus become incorporated would be valid; but the corporation, in carrying out this general purpose, would not be authorized to exercise the powers necessary for so doing in any mode which the law of the state would not justify in any private persons or any unincorporated body. The manner in which these powers shall be exercised, and their subjection to the restraint of the general laws of the state and its general principles of public policy, are not in any sense enlarged by inserting in the articles of association the authority to depart therefrom.

[16] See State v. Richmond, &c. R. Co., 72 N. Car. 634; Hampe v. Pittsburg, &c. Co., 165 Pa. St. 468, 30 Atl. 931.

cordance with this principle a grant of power wherein is manifested the intention of the legislature to enable a railroad company to secure a continuous line of transportation and to make contracts with other railroad companies or with steamboat lines to effect that object authorizes the railroad corporation to contract with a steamboat line and confers authority to execute and accept a lease.[17] The express grant of a right to lease a railroad authorizes the transfer by way of lease of all such incidents and appurtenances as are reasonably necessary to the operation of the demised road.[18] This must, on principle, be the correct rule. If the legislature authorizes the execution of a lease it is necessarily implied that the lease shall be an effective one, and in order to make it effective it is essential that all incidents necessary to a proper operation of the road shall pass to the lessee. The legislative sanction implies the authority to properly operate the leased road, and so, too, the public welfare demands that it shall be properly operated. It must be true that necessary incidents pass to the lessee, since the lessor, by executing a lease under legislative sanction, parts with all control and the lessee must operate the road or else it must cease to do business. That it must cease to do business cannot be affirmed, since the cessation of business would be the defeat of the legislative purpose in creating the corporation and authorizing it to lease its road.

§ 499 (436). **What is included in the authority to execute a lease.**—In a preceding paragraph of this chapter we said that authority to execute a lease carried such incidental powers as

[17] Green Bay, &c. R. Co. v. Union, &c. Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413, 13 Am. & Eng. R. Cas. 658; Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279, 9 Am. & Eng. R. Cas. 558; Pittsburg, &c. R. Co. v. Keokuk, &c. R. Co., 131 U. S. 371, 9 Sup. Ct. 770, 38 L. ed. 157, 39 Am. & Eng. R. Cas. 213. See also Huntting v. Hartford, &c. R. Co., 73 Conn. 179, 46 Atl. 824; Day v. Ogdensburgh, &c. R. Co., 107 N. Y. 129, 13 N. E. 765; Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648; Hill v. Atlantic, &c. R. Co., 143 N. Car. 539, 55 S. F. 854, 9 L. R. A. (N. S.) 606 (authority to "farm out" right of transportation).

[18] Simpson v. Denison, 10 Hare 51, 16 Jurist 828.

were necessary to make the lease effective, and this principle authorizes the conclusion that authority to lease, given in general and unrestricted terms, confers authority to assign a lease or accept an assignment. The matter of form is of comparatively little importance, for the courts will look through the form to the substance. Upon this principle it is held that a railroad company which is authorized to take a lease of another line may take an assignment of such a lease from the lessees of such other line,[19] and that giving authority to one company to lease the property of another certain company authorizes the latter to make the lease.[20]

§ 500 (437). **Scope of authority to lease.**—Some of the cases give a very wide and liberal construction to the express grant of authority to execute a lease. In some of the cases very broad language is used, broader than true principle warrants. While it is true that incidents pass by the grant of a principal power, purely collateral powers do not. The courts hold that under a statute giving a railroad company power to lease, maintain and operate another railroad upon such terms and conditions as may be agreed upon between the companies respectively, the lessee

[19] Stewart v Long Island R. Co., 102 N. Y. 601, 8 N. E. 200, 55 Am. Rep. 844. Where a railroad is sold under foreclosure a new corporation acquiring all of the property of the old except the leased line, not included in the transfer, but of which, nevertheless, the new company actually takes possession and operates, the new company must be regarded as the assignee of the lease, and, by virtue of its possession, is liable for the rent which in this case was the interest on first mortgage bonds, which the original lessee had agreed to pay; and the succeeding company is liable as long as it occupies the road. Frank v. New York, &c. R. Co., 122 N. Y. 197, 23 N. E. 332; Jacksonville, &c. R. Co. v. Louisville, &c. R. Co., 47 Ill. App. 414, 150 Ill. 480, 37 N. E. 924. A railroad company having issued to plaintiff a perpetual pass over its road in consideration of a right of way given it through plaintiff's land, subsequently sold its road, the purchaser assuming none of its debts or obligations, and not using the right of way. Held, that the purchaser was not bound to honor plaintiff's pass. Dickey v. Kansas City, &c. R. Co., 122 Mo. 223, 26 S. W. 685.

[20] Huntting v. Hartford St. R. Co., 73 Conn. 179, 181, 46 Atl. 824; Pinkerton v Pennsylvania Traction Co. 193 Pa. St. 229, 44 Atl. 284.

company may guarantee the payment of interest coupons of bonds issued by the lessor company, which are equal in amount and times of payment to the reserved rent.[21] The general authority to lease implies the incidental authority to agree upon the consideration, terms and conditions of the lease, and hence the contracting companies may agree that part or all of the consideration agreed upon may be yielded by guarantying payments of bonds.

§ 501 (438). **Statutes conferring power to lease must be strictly followed.**—It is held that statutes conferring power upon a railroad company to lease its road must be strictly followed,[22] but we suppose that if all the material requirements of the statute are substantially complied with the lease would not be void. The power to lease is, however, not favored, and a material departure from the provisions of the statute would make the lease ineffective. Where conditions are imposed by the statute they must be complied with or the lease may be avoided.[23]

[21] Eastern Townships Bank v. St. Johnsbury, &c. R. Co., 40 Fed. 423, 40 Am. & R. Cas. 566; Day v. Ogdensburg, &c. R. Co., 107 N. Y. 129, 13 N. E. 765. An agreement by the lessor company, guaranteeing to the lessee a sum of money equal to ten per cent. of the latter's capital stock, to be paid in equal quarterly instalments, and an unsigned clause printed on the margin of such stock, in pursuance of the agreement, that lessor "has agreed to pay to (the lessee) an amount equal to ten per cent. per annum on the capital stock," do not constitute any contract to which a holder of such stock is a party or privy. Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. An agreement by a railroad company, in leasing property and franchises from another company, to pay as rent the interest on certain liabilities of the lessor during term of the lease, and to pay the principal of such liabilities at the expiration of the lease is not ultra vires. Gere v. New York, & R. Co., 19 Abb. N. Cas. (N. Y.) 193.

[22] In Humphreys v St. Louis, &c. R. Co., 37 Fed. 307, the president of the company signed a certificate that a majority of the shareholders had assented to the lease, and it was evidence of the assent of all shareholders and was a compliance with the statutory requirement that the assent of a majority of the shareholders to the execution of the lease should be given in writing.

[23] Peters v. Lincoln, &c. R. Co., 14 Fed. 319; Peters v. Lincoln, &c. R. Co., 12 Fed. 513; Kent, &c. R. Co. v. London, &c. Co., L. R. 3 Ch. R. 656.

§ 502 (439). **Consent of stockholders—Statutory requirement must be obeyed.**—Many of the states make the consent of a designated number of the stockholders requisite to the effective execution of a lease.[24] Where the mode of assenting is prescribed by statute there must be a substantial compliance with its requirements. It has been decided that where the statute requires that "no lease shall be perfected until a meeting of the stockholders shall have been called by the directors," and the "holders of at least two-thirds of the stock," voting "at such meeting, shall have assented thereto," the requirement that the assent shall be given by voting at a stockholders' meeting is of the essence, and the assent of the individual stockholders given otherwise than in such meeting is of no effect.[25]

§ 503 (440). **Concurrence of stockholders necessary.**—We regard the concurrence of the stockholders as essential, ordinarily at least, to the validity of the lease of a railroad and its equipment. There is, however, conflict of authority upon this question which cannot be reconciled. It is held in a New York case that where a general power to lease its road is given by the law of its incorporation to a railroad company whose directors are charged with the government and direction of its affairs, a contract for such leasing is within the original power of the board of directors, and may be exercised without the concurrence of the stockholders.[26] We cannot assent to the doctrine

[24] A certificate signed by the president, who owns nearly all the stock, to the effect that a majority of the stockholders have assented to the lease is sufficient evidence of a compliance with the statute of Missouri, which requires the majority of the stockholders to give their assent in writing. Humphreys v. St. Louis, &c. R. Co., 37 Fed. 307. See Peters v. Lincoln, &c. R. Co., 12 Fed. 513.

[25] Peters v. Lincoln, &c. R. Co., 12 Fed. 513. See Smith v. Hurd, 12 Metc. (Mass.) 371; Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. ed. 473. See generally as to such assent and waiver or estoppel, Rogers v. Nashville, &c. R. Co., 91 Fed. 299; St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738; Boston, &c. R. Co. v. Graham, 179 Mass. 62, 60 N. E. 405; Continental Ins. Co. v. New York, &c. R. Co., 103 App. Div. 282, 93 N. Y. S. 27; Latimer v. Richmond, &c. R. Co., 39 S. Car. 44, 17 S. E. 258.

[26] Beveridge v. New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. It was held in the

of the case referred to. The execution of a lease of the entire road is a matter in its nature fundamental and organic, and where there is a mere grant of authority to execute a lease, we think that the consent of the stockholders is necessary, but if the power is by statute lodged in the governing board then, of course, the concurrence of the stockholders is not required. The New York case to which reference has just been made,[27] does not, we venture to say with due respect for the able court by which the case was decided, correctly express the general rule of law. We do not believe that the board of directors is, in name or in power, the corporation, for as we have elsewhere shown,[28] the board is the representative of the corporation. The courts do certainly apply to corporate directors the rule respondeat superior, and this is a recognition of the fact that they are the mere agents of the corporation.[29] Their powers to

case cited that an agreement on the part of the lessor company, made in good faith and on account of the financial embarrassment of the lessee, to reduce the amount of rental under the lease, is within the powers of the directors. We think that some of the statements in the case above cited, and in the cases of Leslie v. Lorillard, 110 N. Y. 536, 18 N. E. 363, and Hoyt v. Thomson, 19 N. Y. 216, go much too far. We do not believe that merely conferring upon the board of directors the power to manage corporate affairs constitutes the board the corporation or invests it with power to make fundamental or organic changes in the constitution of the corporation. If it can be said that the statute vests the whole and entire power of conducting the corporate business in the board of directors, including that of radically changing the corporate objects, then it may properly be held that a lease of the whole road may be made without the concurrence or assent of the stockholders, but if the power is to manage ordinary corporate affairs, we think the assent of the stockholders is necessary.

[27] Beveridge v. New York, &c. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648. See also Dickinson v. Consolidated Trac. Co., 114 Fed. 232.

[28] Ante, §§ 277, 278, 290, 293, 295.

[29] The New York cases assert the doctrine stated in the text. Abbott v. American Hard Rubber Co., 33 Barb. (N. Y.) 578; Cumberland, &c. Co. v Sherman, 30 Barb. (N. Y.) 553; Metropolitan, &c. Co. v. Manhattan, &c. Co., 11 Daly (N. Y.) 377, 15 Am. & Eng. R. Cas. 1; Twin-Lick &c. Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; Branch Bank v. Collins, 7 Ala. 95; Rollins v. Clay, 33 Maine 132; Brokaw v. New Jersey,

a great extent are delegated and not original powers. Doubtless the directors do acquire power from the corporate charter, but not such power as is required to make an organic and fundamental change in the objects, and purposes of a corporation.[30] The object of the formation of a railroad company is to itself operate the road and not to lease to another company and thereby cease to conduct the business for which the corporation was organized and assume the position of a landlord. The effect of a railroad lease is an organic change. The law forbids the leasing of a railroad, except where the power is given by express legislative enactment, and one of the grounds upon which this rule of law rests is that the execution of a lease is an act fundamental and organic in its nature.[31] In granting authority to lease, the legislature grants authority to radically change the character of corporate business, rights and liabili-

&c. Co., 32 N. J. L. 328, 90 Am. Dec. 659; Simons v. Vulcan Oil, &c. Co., 61 Pa. St. 202, 100 Am. Dec. 628; Bank of Middlebury v. Rutland, &c. Co., 30 Vt. 159; Stark Bank v. United States, &c. Co., 34 Vt. 144; State v. Smith, 48 Vt. 266; Lindley Company Law (5th ed.) 155; Burmester v. Norris, 6 Exch. 796; Colman v. Eastern, &c. R. Co., 10 Beav. 1; Clay v. Rufford, 19 Eng. L. & E. 350.

[30] Railroad Co. v. Allerton, 18 Wall. (U. S.) 233, 21 L. ed. 902; Burke v. Smith, 16 Wall. (U. S.) 390, 21 L. ed. 361; Cass v. Manchester, &c. R. Co., 9 Fed. 640; Bank v. St. John, 25 Ala. 566; Marlborough, &c. Co. v. Smith, 2 Conn. 579; Alford v. Miller, 32 Conn. 543; Penobscot, &c. R. Co. v. Dunn, 39 Maine 587; Gill v. Balis, 72 Mo. 424; White Mountain, &c. Co. v. Eastman, 34 N. H. 124; Bedford, &c. Co. v. Bowser, 48 Pa. St. 29; State v. Chamber of Commerce, 20 Wis. 68. In Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692, the court held that a lease does involve a franchise, and that it could not be executed by the board of directors under a statute providing that no contract shall be made "involving the franchise of said road," without the consent of the stockholders. See Kersey, &c. Co. v. Oil Creek, &c. R., 12 Phila. (Pa.) 374; Bedford, &c. R. Co. v. Bowser, 48 Pa. St. 29, 37; Penobscot, &c. R. Co. v. Dunn, 39 Maine 587, 601. See also Rogers v. Nashville, &c. R. Co., 91 Fed. 299, 322; Waldoborough v. Knox &c. R. Co., 84 Maine 469, 24 Atl. 942.

[31] If the power to lease were an ordinary corporate power it would not be necessary to enact a statute conferring the power, but a statute is necessary because the power is in its nature fundamental and organic. Thomas v. West Jersey, &c. R. Co., 101 U. S. 71, 25 L. ed. 950, and cases cited.

ties, and it seems to us that the directors must have the concurrence of the stockholders. We do not mean to say that the stockholders can directly execute a lease, but what we mean is that the directors cannot execute a lease without the concurrence of the stockholders. The directors must, as we believe, formally execute the contract, and must directly represent and act for the corporation in making it,[32] but they must also have the assent of the stockholders. Where, as we have elsewhere remarked, the board of trustees, or the board of directors is incorporated there is reason for a different rule from that which we have here stated to be the sound one. Incidental or ordinary corporate powers may, as a rule, be exercised by the board of directors without any interference on the part of the stockholders, and a contract for the right to use part of a railroad may, perhaps, be regarded as an ordinary corporate contract,[33] but a lease for a long period of years vesting entire and exclusive possession and control in another corporation is essentially different from trackage, traffic, or other contracts of a similar nature.

§ 504 (441). **What number of stockholders must assent to the lease.**—Where the statute designates the number of stockholders that must assent to a lease in order to render it effective there is no difficulty, for it is clear that the assent of the prescribed number will make the lease effective, although the number may be less than the whole number of stockholders. But where no number is designated by the statute, and a general authority to lease is granted there is difficulty. Some of the courts hold that where a general authority is granted to execute a lease, the lease is not effective unless the stockhold-

[32] Ante, § 195.

[33] Green Bay, &c. R. Co. v. Union, &c. Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413. See York, &c. R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27; Pearce v. Madison, &c. R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Davis v. Old Colony, &c. R. Co., 131 Mass. 258, 41 Am. Rep. 221. See generally Eastern, &c. R. Co. v. Hawkes, 5 H. L. Cas. 331, 371-381; Ashbury, &c. Co. v. Riche, L. R. 7 H. L. 653; MacGregor v. Dover, &c. R. Co., 18 Q. B. 618; East Anglian, &c. R. Co. v. Eastern Counties R. Co., 11 C. B. 775.

ers unanimously assent to its execution.[34] Other courts hold that where there is general authority to execute the lease and no provision is made as to the number that must assent, a majority may authorize the execution of the lease.[35] It seems to us that where the lease transfers the entire road for a long term of years the consent of all the stockholders is required unless the statute otherwise provides. The general rule is that after the shareholders have entered into a contract among themselves, under legislative sanction, and have made investments and expended their money in execution of the plan agreed upon, the plan cannot, even by virtue of legislative enactment, be radically changed by the act of a bare majority. A lease does work a radical change in many respects, notably in the respect that the character of the stockholders' investment is radically altered, for the lease places them substantially in the position of a landlord whose income is derived from rents, whereas the income of a stockholder is derived from the profits of the road. There is, however, reason for a different conclusion from that which we favor. A lease for a limited period is not the same thing as a sale, but in cases where the term is a long one it is not very different in its practical consequences from a sale; for it yields possession and control to the lessee, and takes the entire operation and control from the lessor, although it does not terminate the lessor's ownership. But while the ownership remains, its rights and incidents for the term fixed by the lease are entirely different from those which attach to the ownership of a railroad where there is no lease.

§ 505 (442). **Consent of stockholders—Waiver of objections, formal execution of lease.**—The provisions of a statute requiring the consent of the stockholders confer a personal privilege

[34] Mills v. Central R. Co., 41 N. J. Eq. 1; Zabriskie v. Hackensack, &c. R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617. See Boston, &c. R. Co. v. New York, &c. R. Co., 13 R. I. 260.

[35] Waldoborough v. Knox, &c. R. Co., 84 Maine 469, 24 Atl. 942. See also Dickinson v. Consolidated Traction Co., 114 Fed. 232, and compare Mahen v. Gulf, &c. Co., 173 Ala. 257, 55 So. 607, 35 L. R. A. (N. S.) 396, and note; Cohen v. Bigstone, &c. Iron Co., 111 Va. 468, 69 S. E. 359, Ann. Cas. 1912A, 203, and note.

which it seems they may waive by acquiescence in a lease executed without their consent.[36] The fact that the board of directors agree upon the terms of the lease before submitting it to the stockholders does not invalidate the lease where the stockholders assent to its execution.[37] Where no special mode for executing a lease is provided by statute, an authorized lease executed in the usual form, or in such a form as to express the contract of the parties will be sufficient.

§ 506 (443). Lease where parties are corporations of different states.—As appears from what has been said in a preceding section, and as is indeed clear upon general principles, in order to make an effective lease, it is necessary that there should be power in the one company to execute a lease and in the other to accept it. If the company to which the lease is made has no power to accept a lease, the lease is ineffective. This principle governs cases where leases are executed by corporations of different states. In a very ably reasoned opinion it was affirmed by the supreme court of the United States that a lease executed by an Illinois railroad company to an Indiana company was not valid for the reason that the Indiana company was not authorized by statute to accept a lease from the Illinois corporation.[38]

§ 507 (444). Authority to execute lease has no extraterritorial effect.—State laws, as well known, have no force or effect outside of the limits of the state. Laws conferring authority upon a corporation to do prescribed acts, operate only upon state corporations. We do not mean, of course, that a state has no control over foreign corporations doing business within its borders; our meaning is that its laws conferring authority upon

[36] St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 33 Fed. 440. The lease had been suffered to stand for seventeen years, and the court held the stockholders barred by laches. See also Latimer v. Richmond, &c. R. Co., 39 S. Car. 44, 17 S. E. 258; Archer v. Terre Haute, &c. R. Co., 102 Ill. 493; Boston, &c. R. Co. v. Boston, &c. R. Co., 65 N. H. 393, 23 Atl. 529.

[37] Jones v. Concord, &c. R. Co., 67 N. H. 234, 30 Atl. 614, 68 Am. St. 650.

[38] St. Louis, &c. R. Co. v. Terre Haute, &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738, 6 Lewis' Am. R. & Corp. 439.

a corporation do not carry that authority into other states. The principle stated requires the conclusion that a state cannot, by chartering a corporation, confer upon it a legal right to act within the jurisdiction of another state,[39] and that authority granted to a corporation to lease its road cannot have any effect outside of the state giving such authority.[40] The authority does not extend beyond the state limits. Upon the principle stated, it was held that the charter granted by the state of Kansas to a railroad corporation formed under its laws, conferred upon such corporation no power to lease that part of its road lying in the Indian territory; and that, in the absence of a grant of power to lease contained in the act of congress authorizing the building of that part of the road, a lease of its whole road would be invalid as to the part lying in the territory.[41] And, ordinarily, a statute which provides that railroad companies may lease the property of other railroad companies refer only to domestic corporations, and does not authorize a lease to a foreign corporation.[42] But it has been held that a statute providing for a forfeiture of the franchise and all charter rights of any company acquired under a lease not made in conformity with the statute is applicable to a foreign company operating in the state under a lease,[43] and that a domestic company, authorized to lease, may take a lease from a foreign company if the foreign company had authority to make the lease.[44]

[39] 3 Thomp. Corp. (2nd ed.) § 2485. The law of New Jersey prohibits the lease of a railroad within the state to a foreign corporation, and it is held that under this statute a lease to a domestic corporation whose stock is owned by a foreign corporation is invalid. Stockton v. Central R. Co., 50 N. J. Eq. 52, 24 Atl. 964.

[40] Oregon R. &c. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837.

[41] Briscoe v. Southern Kansas R. Co., 40 Fed. 273, 40 Am. & Eng. R. Cas. 599.

[42] McCabe v. Maysville, &c. R. Co., 112 Ky. 861, 66 S. W. 1054; Archer v. Terre Haute, &c. R. Co., 102 Ill. 493; Van Steuben v. Central R. Co., 178 Pa. St. 367, 35 Atl. 922; Howard v. Chesapeake, &c. R. Co., 11 App. Cas. (D. C.) 300.

[43] Louisiana &c. R. Co. v. State, 75 Ark. 435, 88 S. W. 559.

[44] Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129, 13 N. E. 765. See also Ackerman v. Cincinnati &c. R. Co., 143 Mich. 58, 106 N. W. 558. And a consolidated company formed by consolidation of a foreign company with a domestic company has been held a

§ 508 (445). Rights of foreign lessors.—The rights of a corporation of one state that becomes the lessee of a railroad of another state are such as are conferred by the laws of the state from which the lessor received its charter.[45] This must necessarily be true, for the lessor derives all its powers from the state in which it was incorporated, and, of course, can grant no other rights than such as were conferred upon it by the statute to which it owes its existence and powers. What the lessor was required to do by the state which created it must be done by its lessee.

§ 509 (446). Leases to connecting lines.—In some of the states the statutes grant a right to lease to connecting lines. Where there is such a grant, then, upon the principle that statutes granting authority to execute a lease are to be strictly construed, it is implied that there is no authority to lease to other lines. It is held that under such a statute it is not essential to the validity of a lease that the leased road shall be an extension from either terminus of the main line, but it may be merely a collateral branch, forming a continuous road, by way of the junction, to either terminus of such main line, in as direct a route as the average railroad.[46] The pivotal question under such statutes is whether the

domestic company authorized to take a lease from another company. Peters v. Boston &c. R. Co., 114 Mass. 127.

[45] McCandless v. Richmond &c. R. Co., 38 S. Car. 103, 16 S. E. 429, 18 L. R. A. 440, 61 Am. & Eng. R. Cas. 524.

[46] Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 960, 36 L. ed. 755, construing the Kentucky Act of January 22, 1858. The court says: "The main line of the lessee's road extends in a northeasterly direction from Louisville to Cincinnati. At Anchorage, about twelve miles east of Louisville, the Shelbyville road touches it. At the time of the lease the latter road was completed from the place of junction to Shelbyville, a distance of about eighteen miles, the general course being a trifle south of east. There was a physical connection between the two roads at Anchorage, the latter being the western terminus of the Shelbyville road. From this point the main line of the lessee road extends northeasterly, and the Shelbyville road southeasterly, making two forks of the letter 'V'. Shelbyville is nearly due east from Louisville, and the Shelbyville road, together with twelve miles of the lessee's road, makes a continuous line between Shelbyville and Louisville in a route about as straight as the average railroad. But Anchorage is not a terminus of the lessee road, and the

line to which the lease is executed is or is not a connecting line.[47]

§ 510 (447). Lease to competing lines—Effect of statutes prohibiting.—Many of the states now provide by general laws for the transfer by lease, of a railroad to another corporation which does not own a parallel or competing line.[48] The effect of these statutes is, generally speaking, to confer power to lease to any other than competing or rival lines, so that the validity of the lease depends upon whether the lines are rival or competing lines within the meaning of the statute. Such statutes are to be strictly construed; as some of the courts say, a railroad company is required to "be able to point to the exact provisions granting authority" to make any given lease.[49] It is clear from the trend

contention is that, under the statute, the leased line must touch one of the termini of the lessee's road so as to make an extension of it. * * * We think it is enough that by the lease the connected roads form a continuous line, and it is not essential that the leased line be an extension from either terminus of the lessee's road. The evil which was intended to be guarded against by this limitation was the placing of parallel and competing roads under one management and the control by one company of the general railroad affairs of the state through the leasing of roads remote from its own and with which it has no physical or direct business connection. It was not intended to prevent a company with a long road, like the lessee company, from leasing branches by means of which it establishes continuous lines from their several termini to each of its own."

[47] Text quoted in Georgia R. &c. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315, 320. See also Chesapeake &c. R. Co. v. Howard, 178 U. S. 153, 20 Sup. Ct. 880, 44 L. ed. 1015; Hampe v. Pittsburgh &c. Traction Co., 165 Pa. St. 468, 30 Atl. 931; Kaufman v. Pittsburgh &c. R. Co., 217 Pa. 599, 66 Atl. 1108. There is some difference of opinion as to what is a continuous or connecting line, and the following cases seem to require more than several of those cited in the last preceding note. State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164; State v. Vanderbilt, 37 Ohio St. 590.

[48] A line of railroad may be competing within the meaning of a statute which forbids railroads companies from purchasing or leasing a competing line, though the competing points are reached by trackage arrangements with other lines. Hafer v. Cincinnati, H. & D. R. Co., (Ohio Com. Pl.) 29 Wkly. Law Bul. 68.

[49] Pennsylvania &c. R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164. A railroad corporation whose power of eminent domain necessary to the construction

of the judicial decisions that as in favor of the power to lease, there is no elasticity in such statutes. A statute authorizing a railroad to lease its track to another company, when the respective lines "are continuous or connected," has been held to authorize a lease only when the two roads form one continuous line, between points not otherwise connected by either separately,[50] over which, according to some authorities, freight and passengers may be carried without transfer,[51] and it will usually be construed as not permitting a lease of parallel and competing lines.[52] The principle asserted by the courts in the cases referred to, as in many others, forbids transfers to rival lines except where the statute clearly and unequivocally confers the right to make such transfers, but where there is a valid statutory power the transfer to rival lines is valid.[53] It is held that a statute which forbids

of a branch road conferred by charter is extinct by reason of non-user during the term prescribed for its exercise cannot purchase or lease the branch road subsequently built, on the foundation of the right of eminent domain which is extinct. Such lease is therefore ultra vires. Camden &c. R. Co. v. May's Landing &c. R. Co., 48 N. J. L. 530, 7 Atl. 523. It was held that neither Rev. St. Ohio, § 3300, providing that any railroad may lease or purchase the road of another company, not competing, nor § 3409, providing that a company, not able to complete the construction of its line, may transfer its property to another, which transfer "shall include all work done, together with all rights, privileges and easements," confers authority to sell and transfer a company's contracts of subscription payable on completion of the road. Toledo &c. R. Co. v. Hinsdale, 45 Ohio 556, 15 N. E. 665.

[50] State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St. 164; Smith v. Reading City &c. R. Co., 13 Pa. Co. Ct. 49. It was held in Pennsylvania that two lines which cannot be operated together without a transfer of passengers and freight do not form a continuous line." Hampe v. Mt. Oliver I. R. Co., (Pa. Com. Pl.) 24 Pittsb. Leg. J. (N. S.) 330. But this case has been reversed. Hampe v. Pittsburgh &c. Co., 165 Pa. St. 468, 30 Atl. 931.

[51] State v. Vanderbilt, 37 Ohio St. 590.

[52] See Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 388. See also Pearsall v. Great Northern R. Co., 161 U. S. 646, 16 Sup. Ct. 709, 40 L. ed. 838.

[53] In the case of the Catawissa &c. R. Co. v. Philadelphia &c. R. Co., 14 Pa. Co. 280, it was held that where one railroad company acquired, by virtue of a valid lease, the right to the railroad of another company, the former, in building a line parallel with the road acquired, did not violate the constitutional provision, prohibiting one company from ac-

railroad companies to purchase or lease competing lines renders void a lease of a railroad by another, which reaches competing points by means of trackage arrangements with other lines.[54]

§ 511 (448). Effect of executing unauthorized lease.—The highest authorities generally affirm that an unauthorized lease which the company has no power to make is void,[55] but some of the cases seem to hold that rent provided for by such a lease may be recovered where the road is operated under the lease and benefit is actually received by the company which has possession and use of the road. Our opinion, elsewhere expressed and elaborated, is that such a lease is void[56] and no recovery can be had

quiring the rights of a parallel and competing road. In the course of the opinion, it was said: "Was it in any sense a competing road the acquisition of which is prohibited by Article XVII, of the constitution? The object of the prohibition was clearly to prevent one independent corporation from acquiring the possession of the road of another company which is operating a competing line. It was to prevent the buying up of one railroad corporation of a competing line and the establishment thereby of a monopoly. The building of one road by another for the purpose of facilitating and enlarging its own business, can by no fair process of reasoning be contended to be within the constitutional prohibition, unless, indeed, a man be said to compete with himself, when he enlarges his own business or enters into a new one."

[54] Hafer v. Cincinnati &c. R. Co., (Ohio Com. Pls. 1893) 29 Weekly Law Bul. 68. But see Hancock v. Louisville &c. R. Co., 145 U. S. 409, 12 Sup. Ct. 969, 36 L. ed. 755; Black v. Delaware &c. Canal Co., 22 N. J. Eq. 402. In the case of Louisville &c. R. Co. v. Commonwealth, 97 Ky. 672, 31 S. W. 476, it was held that a statute authorizing a railroad company to purchase and own a road constructed by another company did not confer authority to purchase a competing line in violation of a constitutional provision adopted subsequent to the enactment of the statute prohibiting railroad companies from purchasing competing lines. See Missouri Pacific &c. Co. v. Sidell, 67 Fed. 464; State v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271; Chesapeake &c. R. Co. v. Howard, 14 App. Cas. (D. C.) 262. See generally as to what are parallel or competing lines, note in Ann. Cas. 1913A, 638.

[55] We think that principle and authority require the conclusion that the unauthorized lease by which a railroad seeks to turn over its entire road to another is ultra vires and void, and may be set aside at the suit of a dissenting stockholder. Ante, §§ 423, 428.

[56] State v. Atchison &c. R. Co., 24 Nebr. 143, 38 N. W. 43, 8 Am. St.

upon it, but that in the proper case there may perhaps be a recovery upon an implied contract. Some of the courts hold that the abandonment of its road to the lessee is sufficient ground for the institution of quo warranto proceedings on the part of the state.[57]

§ 512 (449). **Lease—Construction.**—The approved doctrine seems to be that the terms of a lease made under legislative authority will be strictly construed, and their meaning will not be extended by implication.[58] We can see no reason, however, for applying to railroad leases any other rules of construction than those which govern in the construction of similar contracts exe-

164. An Illinois railroad corporation is bound to take notice that its lease to an Indiana corporation is ultra vires of the latter, so that where the lease becomes an executed contract by the delivery of the leased property the lessor is in pari delicto with the lessee, and cannot maintain a suit to recover possession. So far as the lessor corporation can be regarded as representing its non-consenting stockholders in their efforts to set aside the lease, it and they are barred by laches in failing to bring an action to set it aside for seventeen years, and by accepting the rentals during that time. St. Louis &c. R. Co. v. Terre Haute &c. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738. In Cox v. Terre Haute &c. R. Co., 133 Fed. 371, it is held that a lease void as against public policy can not be the foundation for recovery of rental. But see Camden &c. R. Co. v. May's Landing &c. R. Co., 48 N. J. L. 530, 7 Atl. 523; Woodruff v. Erie R. Co., 93 N. Y. 609, 3 Thomp. Corp. (2nd ed.), § 2494, and see post, § 526, as to recovery of rent.

57 Board Comrs. v. Lafayette &c. R. Co., 50 Ind. 85. But, it is held that a contract whereby another railroad is permitted to use a track jointly with a lessor, in such manner as not to interfere with the lessor's use thereof, is valid unless expressly forbidden. Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309. Such a contract is not within the rule forbidding a railroad company from transferring property essential to the performance of its corporate duties, since the company does not by permitting another company to make a limited and qualified use of its tracks, disable itself from performing the duties imposed upon it by law.

58 Chicago &c. R. Co. v. Denver &c. R. Co., 143 U. S. 596, 12 Sup. Ct. 479, 36 L. ed. 277. For contract held to be a lease, and construction thereof, see Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261, distinguishing St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607. See also Terre Haute &c. R. Co. v. Cox, 102 Fed. 825; Continental Ins. Co. v. New York &c. R. Co., 187 N. Y. 225, 79 N. E. 1026.

cuted under statutory authority. The terms must, of course, be such as the statute authorizes, but, within the limits of the power conferred, the contracting parties may agree upon such terms and conditions as they deem proper, provided, of course, no rule of law is violated.

§ 513 (450) **Lease—Dependent and independent contracts.**—The question whether a contract relating to a lease and in a measure connected with it is dependent or independent, is sometimes an important one, for a lease may be void and the contract relating to the same subject, executed by the same parties, may be valid.[59] If the contract is independent of the lease it may be valid, although the lease is void. Reference in the independent contract to the lease does not necessarily make the lease part of it, but, of course, the reference may be such as to incorporate the lease in the contract, and whether it does or not is to be determined in each particular case from the language employed in the instrument.[60] Whether the contract is or is not a dependent one depends, of course, upon the language employed by the parties, and the ordinary doctrines of law, applicable to the subject of dependent and independent contract provisions govern cases in which the construction of such leases are involved and supply the rules of decision. In an Illinois case, the agreement in the form of a lease was that the railroad company should deliver to the

[59] Pittsburgh &c. R. Co. v. Keokuk &c. Co., 155 U. S. 156, 15 Sup. Ct. 42, 39 L. ed. 106; Pittsburgh &c. R. Co. v. Keokuk &c. Co, 131 U. S. 371, 7 Sup. Ct. 770, 33 L. ed. 157, 39 Am. & Eng. R. Cas. 213. See 1 Elliott Cont., § 1576.

[60] Pittsburgh &c. R. Co. v. Keokuk &c. Co., 131 U. S. 371, 9 Sup. Ct. 770, 39 Am. & Eng. R. Cas. 213, 33 L. ed. 157. Ordinarily the reference would make the lease part of the contract. The maximum is, "Instruments to which reference is made in another instrument have the same effect and operation as if they were inserted in the clause referring to them." In applying this ancient and well-settled rule in the case of Fitzmaurice v. Bayley, 9 H. L. Cases 78, Compton, J., said: "By referring in a document signed by the party to another document, the person so signing in effect signs a document containing the terms of the one referred to." The rule applies to references made by acts of parliament. North British &c. Co. v. Tod, 12 Cl. & Fin. 722; Ware v. Regent's Canal Co., 28 L. J. Ch. 153; Galwey v. Baker, 5 Cl. & Fin. 157; Brain v. Harris, 10 Exch. 908; Reg. v. Caledonia R. C. 16 Q. B. 19.

other party a designated quantity of grain, which the other should accept and store, and it was held that the promises to deliver and to accept and store were dependent promises.[61] Covenants in leases executed by railroad companies are construed and enforced as are covenants in leases executed by natural persons, that is, the same general principles of law govern in such cases,[62] but the nature of the business of such companies and the limited powers with which they are invested, necessarily render their leases different in some respects from those of natural persons. A reasonable construction is to be given covenants in railroad leases, and such covenants are held to require that to be done which "is reasonable and which would be so accounted by reasonable men."[63] In a New Hampshire case, the subject of covenants in leases executed by one railroad company to another is very fully discussed, and the effect of such covenants clearly stated.[64] Where the contracting parties have, by a settled course of dealing, given a construction to the lease, that construction will be

[61] Dunlap v. Chicago &c. R. Co., 151 Ill. 409, 33 N. E. 89; citing Hough v. Rawson, 17 Ill. 588; Porter v. Rose, 12 Johns. (N. Y.) 209, 7 Am. Dec. 306.

[62] Boston &c. R. Co. v. Boston &c. R. Co., 65 N H. 393, 23 Atl. 529, 51 Am. & Eng. R. Cas. 106. See Grand Trunk &c. R. Co. v. Chicago &c. R. Co., 141 Fed. 785.

[63] In the case of Catawissa &c. R. Co. v. Philadelphia &c. R. Co., 14 Pa. Co. Ct. 280, the lease contained a covenant that the lessee should maintain the leased road in good condition, operate it with reasonable care, and "use all proper and reasonable means to maintain and increase the business thereof." It was held that this covenant was not broken by the construction of a parallel road. The court said, inter alia: "The defendants are required to use all reasonable means to maintain and increase the business of the road. This means that they will do what is usually accounted reasonable, and what ought to be so accounted by reasonable men. It is difficult, perhaps impossible, to bring within the limits of a precise definition exactly what is required by an undertaking in such general terms. It can only be determined when questions arise in regard to the particular actions and conduct of the party, and their result." We agree with the court that the solution of the question generally depends upon the facts of the particular case, but it seems to us that a covenant such as that contained in the lease before the court prohibits the lessee from building a road parallel with that leased to it.

[64] Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529, 51 Am. & Eng. R. Cas. 106

upheld by the courts, unless it is in violation of the law or the clear words of the contract or infringes the rights of others. Thus, where a railroad company which has granted to another company the right to the joint use of its track and depots, allows the grantee and assignee of the latter to enter upon and continue in such possession and use, it is practically a construction of the power of the company to assign its rights under the contract.[65]

§ 514 (451). **Contract to permit use of track not necessarily a lease.**—A contract between two railroad companies wherein one company agrees to permit another company to use its tracks, station, buildings or the like, is not necessarily a lease within the meaning of the rule prohibiting a railroad company from transferring its property by way of lease. There is a distinction between a lease and a traffic, or trackage contract.[66] A lease transfers control from the lessor to the lessee, and the former is thereby disabled from performing the duties imposed upon it by law, whereas a contract granting the privilege of using tracks, station buildings and the like does not divest the company granting such use or control, nor disable it from discharging its corporate duties or exercising its corporate functions.[67] There is solid foundation

[65] Chicago &c. R. Co. v. Denver &c. R. Co., 46 Fed. 145. See also Columbus &c. R. Co. v. Pennsylvania Co., 143 Fed. 757. But compare Pere Marquette R. Co. v. Wabash R. Co., 141 Mich. 215, 104 N. W. 650.

[66] Ante, §§ 411, 412, 413, 414; Chicago &c. Co. v. Union Pac. Co., 47 Fed. 15; Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309, 51 Am. & Eng. R. Cas. 162. See Langly v. Railroad Co., 10 Gray (Mass.) 103; Humphreys v. St. Louis &c. R. Co., 37 Fed. 307. See also Coney Island &c. R. Co. v. Brooklyn Cable Co., 53 Hun 169, 6 N. Y. S. 108; South Carolina &c. R. Co. v. Carolina &c. R. Co., 93 Fed. 543; Archer v. Terre Haute &c. R. Co., 102 Ill. 493. But compare Central Trust Co. v. Colorado &c. R. Co., 89 Fed. 560. A contract wherein one company agrees to permit another company at the expense of the latter to connect with the main track of the former, the object being to facilitate an interchange of business is more than a mere revocable license. It is an enforceable contract founded on a valuable consideration. Louisville &c. R. Co. v. Kentucky &c. Co., 95 Ky. 550, 26 S. W. 532. See generally Kanawha &c. R. Co. v. Public Utilities Com., 96 Ohio St. 414, 117 N. E. 353; Philip A. Ryan Lumber Co. v. Ball (Tex. Civ. App.), 197 S. W. 1037.

[67] The reasoning upon which a denial of the right of a railroad company to transfer its property and franchises so as to disable itself to

for the distinction between a contract whereby one company simply permits use to be made of its railroad, and a contract whereby the one company transfers to the other its railroad through the instrumentality of a lease. The right to do such things as are reasonably necessary to the successful operation of a railroad is implied in the grant of a franchise to build and operate a railroad, and it may well be held in cases where the object to be attained advances the interests of the contracting companies and the contract which they enter into does not disable either from performing its corporate duties, that in making such a contract the companies have not exceeded the power conferred upon them. There is, it is obvious, no rule of public policy which forbids one company from granting to another a mere right to use tracks, depots or the like, so long as there is no unlawful discrimination or violation of the interstate commerce law or other governing statute. If, however, under the guise of a contract permitting one company to use the property of another, there should, in fact, be a transfer from one to the other, the contract would be ultra vires, and against public policy.

§ 515 (452). **Traffic contract—Not valid if it is in effect a lease.**—A traffic contract may be rightfully entered into, but, under the guise of a traffic contract, a railway company cannot, except where the statute authorizes it, turn over its road to another company. In other words, a railroad company cannot, under the form of a traffic contract, make a lease of its road, except where there is statutory authority to execute the lease.[68] If

perform its public duties is based does not, it is obvious apply to a contract whereby a railroad company lets another company into joint possession of part of its line for a term of years at an agreed rental; and such a contract is not, as between the parties, ultra vires, where such joint possession does not interfere with the present use of such line by the company that owns it. Chicago &c. R. Co. v. Union Pac. R. Co., 47 Fed. 15. It has been held that a contract whereby a railroad company is granted "the perpetual and free use" of the right of way of another railroad company, within a specified distance, means that the grantee of such privilege is to have, not merely the uninterrupted use of such right of way, but is to have it free of compensation. Alabama &c. R. Co. v. South &c. R. Co., 84 Ala. 570, 3 So. 286, 5 Am. St. 401.

[68] In the case of Nashua &c. R. Co. v. Boston &c., 164 Mass. 222, 41 N. E. 268, 49 Am. St. 454, the ques-

the professed traffic contract is, in fact, a lease, it is ultra vires, but where the contract is in the proper sense a traffic contract, then, as we believe, it may be effective.

§ 516 (453). **Contracts granting right to use—Effect and construction of.**—It is held that an agreement between two railroad companies, conferring on each the right to run its cars over the tracks of the other, each retaining absolute control over its road for all other purposes, confers no interest which can be assigned or leased.[69] It is obvious that such a contract cannot be regarded as a lease since there is nothing more than an agreement permitting one company to use the tracks of another, but it is difficult to determine just what the specific nature of the contract is and what are the rights of the parties. It is a contract for joint use, and the company owning the road does not fully part with possession or control, so that the rights and obligations of the parties are not the same as those of a lessor and lessee in an authorized lease. Some of the courts hold that an agreement by one railroad company that another, "and its assigns," may use one of its tracks on certain conditions, is a mere license and not a lease.[70] We incline to the opinion that where there is a valid

tion was stated but not decided. The court, however, referred to the cases of Burke v. Concord &c. R. Co., 61 N. H. 160, and Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529. In the first of the cases cited the court held that the joint manager of two roads both operated by one company under a contract had no right to use the joint funds in improving the road of the operating company and that the other company might recover it in a proper action. In support of this ruling the court cited Slater Woolen Co. v. Lamb, 143 Mass. 420, 9 N. E. 823; Central &c. Co. v. Pullman's &c. Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. ed. 55; Central Trust Co. v. Ohio &c. R. Co., 23 Fed. 306; Nims v. Mount Hermon &c., 160 Mass. 177, 35 N. E. 776, 22 L. R. A. 364, 39 Am. St. 467; L'Herbette v. Pittsfield &c. Bank, 162 Mass. 137, 38 N. E. 368, 44 Am. St. 354; Manchester &c. R. Co. v. Concord &c. R. Co., 66 N. H. 100, 20 Atl. 383, 9 L. R. A. 689, 49 Am. St. 582. See also Central Trust Co. v. Colorado &c. R. Co., 89 Fed. 560.

[69] Brooklyn Crosstown R. Co. v. Brooklyn City R. Co., 51 Hun 600, 3 N. Y. S. 901.

[70] Coney Island &c. R. Co. v. Brooklyn Cable Co., 53 Hun 169, 6 N. Y. S. 108. In a reported case the president of the plaintiff railroad company testified that the vice-president of the defendant railroad company promised that plaintiff should have, free of charge, full terminal

consideration for such an agreement it is not a mere revocable license but is an enforceable contract.[71] If there is a sufficient consideration for the agreement, we can see no reason why it should not be regarded as a contract in all that the term implies. If, however, there is no consideration the agreement may well be treated as a mere license. If there is nothing more than a license then there is reason for holding that the licensee cannot enjoy the privileges conferred by such agreement and at the same time confer the right to do so on other companies, since this would be to impose greater burdens on the licensor than the agreement contemplated.[72] We do not believe that there can be an assignment, even if there be a contract, where the original company also retains the right to make use of the right or privilege granted it, for the grant implies that the right to exercise the privilege is only conferred upon the company to which it is granted. The

facilities at the junction of the two roads. A director of plaintiff testified that it was assumed, rather than expressly agreed, that plaintiff should have such terminal facilities. Several officers of plaintiff testified that they had heard of no claim that said agreement had been made until about twenty years after the organization of plaintiff, when it was deprived of such terminal facilities. It appeared that the plaintiff company had been operated by defendant for five years, and that on being reorganized, it consented that a charge should be made for the use of the terminal facilities; that at a subsequent reorganization a higher charge was paid for eighteen months; and that two years later the charge was increased, and one payment made under protest. No action was ever taken by the directors of either company upon the subject. It was held, in an action for damages for severing the connection between the two companies, and depriving the plaintiff of such facilities, that the evidence justified a finding that the agreement was temporary and permissive only. Port Jervis &c. R. Co. v. New York &c. R. Co., 132 N. Y. 439, 30 N. E. 855. Where one railroad company has permission by parol to extend its track upon the right of way of another company for the purpose of making a connection, such permission is a mere license, and, although valuable improvements have been made, may be revoked at the will of the licensing company. Richmond &c. R. Co. v. Durham &c. R. Co., 104 N. Car. 658, 10 S. E. 659, 40 Am. & Eng. R. Cas. 488.

[71] Louisville &c. R. Co. v. Kentucky &c. R. Co., 95 Ky. 550, 26 S. W. 532.

[72] Coney Island &c. R. Co. v. Brooklyn Cable Co., 53 Hun 169, 6 N. Y. S. 108.

parties may, of course, provide for an assignment by the stipulations of their contract.[73]

§ 517 (454). **Part performance—Effect of.**—Under the rule approved by the Supreme Court of the United States, the partial performance of a contract of lease, executed without legislative authority, confers no rights under the lease. Thus, where a void lease is made by a railroad company for a term of ninety-six years, at a certain yearly rental, the use of the road by the lessee and payment of the rental for three years does not make the contract so far an executed one as to estop the lessee to deny its validity.[74] This doctrine results from the principle elsewhere considered that where the contract is, in a proper sense, ultra vires, no right can be founded on the contract itself. If the contract be absolutely void and not merely voidable, it cannot be made effective by the acts of the contracting parties.[75]

§ 518 (455). **Duration of a lease.**—Where there is no authority to sell, there is, as it seems to us, no right to execute a lease the practical effect of which is equivalent to a sale.[76] This principle would prohibit a railroad company from leasing its road for such a length of time as would clearly deprive it of possession and use

[73] As to assignments of leases, see, generally, Terre Haute &c. R. Co. v. Peoria &c. R. Co., 61 Ill. App. 405, 167 Ill. 296, 47 N. E. 573; Indianapolis Mfg. &c. Union v. Cleveland &c. R. Co., 45 Ind. 281; St. Joseph &c. R. Co. v. St. Louis &c. R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529; Frank v. New York &c. R. Co., 122 N. Y. 197, 25 N. E. 332.

[74] Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Oregon R. &c. Co. v. Oregonian R. Co., 145 U. S. 52, 12 Sup. Ct. 814, 36 L. ed. 620. See also East St. Louis &c. R. Co. v. Jarvis, 92 Fed. 735; Ogdensburgh &c. R. Co. v. Vermont &c. R. Co., 63 N. Y. 176. But see where authority was afterwards conferred and the lease recognized. Terre Haute &c. R. Co. v. Cox, 102 Fed. 825.

[75] Ante, §§ 427, 438 and §§ 411-414.

[76] St. Louis &c. R. Co. v. Terre Haute &c. R. Co., 145 U. S. 393, 12 Sup. Ct. 953, 36 L. ed. 738, and cases cited. But it has been held that a lease may be made for 999 years where there is authority to lease. Dickinson v. Consolidated Trac. Co., 119 Fed. 871; Wormser v. Metropolitan St. R. Co., 98 App. Div. 29, 90 N. Y. S. 714.

for a palpably unreasonable period. We do not believe that a transfer can be made which is in substance a sale, although in form a lease. Of course, where there is authority to sell, a sale may be made. It has been held in New York that a lease of its road by a railroad company for a longer term than the period of its corporate existence is not void, since the laws of that state provide for an extension of the charter.[77] There is, as it seems to us, reason for the conclusion that a railroad corporation cannot make a lease extending beyond its corporate life. One would think that in authorizing a lease the legislature had in mind the statute fixing the duration of corporate existence, and that it did not mean that any corporate act should be effective after corporate death. But there is also some reason for the other view, and as already shown, the courts seem inclined to adopt the view that such a lease is not void.[78]

§ 519 (456). **Effect of lease on taxation.**—Where the statute authorizes the execution of a lease and also provides that the leased road shall become the property of the lessee company, the road is assessable as the property of the lessee and not as the property of the lessor.[79] It may well be doubted whether this

[77] Gere v. New York &c. R. Co., 19 Abb. N. Cas. (N. Y.) 193. The fact that a lease by a railroad company was for 999 years, while the charter of the lessee would expire in about forty years, did not render it void, especially as the charter contained a provision that it might be renewed from time to time, and as the lease was expressly made binding upon the assigns and successors of the parties. Union Pac. R. Co. v. Chicago &c. R. Co., 51 Fed. 309, 10 U. S. App. 98, 163 U. S. 564, 599, 16 Sup. Ct. 1173, 41 L. ed. 265.

[78] See also as to such leases and leases for a long term distinguished from a sale or consolidation. Union Pac. R. Co. v. Chicago &c. R. Co., 163 U. S. 564, 569, 16 Sup. Ct. 1173, 41 L. ed. 265; Sioux City &c Co. v. Trust Co., 82 Fed. 124; Chicago &c. R. Co. v. People, 153 Ill. 409, 38 N. E. 1075, 29 L. R. A. 69; Morrison v. St. Paul &c. R. Co., 63 Minn. 75, 65 N. W. 141, 30 L. R. A. 546; State v. Montana R. Co., 21 Mont. 221, 53 Pac. 623, 45 L. R. A. 271, and see generally Ackerman v. Cincinnati &c. R. Co., 143 Mich. 58, 106 N. W. 558; Lancaster County v. Lincoln Auditorium Assn., 87 Nebr. 87, 127 N. W. 226.

[79] Huck v. Chicago &c. R. Co., 86 Ill. 352; Hagan v. Hardie, 8 Heisk. (Tenn.) 812. See generally Philadelphia &c. R. Co. v. Appeal Tax Court, 50 Md. 397; Appeal Tax Court v. Western &c. R. Co., 50 Md. 274. Such a contract is practically a con-

result would follow where the lessor remains the owner and only transfers the road for a limited time. If the lessor remains the owner the principle which ordinarily prevails would require that taxes be assessed against it and not against its lessee.[80] We suppose that where there is simply an authority to lease and no provision vesting the lessee with the ownership the property must be treated for the purpose of taxation as that of the lessor. Authority to execute a lease implies that the lessor retains the ownership of the demised property, but grants to the lessee use, possession and control for a designated term. A person, natural or artificial, who executes a lease, does not sell or convey the property, but simply transfers use, possession and control for the term designated in the lease. It is competent for the legislature in conferring authority to lease to prescribe the terms and conditions upon which the authority shall be exercised, and hence it may provide that the lessee company shall be treated as the owner or that it shall pay all taxes. In every authorized lease there are two estates, that of the lessor and that of the lessee, and where both are of value both may be assessed, but each estate must be assessed against its owner unless the statute otherwise provides. It is probably true that if under the form of a lease a sale is made, the company acquiring the property is liable to taxation as owner,[81] but to have this effect the contract, although in form a lease, must be, in legal contemplation, a sale. Where the statute provides for a tax upon the earnings of the road the lessee company is, ordinarily, the party against which the assessment should be made.[82] The earnings are part of the estate of

tract of sale, or rather, in its practical effect is equivalent to a sale in cases where the term is one of great length; while nominally a lease it is practically a sale in its effects and consequences. Where the contract is for a short term it is a lease rather than a sale, but if for a great number of years it would be substantially a sale of the property. Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83.

[80] See to the effect that the lessor must pay the franchise tax. Central of Georgia R. Co. v. Wright, 206 Fed. 107; Chesapeake &c. R. Co. v. Louisville &c. R. Co., 154 Ky. 637, 157 S. W. 1107.

[81] Commonwealth v. Nashville &c. R. Co., 93 Ky. 430, 20 S. W. 383, 54 Am. & Eng. R. Cas. 254.

[82] Vermont &c. R. Co. v. Vermont &c. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 46 Am. & Eng. R. Cas. 646.

the lessee company and not of the estate of the lessor. The earnings are derived from the possession and use of the road, and hence are the property of the lessee. The question, however, is one depending almost entirely upon the statute governing the particular case, for, as we have said, the legislature may lay the tax upon either company as it deems proper, since it has full power to prescribe the terms and conditions upon which the authority to lease shall be exercised.

§ 520 (457). Public duties of lessee under an unauthorized lease—Mandamus.[83]—It by no means follows from the rule that the lessee operating a road under an unauthorized lease is liable for torts in the management of the leased road, that it can be compelled to perform the duties imposed upon the lessor company. It is evident that it may be liable for its torts in operating the road and yet not bound to perform the obligations which the law requires the lessor to perform. If the lease is void it neither confers a right not creates a duty. In a well-reasoned opinion it was adjudged that where a lease was executed without authority the lessee could not be compelled to operate the leased road and that mandamus would not lie.[84]

§ 521 (458). Authorized lease—Duty of lessee to operate the road—Mandamus.—Where the lease is authorized a very different question is presented from that which arises in cases where the lease is unauthorized. If it is the imperative duty of the lessor company to operate the road and it has no discretionary power in the matter and that duty was transferred to the lessee

[83] This entire section, including the note, is quoted with approval in Alabama Cent. R. Co. v. Alabama Pub. Serv. Com. (Ala.), 76 So. 862, L. R. A. 1918C, 293, 296.

[84] People v. Colorado &c. R. Co., 42 Fed. 638. In the course of the opinion Caldwell, J., said: "As the relator and the respondents are agreed that the lease was void that ends the case as to the Union Pacific Railroad Company, for if the lease 'is void it imposes no obligation on the Union Pacific Railroad Company to operate the road." The decision was placed on the ground that the lease was void, for it was affirmed that mandamus lies where there is a duty to operate a railroad. The court cited State v. Sioux City &c. R. Co., 7 Nebr. 357; Commonwealth v. Fitchburgh &c. R. Co., 12 Gray (Mass.) 180.

by the lease, it would seem clear that the lessee could be compelled by mandamus to perform the duty. This conclusion is supported by decisions in analogous cases.[85] It is settled that a railroad company in possession of its road may be compelled by mandamus to operate its road in accordance with the positive requirements of its charter, and we can see no reason why this principle should not apply to a company in full possession of a road under an authorized lease. In authorizing the lease the legislature empowered the transfer of the duty of operating the road to the lessee, and, with the duty, authorized the transfer of important rights and privileges, so that the duty of the lessee accepting the lease with its benefits becomes imperative. The lessor having rightfully transferred possession to the lessee company cannot operate the road, and hence the duty necessarily devolves on the lessee.[86]

§ 522 (459). Lessee not liable for wrongs committed prior to the execution of the lease.—The lessee does not become liable for

[85] Union Pacific R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; Chicago &c. R. Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. 578, 28 L ed. 1064; Talcott v. Pine Grove, 1 Flip. (U. S.) 120, Fed. Cas. No. 13735; State v. Hartford &c. R. Co., 29 Conn. 538; State v. New Haven &c. R. Co., 41 Conn. 134; New Haven &c. R. Co. v. State, 44 Conn. 376; Chicago &c. R. Co. v. People, 56 Ill. 365, 8 Am. Rep. 690; Railroad Commissioners v. Portland &c. R. Co., 63 Maine 269, 18 Am. Rep. 208; Commonwealth v. Fitchburg &c. R. Co., 12 Gray (Mass.) 180; State v. Nebraska Tel. Co., 17 Nebr. 126, 52 Am. Rep. 404; State v. Sioux City &c. R. Co., 7 Nebr. 357; People v. New York &c. R. Co., 28 Hun (N. Y.) 543; People v. Albany &c. Co., 24 N. Y. 261, 82 Am. Dec. 295; People v. Rome &c. R. Co., 103 N. Y. 95, 8 N. E. 369; Mobile &c. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125; Farmers' &c. Co. v. Henning, 17 Am. Law Reg. (N. S.) 266; King v. Severn &c. R. Co., 2 Barn. & Ald. 646. See also Southern R. Co. v. Franklin &c. R. Co., 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297; Litchfield &c. R. Co. v. People, 222 Ill. 242, 78 N. E. 589; State v. Mobile &c. R. Co., 86 Miss. 172, 38 So. 732.

[86] There may, possibly, be exceptional cases, as where the operation of a line would exhaust the corporate capital, in which a mandamus would not lie. Commonwealth v. Fitchburg &c. R. Co., 12 Gray (Mass.) 180. But where there is not a clear, valid and sufficient reason shown excusing the company there can, as we believe, be no doubt of the power to coerce a performance of duty by mandamus.

injuries inflicted by the lessor before the execution of the lease, unless it expressly assumes such liability.[87] Where there is an assumption of liability the extent and nature of the liability of the lessee company depends upon the provisions of the contract. In saying that the lessee is not liable for wrongs committed prior to the execution of the lease we do not mean to convey the impression that for a continuing wrong the lessee is not liable, for our opinion is that where the lessor company is the original wrongdoer and the lessee continues the wrong after the execution of the lease it is liable.[88] But this rule can not apply where there was a single transient wrong and the injury was complete prior to the execution of the lease.

§ 523 (460). **Effect of a lease upon rights of creditors.**—The question whether a railroad company which acquires by an authorized lease all the property of another company, can hold the property free from the claims of the general or unsecured creditors of the lessor company, is not entirely free from difficulty. If the lessee acts in good faith, and the lease is such as the law authorizes it to take and its lessor to execute, it certainly does acquire valuable property rights. Where there is good faith, no liens, no notice, actual or constructive, and the lease is one the lessor has authority to execute and the lessee to accept, it is difficult to perceive any solid ground upon which the rights of the lessee can be subordinated to the claims of general and unsecured creditors. If the lessee company acts in bad faith, or if it secures property under such circumstances as to make it equitably chargeable as a trustee, then equity will so charge it, and will decree that the avails of property received under such circum-

[87] Pittsburgh &c. R. Co. v. Kain, 35 Ind. 291; Little Miami &c. R. Co. v. Hambleton, 40 Ohio St. 496. See also DeLaney v. Georgia &c. R. Co., 58 S. Car. 357, 36 S. E. 699, 79 Am. St. 843.

[88] Little Miami &c. R. Co. v. Hambleton, 40 Ohio St. 496. See also Canon City &c. R. Co. v. Oxtoby, 45 Colo. 214, 100 Pac. 1127; Wabash &c. R. Co. v. Peyton, 106 Ill. 534, 46 Am. St. 705; Chicago, Rock Island & Pacific Railway Company v. William Martin, 81 Kans. 344, 105 Pac. 451, 27 L. R. A. (N. S.) 164; Stickley v. Chesapeake &c. R. Co., 93 Ky. 323, 20 S. W. 261; Silver v Missouri Pac. R. Co., 101 Mo. 79, 13 S. W. 410; Wasmer v. Delaware &c. R. Co., 80 N. Y. 212, 36 Am. Rep 608.

stances may be applied to the payment of the claims of the creditors of the lessor company.[90] But we very much doubt whether it can be deprived of the leased property in a case where it is entirely free from fault or wrong, and takes the property under an authorized lease. Doubtless a court of equity would make such a decree in the particular case as the principles of equity require, but it seems to us that it would not decree that the claims of unsecured creditors are in all cases paramount to the rights of the lessee. The rights of creditors should be protected, as far as it can be done, without depriving the lessee of its rights, but the rights of the lessee when it is entirely free from fault are entitled to protection.[91]

§ 524 (461). **Authorized lease, rights and duties to which lessee company succeeds.**—What are known as "prerogative franchises" do not pass to the lessee under an authorized lease, but such rights as are necessary to the operation of the road and the conduct of its affairs do pass to the lessee.[92] In other words, the

90 Chicago &c. R. Co. v. Third National Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. ed. 900, citing Central R. &c. Co. v. Pettus, 113 U. S. 116, 124, 5 Sup. Ct. 387, 28 L. ed. 915; Mellen v. Moline &c. Iron Works, 131 U. S. 352, 366, 9 Sup. Ct. 981, 33 L. ed. 178. See also Ward v. McPherson, 87 Ark. 521, 113 S. W. 42; Chicago &c. R. Co. v. Third National Bank, 26 Fed. 820. In the case first cited the question we are here dealing with was stated, but not decided. We quote from the opinion the following: "Can a corporation in debt transfer its entire property by lease, so as to prevent the application of the property at its full value, to the satisfaction of its debts? We do not care to pursue an inquiry into this question at length, or consider what limitations would surround this doctrine as applied generally, preferring to notice a single matter which is significant and decisive."

91 See Harle-Haas Drug Co. v. Rogers Drug Co., 19 Wyo. 35, 113 Pac. 791, Ann. Cas. 1913E, 181.

92 The execution of a lease does not, ordinarily, confer upon the lessee the franchise to be a corporation nor a franchise to take property under the power of eminent domain; but the legislature may, perhaps, by express and apt words confer such franchises. Such franchises do not pass under authority conferred in general terms to execute a lease. The general authority does not imply that the lessee shall take such high prerogative franchises, although it does imply that the lessee shall have power to do such things as are reasonably necessary to enable it to properly operate the road.

lessee company, under such a lease, generally succeeds to the charter rights of the lessor company, so far as such rights are necessary to the operation of the road under the lease.[93] In granting the principal, that is, the right to lease, the incidental rights essential to the exercise of the principal right is also granted. As a general rule it is safe to say that the lessee is bound to perform all of the public duties imposed by law upon the lessor company. The lessee company takes the burdens with the benefits.[94] In a recent case a lease by a domestic company to a

[93] Fisher v. New York Central R. Co., 46 N. Y. 644, where the lessee was held entitled to charge such rates as were legal for the company owning the leased line. But the right to appropriate property under the right of eminent domain does not pass to the lessee. Mayor v. Norwich, &c. R. Co., 109 Mass. 103; Chicago, &c. R. Co. v. Illinois Central R. Co., 113 Ill. 156. In Nebraska it is permitted to institute proceedings in the name of the lessor. Dietrichs v. Lincoln, &c. R. Co., 13 Nebr. 361; Gottschalk v. Lincoln, &c. R. Co., 14 Nebr. 389, 13 N. W. 624. See Chattanooga R. Co. v. Felton, 69 Fed. 273; Kip v. New York, &c. R. Co., 67 N. Y. 227; Pittsburgh, &c. R. Co. v. Moore, 33 Ohio St. 384, 31 Am. Rep. 543. It has been held that the lessee succeeds to the right of the lessor to lay a double track on land acquired as a right of way. Earnhardt v. Southern R. Co., 157 N. Car. 358, 72 S. E. 1062.

[94] Dryden v. Grand Trunk R. Co., 60 Maine 512; McMillan v. Michigan Southern, &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; State v. Mobile, &c. R. Co., 86 Miss. 172, 38 So. 732; New York, &c. Co., In re, 49 N. Y. 414; New York v. Twenty-third St. R. Co., 113 N. Y. 311, 21 N. E. 60; Pennsylvania R. Co. v. Sly, 65 Pa. St. 205; Commonwealth v. Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38; South Carolina R. Co. v. Wilmington, &c. R. Co., 7 S. Car. 410. The lessee may be compelled to operate the road along such places as had extended aid to the lessor company. State v. Central Iowa R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806. See Chicago, &c. R. Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. ed. 1064. It must maintain all fences, cattle-guards, etc., which the lessor company was required by law to maintain. Curry v. Chicago, &c. R. Co., 43 Wis. 665. It must give all statutory signals, etc., required of the lessor company. Linfield v. Old Colony, &c. R. Co., 64 Mass. 562, 57 Am. Dec. 124. And it is bound to make alterations in a highway crossing required by statute. Westbrook's Appeal, 51 Conn. 95, 17 Atl. 368. See also State v. Southern Kans. R. Co., 44 Tex. Civ. App. 218, 99 S. W. 167 (bound to maintain closets under statute requiring this of all railroad companies). The corporation tax law of Vermont, 1882, imposes a tax upon the entire gross earnings of all railways oper-

foreign company, authorized by the legislature, giving the lessee the right to have, hold and exercise all the rights, powers, privileges and franchises which could be lawfully held, exercised and enjoyed in connection with such railroad as fully as the same could be held, exercised or enjoyed by the lessor, was held to give the lessee the right to lay water mains along the right of way where the lessor had that right.[95]

§ 525 (462). Contract obligations of lessor—Lessee not liable thereon.—It is obvious that it would be a violation of principle to hold that the lessee under an authorized lease is liable on the contracts of the lessor company in the absence of any provision to that effect.[96] The legislative sanction protects the lessee from any imputation of wrong, and in taking possession of the road under the lease it does what it has a lawful right to do. It cannot be held that by simply accepting a lease it binds itself by contracts made by the lessor before the execution of the lease. The legislature may make it a condition of the exercise of the power to take a lease that the lessee company shall perform the contracts of the lessor, but where the power is granted in general terms the duty to perform prior contracts entered into by the lessor does not necessarily devolve upon the lessee company.

§ 526. (463). Recovery of rent under unauthorized lease.—The question of the right of the lessor to recover rent under an unauthorized lease, is one upon which there is a diversity of opinion. Some of the courts hold that rent may be recovered.[97]

ated in the state, and provides that when a railway is operated under a lease the tax shall be paid by the lessee. Where the lessee had paid the tax and deducted it from the rent, while such legislation was upheld by the decisions of the United States Supreme Court, the lessor was not permitted to recover from the lessee because of a later decision by that court that such tax was unconstitutional. Vermont, &c. R. Co. v. Vermont Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 731, 10 L. R. A. 562.

[95] Canton v. Canton, &c. Co., 84 Miss. 268, 36 So. 266, 65 L. R. A. 561, 105 Am. St. 428.

[96] An agreement by the lessor company to give an annual pass to plaintiff in consideration of a release of the right of way through his land is not binding upon another company to which that company leases the road. Pennsylvania Co. v. Erie, &c. R. Co., 108 Pa. St. 621.

[97] Woodruff v. Erie, &c. R. Co., 93 N. Y. 609, holding that although there is no power to execute a lease

While others deny that there is a right of recovery on the lease, and in a recent case it is held that a lease which is ultra vires and void cannot be the foundation of any recovery of rentals.[98] We think that there can be no recovery upon the lease for the reason that it is void, but it does not necessarily follow from the fact the lease is void that there can be no recovery of compensation for the reasonable rental value of the leased property. If it could be justly said that the lessee was estopped then there would be little difficulty in solving the question. But it is not easy to find any principle upon which a conclusion that the lessee is estopped can be rested.[99] Both parties do what they have no right to do, both parties have equal means of knowledge, and the question whether there was or was not power to execute the lease is one of law and not of fact. We are here speaking of cases where there is an entire absence of power, not simply a defective or improper exercise of power. Where there is power to lease, then, although the lease may be defectively executed, there may be an estoppel, but we do not think there can be an estoppel where there is an entire absence of power. There is an important distinction between a lease not properly executed and a lease executed where there is an utter and entire absence of power to execute a lease, but this distinction is often lost sight of and the result is confusion and error.

§ 527 (464). **Improvements of road by lessee operating under an unauthorized lease.**—It has been held that a lessee operating a railroad under an unauthorized lease cannot recover for improvements made while in possession of the road under the lease.[1] If

to an individual, yet if a lease is executed to an individual, he will be liable for the stipulated rent. The case of Abbott v. Johnstown, &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572, is distinguished, and the cases of Bissell v. Michigan, &c. R. Co., 22 N. Y. 258, and Whitney, &c. Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504, are followed. See Farmers' Grain, &c. R. Co. v. St. Joseph, &c. Co., 2 Fed. 117; Board v. Reynolds, 50 Ind. 85; Ogdensburg, &c. Co. v. Vermont, &c. R. Co., 4 Hun (N. Y.) 268; Union Bridge Co. v. Troy, &c. Co., 7 Lans. (N. Y.) 240.

[98] Cox v. Terre Haute, &c. R. Co., 133 Fed. 371. See also ante, § 511.

[99] Ante, §§ 426, 427, 428.

[1] State v. McMinnville, &c. R. Co., 6 Lea (Tenn.) 369, 4 Am. & Eng. R. Cas. 95. See also Middlesex R. Co. v. Boston, &c. R. Co., 115 Mass. 347.

such a lease is absolutely void then it cannot confer any rights upon the lessee, and, unless there is some controlling element of estoppel or some protecting statute, the lessee cannot recover money expended in improving the road. Whether the lessee company can be regarded as an occupying claimant under the statutes protecting such claimants must depend upon whether the void lease confers color of title upon a company that was itself a wrongdoer in accepting the lease. The lease, being void, will not, of itself, give a right of action nor be sufficient foundation for an enforceable claim or demand. In the first case above referred to the court virtually held that the lessee was not "holding possession in good faith and under color of title."[2]

§ 528 (465). **Receiver's power to lease.**—The receiver of a railroad company cannot execute a lease unless the statute grants permission.[3] If the railroad company has no power to execute a lease it seems clear that a receiver appointed by the court cannot make a valid lease. It seems to us, too, that in the absence of a statute granting permission to execute a lease of a railroad the courts could not confer such a power upon a receiver of the corporation owning the road, for the power to lease is statutory.

§ 529 (466). **Unauthorized lease—Liability of lessor—Generally.**—The question whether a lease is or is not authorized is an important one in cases where claims for injury are sought to be enforced against the company which assumes to lease its railroad. If the lease is unauthorized, that is, made without legislative authority, it is, in our judgment, absolutely void, and if void, the lessor has not transferred any of its public duties or obligations.[4] A transfer of a duty or obligation cannot be made

[2] As to the right of the company as against the landowner where it enters and makes improvements under a license or as a trespasser, see note in 66 L. R. A. 33 et seq.

[3] State v. McMinnville, &c. R. Co., 6 Lea (Tenn.) 369; McMinnville, &c. R. Co. v. Huggins, 3 Baxt. (Tenn.) 177. But see Mercantile T. Co. v. Missouri, &c. R. Co., 41 Fed. 8; Gilbert v. Washington City R. Co., 33 Grat. (Va.) 586, to the effect that the court may authorize him to do so. As to rights and liabilities of receiver where there is an existing lease, see 3 Thomp. Corp. (2nd ed.) § 2517, and post, chapter on Receivers.

[4] See post, § 537. See also Quigley v. Toledo R. &c. Co., 89 Ohio St.

by a void act. If there is no transfer of duty it remains where the law cast it, and if there is a culpable breach of duty resulting in injury the fact that there was an attempt to transfer the duty will not relieve the party upon whom the law imposed the duty from liability. If the duty remains unaffected by a transfer, as it does where the transfer is void, the breach of duty is the wrong of the party upon whom the duty was imposed by law. It clearly and necessarily results from the principles stated that where the lease is unauthorized a wrongful breach resulting in injury imposes a liability upon the company that assumes, without power, to execute a lease. But while it is clear that there is a liability on the part of the lessor where the lease is unauthorized, that is, where there is no power to execute it, there is doubt whether this liability extends to the servants employed by the lessee in operating the road.[5] The weight of authority at present perhaps is that the lessor is liable to the servants of the lessee, but it is not

68, 105 N. E. 185, Ann. Cas. 1915D, 992, L. R. A. 1918E, 249, and notes to said cases as reported in both of these last reports.

[5] Baltimore, &c. R. Co. v. Paul, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216, applying the doctrine of East Line, &c. Railroad Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. 805, and distinguishing Macon, &c. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678. Judge Cooley illustrates the general doctrine and says: "The general duty of a railroad company to run its trains with care becomes a particular duty to no one until he is in a position to have a right to complain of the neglect." Cooley Torts, 660. In the case of Kahl v. Love, 37 N. J. Law 5, the rule was thus stated: "Actionable negligence exists only when the party whose negligence occasions the loss owes a duty, arising from contract or otherwise, to the person sustaining such loss." The court in Lary v. The Cleveland, &c. Co., 78 Ind. 323, 329, 41 Am. Rep. 572, quoted a very similar statement of the rule with approval. The statement quoted is this: "Actionable negligence exists only where the one whose act causes or occasions the injury owed the injured person a duty created either by contract or by operation of law, which he has failed to discharge." Many cases are cited in the case from which we have quoted. Gibson v. Chesapeake, &c. R. Co., 215 Fed. 24; The State Travelers' Ins. Co. v. Harris, 89 Ind. 363, 366, 46 Am. Rep. 169; Nave v. Flack, 90 Ind. 205, 207, 46 Am. Rep. 205; Evansville, &c. R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Indianapolis, &c. R. Co. v. Pitzer, 109 Ind. 179, 182, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387. This subject is further considered post, § 535.

clear that this doctrine is sound. It is elementary learning that there is no negligence where there is no duty, and that a party who bases an asserted right of action upon the negligence of the defendant must show the breach of a specific duty owing him,[6] and where the relation of master and servant exists the only duty, so far as such relation is concerned, is that created by the contract of employment, so that it would seem that the employer is the only person liable, at least unless it can justly be said that there is a breach of duty which could not be transferred or escaped, owing to the injured party as one of the public. In the latter case, where the negligence is not merely that of the lessee but consists of that of the lessor in having defective tracks, switches, engines and cars, or the like, there is much reason for holding the lessor liable even to the employes of the lessee.

§ 530 (467). **Authorized lease—Liability of lessor for injuries caused by negligence of lessee—Cases holding lessor liable.**— There is a wide diversity of opinion upon the question whether a company that leases its railroad to another company under authority of law is liable for the negligence of the lessee in operating the road under the lease. Many of the courts and some of the text-writers affirm that the lessor is liable although the lease is executed under authority of law, unless the statute which grants the right to lease exempts the lessor from liability.[7] The theory

[6] See post, § 535.

[7] In Logan v. North Carolina R. Co., 116 N. Car. 940, 21 S. E. 959, the court referred to the cases of State v. Richmond, 72 N. Car. 634; Gooch v. McGee, 83 N. Car. 59, 35 Am. Rep. 558; Hughes v. Commissioners, 107 N. Car. 598, 12 S. E. 465, and other cases holding that express legislative authority is requisite to the validity of a lease and adjudged that even though there was legislative authority for the execution of the lease, the lessor company was liable for injuries caused by the negligence of the lessee. The court approved the case of Braslin v. Somerville, &c. R. Co., 145 Mass. 64, 13 N. E. 65. As sustaining the doctrine that the lessor was liable for an injury to a person employed by the lessee, the court cited National Bank, &c. v. Atlanta, &c. R. Co., 25 S. Car. 216; Harmon v. Columbia, &c. R. Co., 28 S. Car. 401, 5 S. E. 835, 13 Am. St. 686; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574, 21 Am. & Eng. R. Cas. 226; Balsley v. St. Louis, &c. R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; Naglee v. Alexandria, &c. R. Co., 83 Va. 707, 3 S. E.

of some of the cases which hold the lessor liable for the negligence of the lessee in operating the road is that a railroad company is never exonerated except where there is an express statutory provision relieving it from liability. The cases to which we refer deny that there can be exoneration by implication, and assert that the authority to lease does not protect the lessor.[8] Other courts hold that the lessor is exonerated from liability for the negligence of the lessee in operating the road, but is liable for

369, 5 Am. St. 308; Acker v. Alexandria, &c. Railroad Co., 84 Va. 648, 5 S. E. 688. See also Georgia R. &c. Co. v. Haas, 127 Ga. 187, 56 S. E. 313; Driscoll v. Norwich &c. R. Co., 65 Conn. 230, 32 Atl. 354; Green v. Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 33 L. R. A. 806, 54 Am. St. 379; Chicago &c. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050; Stephens v. Railroad Co., 36 Iowa 327; Sorenson v. Chicago &c. R. Co., 183 Iowa 1123, 168 N. W. 313; Bower v. Burlington, &c. R. Co., 42 Iowa 546; McCabe v. Maysville &c. R. Co., 112 Ky. 861, 66 S. W. 1054; Clinger v. Chesapeake &c. R. Co. 128 Ky. 736, 109 S. W. 315, 15 L. R. A. (N. S.) 998; Markey v. Louisiana &c. R. Co., 185 Mo. 348, 84 S. W. 61; Chollette v. Omaha &c. R. Co., 26 Nebr. 169, 41 N. W. 1106, 4 L. R. A. 135; Harden v. North Carolina R. Co., 129 N. Car. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. 747; Parker v. North Carolina R. Co., 150 N. Car. 433, 64 S. E. 186; Quigley v. Toledo &c. R. Co., 89 Ohio St. 68, 105 N. E. 185, Ann. Cas. 1915D, 992, L. R. A. 1918E, 249; Midland Valley R. Co. v. Toomer, 62 Okla. 162, 162 Pac. 1127, 1129; Davis v. Atlanta, &c. R. Co., 63 S. Car. 370, 41 S. E. 468; Chicago &c. R. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. ed. 521. Under the South Carolina law the lessor remains liable with the lessee for damages to individuals caused in the operation of the road. Price v. Southern Power Co., 206 Fed. 496. So under a Missouri statute even though the charter originally provided otherwise. Brown v. Louisiana &c. R. Co., 256 Mo. 522, 165 S. W. 1060.

[8] Balsley v. St. Louis, &c. R. Co., 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784; Wabash, &c. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705, 18 Am. & Eng. R. Cas. 1; Chollette v. Omaha, &c. R. Co., 26 Nebr. 159, 41 N. W. 1106, 37 Am. & Eng. R. Cas. 16. It is so held even as to an employe of the lessee company in the recent case of Chicago, &c. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75, where authorities on both sides are collected and reviewed in the prevailing and dissenting opinions. And in Parr v. Spartanburg, &c. R. Co., 43 S. Car. 197, 49 Am. St. 826, the lessor company was held liable for a tort in the negligent operation of the road by a receiver of its lessee, appointed in an action to which it was not a party. South Carolina has a statute making a consolidated company liable for injury to an employe of its lessee. Reed v. Southern R., 75 S. Car. 162, 55 S. E. 218.

injuries resulting from a breach of duty owing to the public, as, for instance, negligence in the construction of tracks, station buildings and the like.[9]

§ 531 (468). Authorized lease—Liability of lessor for negligence of lessee in operating the road—Authorities denying liability.—As said in the preceding section some of the cases make a distinction between negligence in the operation of the road and negligence in its construction or in the performance of a duty to the public, and adjudge that the lessor company is not liable for the negligence of the lessee in operating the road.[10]

[9] Central, &c. R. Co. v. Phinazee, 93 Ga. 488, 21 S. E. 66; Kansas, &c. Railroad Co. v. Wood, 24 Kans. 619; St. Louis &c. R. Co. v. Curl, 28 Kans. 622, 11 Am. & Eng. R. Cas. 458; Nugent v. Boston, &c. R. Co., 80 Maine 62, 12 Atl. 797, 6 Am. St. 151, 38 Am. & Eng. R. Cas. 52; Bay City R. Co. v. Austin, 21 Mich. 390; Kearney v. Central, &c. R. Co., 167 Pa. St. 362, 31 Atl. 637; Texas, &c. R. Co. v. Moore, 8 Texas Civ. App. 289, 27 S. W. 962. See also Lee v. Southern Pac. R. Co., 116 Cal. 97, 58 Am. St. 140, and note; Louisville, &c. R. Co. v. Linton, 43 Ind. App. 709, 88 N. E. 532 (lessor not liable to passenger of lessee unless injury caused by defective track or the like); De Lashmutt v. Chicago, &c. R. Co., 148 Iowa 556, 126 N. W. 359; Hamilton v. Louisiana, &c. R. Co., 117 La. 243, 41 So. 560, 6 L. R. A. (N. S.) 787; McCplloch v. Southern R. Co., 149 N. Car. 305, 62 S. E. 1096; Lakin v. Railroad Co., 13 Ore. 436, 11 Pac. 68, 57 Am. St. 25. Not for acts of the lessee in the maintenance and repair of the road. Ackerman v. Cincinnati, &c. R. Co., 143 Mich. 58, 106 N. W. 558, 114 Am. St. 640; Shores v. Southern R. Co., 72 S. Car. 244, 51 S. E. 699.

[10] Arrowsmith v. Nashville, &c. R. Co., 57 Fed. 165. In the case cited the court, after a very full review of the authorities, adopted the doctrine of the cases of Mahoney v. Atlantic, &c. R. Co., 63 Maine 68, and Nugent v. Boston, &c. R. Co., 80 Maine 62, 12 Atl. 797, 6 Am. St. 151, 38 Am. & Eng. R. Cas. 52, and quoted from the latter case as expressive of the true rule the following: "And herein, as we think, lies the true distinction which marks the dividing line of the lessor's responsibility. In other words an authorized lease, without any exemption clause, absolves the lessor from the torts of the lessee resulting from the negligent operation and handling of trains and the general management of the leased road over which the lessor could have no control. But for an injury resulting from the negligent omission of some duty owed to the public, such as the proper construction of the road, sta-

§ 532 (469). Authorized lease—Liability of lessor for negligence of lessee in operating the road—Views of the authors. —Our opinion is that where the lease is executed under the provisions of a statute, in accordance with its requirements, and is made to a company having authority to accept it, and is made in good faith and not for the purpose of transferring duties or obligations to an irresponsible party, the lessor company is not liable for injuries caused by the negligence of the lessee and not attributable to a breach of any public duty of the company that executed the lease. It must be assumed that in granting the authority to execute a lease the legislature had in mind former statutes as well as the established rules of the common law.[12] When power to execute a lease is conferred upon a corporation the legislature must, in the absence of countervailing language, be deemed to intend to authorize the execution of such an instrument as the established law regards as a lease. The law enters as a silent factor into every contract, and hence of every lease it is an important element. The

tion houses, etc., the charter company cannot, in the absence of statutory authority, discharge itself of legal responsibility." The court in the case first named cited as supporting its conclusion the following authorities: Briscoe v. Southern &c. R. Co., 40 Fed. 273; St. Louis &c. R. Co. v. Curl, 28 Kans. 622, 11 Am. & Eng. R. Cas. 458; Ditchett v. Spuyten, &c. R. Co., 67 N. Y. 425; Miller v. New York, &c. R. Co., 125 N. Y. 118, 47 Am. & Eng. R. Cas. 369; Virginia, &c. R. Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344, 43 Am. & Eng. R. Cas. 688. See also Heron v. St. Paul, &c. R. Co., 68 Minn. 542, 71 N. W. 706 (citing text); Hayes v. Northern Pac. R. Co., 74 Fed. 279; Litte Rock, &c. R. Co. v. Daniels, 68 Ark. 171, 56 S. W. 874; Caruthers v. Kansas City, &c. R. Co., 59 Kans. 629, 54 Pac. 673, 44 L. R. A. 737; Harper v. Newport News, &c. R. Co., 90 Ky. 359, 14 S. W. 346; New York v. Twenty-third St. R. Co., 113 N. Y. 311, 21 N. E. 60; Miller v. Railroad Company, 125 N. Y. 118, 26 N. E. 35. The same view is taken in Yeates v. Illinois Cent. R. Co., 137 Fed. 943, 945 (citing text) where it is also held that the question is one of general law in regard to which a federal court is not controlled by state decisions. See also Williams v. Spartanburg R. Co., 124 Fed. 796; Curtis v. Cleveland, &c. R. Co., 140 Fed. 777; Gibson v. Chesapeake, &c. R. Co., 215 Fed. 24; Vadas v. Pittsburg, &c. R. Co., 230 Pac. St. 41, 79 Atl. 166.

12 "The legislature are presumed to know existing statutes and the state of the law relating to the subjects with which they deal." Sutherland Stat. Const. § 287.

legal effect of a lease is to transfer for a prescribed period of time the possession and control of the property to the lessee. In authorizing the execution of a lease the legislature grants the right to execute and carry into effect such an instrument as divests the lessor of possession and control and places it in the lessee to the exclusion of the lessor. The possession of the one party is excluded and that of the other is made complete by the legislative sanction. If a sale is made under valid legislative authority the company that acquires the property acquires an exclusive right and interest, and the lessee by virtue of the lease acquires a similar right so far as possession, control and management are concerned, for the term for which the property was leased. It cannot be doubted that a statute conferring general authority to sell means a complete and effective sale, and upon the same principle it must be concluded that the power to lease, unless qualified and limited by statute, is a power to make a complete and effective lease. A complete and effective lease certainly vests the right of possession, control and management in the lessee, since no other effect can be assigned such a lease without a direct and palpable violation of long and well established principles of law. The lessor company does no wrong in executing a lease which the law of the land gives it full power to execute, so that in executing the lease there is no improper motive, no illegal act, nor any wrongful attempt to escape a duty. In granting authority to lease, the legislature empowers the lessor company to transfer the duty of operating the road to the lessee, and in doing what the legislature authorizes no rule of public policy is violated. It is, indeed, inconceivable that there can be a violation of a rule of public policy where the act done by a party is done under a legislative enactment and in accordance with its provisions The cases which hold the lessor liable, although the lease is an authorized one, upon the ground that there must be an express exemption from liability in order to exonerate the lessor, concede, what could not be denied without leaving the domain of reason, that the legislature may by express enactment exonerate the lessor, so that, even upon that theory (which we believe to be unsound) the question, at bot-

tom, is one of statutory construction. The courts which assert the theory mentioned tacitly assume that in granting authority to lease, the legislature granted something less than an authority to lease. We believe that the only theory that can be defended on principle is that in granting authority to execute a lease the legislature conferred authority to execute an effective instrument with all the qualities and incidents with which the law invests a lease. If this be true then the lease does transfer possession and control from the one party to the other for the term of the lease, and the rights and obligation of the parties are such, and such only, as the law annexes to the relation of lessor and lessee. For negligence in managing and using the demised premises the lessor is not responsible. If it has performed its duty in constructing tracks and necessary structures it cannot be held responsible for the negligence of the lessee in employing incompetent servants, or in negligently handling trains, or in negligently overloading cars, or in negligently failing to provide a sufficient number of persons to manage trains, or for any negligence which relates solely to the mode of operating the leased road.[13]

[13] This section is quoted almost in full and the view of the authors taken in Heron v. St. Paul, &c. R. Co., 68 Minn. 542, 71 N. W. 706, 707, 708. It is also approved in Yeates v. Illinois Cent. R. Co., 137 Fed. 943, 945; and in elaborate opinions in Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261, 274, 280, 281 (affirmed in 203 Mo. 121, 100 S. W. 611, 612, quoting text at length), where it is said to be "illuminating, exhaustive and conclusive." Pennsylvania Steel Co. v. New York City R. Co., 229 Fed. 367 (calling attention to conflict of decisions in various jurisdictions); Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114; Pinkerton v. Pennsylvania Trac. Co., 193 Pa. 229, 44 Atl. 284. See also Johnson v. Southern Pac. R. Co., 154 Cal. 285, 97 Pac 520; Peacock v. Detroit, &c. R. Co. (Mich.), 175 N. W. 580, 8 A. L. R. 964; McAllister v. Chesapeake &c. R. Co., 198 Fed. 660. The doctrine of the section is distinguished in Sorenson v. Chicago, &c. R. Co., 183 La. 1123, 168 N. W. 313, 315. In Chicago, &c. R. Co. v. Weber, 219 Ill. 372, 76 N. E. 489, 4 L. R. A. (N. S.) 272, limits of the broad doctrine of liability in Illinois are pointed out, and it is held that servants or agents of the lessee are not agents of the lessor to receive service of process in personal injury cases; that in such a case it may be shown by parol that at the time of the accident the road was operated by a lessee, and that the lessor is not bound by declarations in a time table, put out by

§ 533 (470). **Control reserved by lessor.**—Where the lessor company, in an authorized lease, retains control of the road, there is reason for holding it liable for the negligence of the lessee in operating the road. The fact that exclusive control is not transferred to the lessee is an influential factor, and may well be held to constitute the basis of an exception to what we conceive to be the general rule. If the lessor company does retain control its duty is to exercise that control as the law requires.[14]

§ 534 (471). **Liability of lessee under authorized lease—Illustrative cases.**—An authorized lease, that is, a lease executed under power granted by the legislature, imposes upon the lessee the duty of operating and conducting the road as the statute from which the lessor company derived its powers prescribes.[15] The lessee is under a duty to provide fences, as the charter of the company from which it acquired its title re-

the lessee, where it is not shown that the lessor had any knowledge of it or authorized it in any way. And lessor is not liable for negligence of receiver of lessee. Henning v. Sampsell, 236 Ill. 375, 86 N. E. 274.

[14] Driscoll v. Norwich, &c. Co., 65 Conn. 230, 32 Atl. 354. In the case cited the lessor reserved to itself the control of the road while in the hands of the lessee, so that there can be no doubt that the conclusion asserted by the court is sound. See also Central Trust Co. v. Colorado Midland R. Co., 89 Fed. 560; Central Trust Co. v. Denver, &c. R. Co., 97 Fed. 239; Braslin v. Sommerville, 145 Mass. 64, 13 N. E. 65. This distinction is noted and this section quoted with approval in Quigley v. Toledo, &c. R. Co., 89 Ohio St. 68, 105 N. E. 185, L. R. A. 1918 E, 249, 253, Ann. Cas. 1915 D, 992, 994. See also Grand Trunk R. Co. v. Parks, 183 Fed. 750; Texas &c. R. Co. v. Lacey, 185 Fed. 25; Willson v. Colorado &c. R. Co., 57 Colo. 303, 142 Pac. 174; Atlanta &c. R. Co. v. Barnwell, 138 Ga. 569, 75 S. E. 645; Campbell v. Canadian &c. R. Co., 124 Minn. 245, 144 N. W. 772; Sanders v. Pennsylvania R. Co., 225 Pa. St. 103, 73 Atl. 1010, 133 Am. St. 857; Bellamy v. Conway, &c. R. Co., 85 S. Car. 450, 67 S. E. 545; St. Louis, &c. R. Co. v. McGrath (Tex.), 160 S. W. 444.

[15] State v. Central, &c. R. Co., 71 Iowa 410, 60 Am. Rep. 806; New York, &c. R. Co., In re, 49 N. Y. 414; Ogdenburg, &c. R. Co. v. Vermont, &c. R. Co., 4 Hun (N. Y.) 712; Pennsylvania R. Co. v. Sly, 65 Pa. St. 205; Commonwealth v. Pennsylvania R. Co., 117 Pa. St. 637, 12 Atl. 38; South Carolina, &c. R. Co. v. Wilmington, &c. R. Co., 7 S. Car. 410.

quires;[16] to exercise ordinary care and diligence to prevent the escape of fire, and to give signals at crossings, as provided in the statute governing the lessor company.[17] A lessee is liable for maintaining a nuisance after notice to abate, although the nuisance existed at the time the lease was executed.[18] The lessee is, as a rule, liable for injuries resulting from a failure to properly operate and maintain the road,[19] and for the negligent acts of its servants in the operation of the road.[20] It is liable for the failure to carry, safely and promptly, any persons or goods entrusted to it for carriage.[21] It may be safely asserted as a general rule that when a road is transferred by lease under legislative authority, the lessee company is liable as if it were operating the road as owner.[22]

[16] Liddle v. Keokuk, &c. R. Co., 23 Iowa 378; Cook v. Milwaukee, &c. R. Co., 36 Wis. 45; McCall v. Chamberlain, 13 Wis. 637; Curry v. Chicago, &c. R. Co., 43 Wis. 665. See also Chicago, Rock Island, &c. R. Co. v. Martin, 81 Kans. 344, 105 Pac. 451, 27 L. R. A. (N. S.) 164.

[17] Linfield v. Old Colony, &c. R. Co., 64 Mass. 562, 57 Am. Dec. 124.

[18] Western, &c. R. Co. v. Cox, 93 Ga. 561, 20 S. E. 68.

[19] St. Louis, &c. R. Co. v. Curl, 28 Kans. 622, 11 Am. & Eng. R. Cas. 458. But, as already shown, it is not ordinarily liable for injuries to land caused by defects in the original construction of the road unknown to it and not caused by operating it in that condition. See Kearney v. Central R. Co., 167 Pa. St. 362, 31 Atl. 637. The lessee has been held liable with the original owner or lessor for damages resulting from a permanent injury to property caused by the construction of the road. Stickley v. Chesapeake, &c. R. Co., 93 Ky. 323, 52 Am. & Eng. R. Cas. 56. The lessee is liable for the continuance of a nuisance erected by the lessor. Dickson v. Chicago, &c. R. Co., 71 Mo. 575. It is liable for injuries arising from a failure to fence the road. Missouri Pac. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87; Illinois Central R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Wabash R. Co. v. Williamson, 3 Ind. App. 190, 29 N. E. 455; Ditchett v. Spuyton, &c. R. Co., 67 N. Y. 425; Cook v. Milwaukee, &c. R. Co., 36 Wis. 45.

[20] A company is liable for fires set by the engines of trains which it runs over a leased road. Cantlon v. Eastern R. Co., 45 Minn. 481, 48 N. W. 22.

[21] Wabash, &c. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; Mahoney v. Atlantic, &c. R. Co., 63 Maine 68; Feitel v. Middlesex, &c. R. Co., 109 Mass. 398, 12 Am. Rep. 720; Burroughs v. Norwich, &c. R. Co., 100 Mass. 26, 1 Am. Rep. 78; Patterson v. Wabash, &c. R. Co., 54 Mich. 91; Philadelphia, &c. R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787.

[22] St. Louis, &c. R. Co. v. Curl,

§ 535 (472). **Unauthorized lease—Liability of lessor to employes of lessee—Generally.**—It is difficult without a departure from sound principle to support the doctrine of the cases which hold that the lessor is liable to the employes of the lessee for injuries caused by the negligence of the lessee in maintaining and operating the leased road. The case of an employe is in some important particulars essentially different from the case of persons using the road, or of persons whose goods are transported over it, or of persons who are themselves carried as passengers. The relations between the lessee company and its employes are contractual, and the duty which the contract creates is that of employer to employe. The person who takes service with the lessee company voluntarily accepts that company as its employer and out of this contract comes the duty which the contracting parties owe to each other. The employe of the lessee certainly owes no duty to the lessor, and it is difficult to conceive a tenable ground for the conclusion that the lessor owes a duty to the employe. The employer assumes to perform the duties imposed upon it by law, in its character of employer, and the employe voluntarily takes the lessee company as his employer. The employe does not contract with the lessee as the agent of the lessor, but contracts directly with the lessee as its own representative and not as the representative of some other person or corporation. There is in all that the term implies a direct and full privity of contract between the lessee and its employes. There is no priority of contract between the lessor and the employes of the lessee, and no implication that for breach of the duty of employer, the employe can look to the lessor for redress. In a recent case the ques-

28 Kans. 622; Mahoney v. Atlantic, &c. R. Co., 63 Maine 68; Davis v. Providence, &c. R. Co., 121 Mass. 134; Patterson v. Wabash, &c. R. Co., 54 Mich. 91; Murch v. Concord R. Corp. 29 N. H. 9, 61 Am. Dec. 631; Ditchett v. Spuyten, &c. R. Co., 67 N. Y. 425; Philadelphia, &c. R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787; International, &c. R. Co. v. Dunham, 68 Tex. 231, 4 S. W. 472, 2 Am. St. 484. See also Chicago, etc. R. Co. v. Schmitz, 211 Ill. 446, 71 N. E. 1050 (lessor and lessee both held liable). De Lashmutt v. Chicago, &c. R. Co., 148 Iowa 556, 126 N. W. 359 (lessor and lessee both held liable). Howard v. Maysville, &c. R. Co., 24 Ky. 1051, 70 S. W. 631 (both held liable).

tion we are considering was thoroughly discussed, and it was held that, although the lease was not authorized by statute, the lessor was not liable to a servant of the lessee injured while engaged in performing the duties of his service by reason of defects in a locomotive used by the lessee in operating the road.[23] The theory of the court was that the lessor owed no duty to the servant of the lessee, and as there was no duty there could not be actionable negligence. There is unquestionably much force in the reasoning of the court in the case under immediate mention, for the settled rule is that where there is no duty there is no negligence, and a party cannot have a right of action unless there is a breach of a specific duty owing to him. In the case of an employer and employe there is no consideration of public policy involved, such as there is in cases of third persons, for the employe by a voluntary contract creates the relation of employer and employe. His rights are such as his contract creates, the duty springs from the contract and but for the contract he would really have no right on the road or any of its equipments. The difference between cases where third persons sue for injuries, and cases where the action is by an employe is so wide that cases deciding that there is a liability to third persons are hardly in point. We incline to the opinion that the lessor is not liable to the servants of the lessee for injuries received by them, in cases where the injuries are caused solely by the negligence of the lessee in

[23] Baltimore &c. R. Co. v. Paul, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216. It was said by the court, speaking of the duty to third persons, that: "The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company, nor will it be permitted to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between persons injured in such a case and the operating company. It is not so with an employe who voluntarily enters the service of the latter company with a knowledge of the facts and participates knowingly in the wrong, if wrong it be." In Missouri &c. R. Co. v. Watts, 63 Tex. 549, 22 Am. & Eng. R. Cas. 277, it was held that the lessor is not liable to the servant of the lessee for injuries received in the line of service required of him in operating the road.

operating the road,[24] but it is difficult to say on which side lies the weight of authority, and in number of decisions, if we consider those of the same courts as constituting the weight of authority, it is perhaps against our opinion.[25] Whether the lessor can be held liable to an employe of the lessee for negligence in the construction of the track or the like[26] is a very

[24] It is so held, and the text is cited with approval in Willard v. Spartanburg, &c. R. Co., 124 Fed. 796, 800. Hukill v. Maysville &c. R. Co., 72 Fed. 745; Curtis v. Cleveland &c. R. Co., 140 Fed. 777; Yeates v. Illinois Cent. R. Co., 137 Fed. 943; Banks v. Georgia R. &c. Co., 112 Ga. 655, 37 S. E. 992; Central of Georgia R. Co. v. Bessinger, 17 Ga. App. 617, 87 S. E. 920; Swice v. Maysville &c. R. Co., 116 Ky. 253, 75 S. W. 278; Travis v. Kansas City &c. R. Co., 119 La. 489, 44 So. 274, 10 L. R. A. (N. S.) 1189, 121 Am. St. 526. To the same effect are East Line &c. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. 805; Virginia &c. R. Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344.

[25] Macon &c. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678; Chicago &c. R. Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 66 L. R. A. 75; Illinois Cent. R. Co. v. Lucas, 89 Miss. 411, 42 So. 607; Logan v. North Carolina R. Co., 116 N. Car. 940, 21 S. E. 959; Harden v. North Carolina R. Co., 129 N. Car. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. 747; Davis v. Atlanta &c. R. Co., 63 S. Car. 370, 41 S. E. 468; Jackson v. Southern R. Co., 77 S. Car. 550, 58 S. E. 605; Missouri &c. R. Co. vs. Owens (Tex. Civ. App.), 75 S. W. 579. It was stated in the first edition that the weight of authority is against our opinion, which remains the same as before expressed, but this statement was criticised as incorrect in the dissenting opinion in the Illinois case herein cited. There are other North Carolina and Illinois cases to the same effect as those herein cited, and authorities upon both sides are cited in a leading article in 62 Cent. L. J. 181, where the view we have taken is regarded as the better one.

[26] The authorities are very generally to the effect that the lessor may be held liable in such a case. Nugent v. Boston &c. R. Co., 80 Maine 62, 12 Atl. 797, 6 Am. St. 151; Lee v. Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. 140, and note; Trinity &c. R. Co. v. Lane, 79 Tex. 643, 15 S. W. 477, 16 S. W. 18. See also Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. ed. 208; Chesapeake &c. R. Co. v. Vaughn, 159 Ky. 433, 167 S. W. 141. And a statute expressly declaring the lessee liable does not necessarily exempt the lessor from liability. Chicago &c. R. Co. v. Crane, 113 U. S. 424, 5 Sup. Ct. 578, 28 L. ed. 1064; Bower v. Burlington &c. R. Co., 42 Iowa 546; Bean v. Atlantic &c. R. Co., 63 Maine 293.

different question from the question here considered, namely, the right of an employe of the lessee to hold the lessor liable for negligence in operating the road.[27]

§ 536. **Liability of lessor to employes of lessee under Federal Employer's Liability Act.**—Where, under the local law, the lessor is liable to the employes of the lessee, the lessee is regarded as in effect the lessor's substitute or agent and the lessor may be held liable to an employe of the lessee under the Federal Employer's Liability Act if he was so employed by the lessee in interstate commerce at the time he was injured.[28] In the case to which we have referred as so holding, all the lessor's tracks and property were within the state and it was not engaged in interstate commerce.

§ 537 (473). **Unauthorized lease—Liability of lessor, general rule.**—The general rule as declared by the great weight of authority is this: Where the lease under which the road is transferred is unauthorized, even though a railroad company puts its road in the possession of a lessee, and surrenders the entire control and management of its road, it is liable in general for all damages caused by the lessee's negligence in the management and conduct of the railroad and its affairs.[29] There is,

[27] The position taken in the text is also supported by the author of the note in L. R. A. 1918E, 264, where he says: "The general rule seems to be that the lessor or owner will be held liable for injuries caused to the employes of the lessee arising out of defective switches, engines, or tracks. But the lessor will not be held liable when it owed no duty to the injured party, or where the injury resulted from the negligent operation and handling of the trains by the lessee."

[28] Noth Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. ed. 591, Ann. Cas. 1914C, 159.

[29] York &c. R. Co. v. Winans, 17 How. (U. S.) 30, 15 L. ed. 27; Arrowsmith v. Nashville &c. R. Co., 57 Fed. 165, 171; Briscoe v. Southern Kansas R. Co., 40 Fed. 273; Ricketts v. Birmingham &c. R. Co., 85 Ala. 600, 5 So. 353; Rome &c. R. Co. v. Chasteen, 88 Ala. 591, 7 So. 94; Lee v. Southern Pac. R. Co., 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. 140; Chattanooga &c. R. Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. 169; Palmer v. Utah &c. R. Co., 2 Idaho 315, 350, 13 Pac. 425, 36 Am. & Eng. R. Cas. 443; Louisville &c.

as we believe, and as we have more clearly pointed out in another place, an important difference between authorized leases and leases executed in cases where there is an entire want of power to execute them, and the rules which govern the one class of cases cannot be justly held to govern the other class. The negligence of a lessee having actual possession and control of a railroad under a lease which the lessor had no power to execute, does not transfer liability from the lessor to the lessee, so the lessor remains liable for the wrongs of the lessee,[30] except in cases where by reason of contract relations, the specific duty which is violated is owing solely from the lessee to the injured person. The theory upon which many of the cases proceed is that the persons operating a road under an unauthorized lease are the agents of the lessor company.[31] But

R. Co. v. Breedon, 111 Ky. 729, 64 S. W. 667; Abbott v. Johnstown &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Harmon v. Columbia &c., 28 S. Car. 401, 5 S. E. 835, 13 Am. St. 686; Parr v. Spartanburg &c. Co., 43 S. Car. 197, 20 S. W. 1009, 49 Am. St. 826; Galveston &c. R. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939; International &c. R. Co. v. Moody, 71 Tex. 614, 9 S. W. 465; Ricketts v. Chesapeake &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. 901. See also Illinois Cent. R. Co. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. ed. 208; Gregory v. Georgia Granite R. Co., 132 Ga. 587, 64 S. E. 686. Many other cases hold the lessor liable, although it does not clearly appear in the reports whether the lease was authorized by statute or not. See Northern Pac. R. Co. v. Wentzer, 214 Fed. 10, and cases cited in note Ann. Cas. 1915D, 996. But as stated in the preceding section, some courts hold otherwise as to employes of the lessee. See also Hukill v. Maysville &c. R. Co., 72 Fed 745; Virginia &c. R. Co. v. Washington, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344. See review of authorities in leading article in 62 Cent. L. J. 181. See also Bailey v. Louisiana &c. R. Co., 129 La. 1029, 57 So. 325; Illinois Cent R. Co. v. Lucas, 89 Miss. 411, 42 So. 607; Booth v. St. Louis &c. R. Co., 217 Mo. 710, 117 S. W. 1094; Logan v. Atlantic &c. R. Co., 82 S. Car. 518, 64 S. E. 515.

[30] It is held that the lessor is liable for the lessee's refusal to carry freight offered for transportation. Central &c. R. Co. v. Morris, 68 Tex. 49, 3 S. W. 457.

[31] Briscoe v. Southern Kansas &c. R. Co., 40 Fed. 273; Nelson v. Vermont &c. R. Co., 26 Vt. 717, 62 Am. Dec. 614. In Van Dresser v. Oregon R. &c. Co., 48 Fed. 202, the court held that the lessee of a railroad, engaged in operating it under an unauthorized lease, must be considered as the agent of the

whatever may be the particular theory adopted, the great weight of authority is that the company that executes such a lease still remains liable.[32]

§ 538 (474). Liability of lessee for injuries resulting from negligence in operating the road.—The lessee is liable for all injuries occasioned by its negligent operation of a road under an unauthorized lease, inasmuch as its liability for its own torts is the same whether it is using its own property or that of another when the injury is done.[33] It is clear that principle

lessor company for the purpose of service of summons in a suit against such company. See also Smalley v. Atlanta &c. R. Co., 73 S. Car. 572, 53 S. E. 1000, 1001 (citing text). A contract for the shipment of freight over a railroad, made by a lessee of the road, does not bind the railroad company to do more than its lessee is bound to do. International &c. R. Co. v. Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67.

[32] Washington &c. R. Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675; Ottawa &c. R. Co. v. Black, 79 Ill. 262; Bower v. Burlington &c. R. Co., 42 Iowa 546; Braslin v. Somerville &c. R. Co., 145 Mass. 64, 13 N. E. 65; Freeman v Minneapolis &c. R. Co., 28 Minn. 443; Brown v. Hannibal &c. R. Co., 27 Mo. App. 394; Chollette v. Omaha &c. R. Co., 26 Nebr. 159, 41 N. W. 1105, 37 Am. & Eng. R. Cas. 16; Abbott v. Johnstown &c. R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Aycock v. Raleigh &c. R. Co., 89 N Car. 321; Lakin v. Willamette &c. R. Co., 13 Ore. 436, 11 Pac. 68, 57 Am. Rep. 25; Bouknight v. Chicago &c. R. Co., 41 S. Car. 415, 19 So. 915; Harmon v. Columbia &c. R. Co., 28 S. Car. 401, 5 S. E. 835, 13 Am. St. 686; Hart v. Charlotte &c. R. Co., 33 S. Car. 427, 12 S. E. 9; Gulf &c. Co. v. Morris, 67 Tex. 692, 4 S. W. 156, 35 Am. & Eng. R. Cas. 94; Fisher v. West Virginia &c. Co., 39 W. Va. 366, 19 S. E. 578, 2 L. R. A. 758. See generally Chicago &c. R. Co. v. Whipple, 22 Ill. 105; Ohio &c. R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Palmer v. Utah &c. R. Co., 2 Idaho 315, 350, 13 Pac. 425, 36 Am. & Eng. R. Cas. 443; Wasmer v. Delaware, &c. R. Co., 80 N. Y. 212, 36 Am. Dec. 608; Sellers v. Richmond, &c. R. Co., 94 N. Car. 554; Pennsylvania Co. v. Sellers, 127 Pa. St. 406, 17 Atl. 987; East Line. &c. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. 805, 38 Am. & Eng. R. Cas. 225; Great Northern, &c. R. Co. v. Eastern, &c. R. Co., 12 Eng. L. & E. 224.

[33] Wabash &c. R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; Muntz v. Algiers &c. R. Co., 111 La. Ann. 423, 35 So. 624, 64 L. R. A. 222, 100 Am. St. 495; Cantlon v. Eastern R. Co., 45 Minn. 481, 48 N. W. 22; Philadelphia &c. R. Co. v. Anderson, 94 Pa. St. 351, 39 Am. Rep. 787. The lessee's liability is in nowise affected by the fact that

requires the conclusion that a lessee operating under an unauthorized lease is liable for negligence in operating the road. To permit a mere intruder into the franchise of a railroad company to escape liability for his failure to perform the duties which he has assumed, upon the plea that he is acting under an invalid contract and is operating the road without right, would be to allow him to allege his own wrong in his defense.[34] If the lease is void the company operating a railroad under it can not, it is obvious, shield itself from liability from injuries caused by its culpable negligence. The person injured is in nowise to be prejudiced by the wrongful act of the corporation that causes him injury in assuming powers and duties it has no right to take upon itself. There is, however, such harmony among the authorities upon the general question that there is no necessity for extended discussion.

§ 539 (475). **Contracts of the lessee.**—The case of one who founds his claim upon a contract with the lessee after the execution of the lease is essentially different from that of one who bases his right on the tort of the lessee. It is obvious that the lessor cannot be held liable for a breach of the contracts entered into by the lessee. If the action is founded on the contract there is no privity between the lessor and the person with whom the lessee contracts. The contract gives the person with whom the lessee contracts no right of action against the lessor, for the latter has assumed no obligation whatever.[35]

the lease was without authority and therefore unlawful. Ricketts v. Chesapeake &c. R. Co., 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am St. 901, 41 Am. & Eng. R. Cas. 42; Haff v. Minneapolis &c. R. Co., 4 McCrary (U. S.) 622; Atlanta &c. R. Co. v. Ray, 70 Ga. 674; Toledo &c. Co. v. Rumbold, 40 Ill. 143; Missouri Pac. R. Co. v. Morrow, 32 Kans. 217, 4 Pac. 87; McCluer v. Manchester &c. R. Co., 79 Mass. 124, 74 Am. Dec. 624; Feital v. Middlesex &c. R. Co., 109 Mass. 398, 12 Am. Rep. 720; McMillan v. Michigan &c. R. Co., 16 Mich. 79, 93 Am. Dec. 208; Hall v. Brown, 54 N. H. 495; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; Cook v. Milwaukee &c. R. Co., 36 Wis. 45.

[34] Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424.

[35] It has been held that under a lease transferring to the lessee all of lessor's contracts, the lessor cannot be held liable for goods delivered to the lessee under a contract between the owner of the goods and

§ 540 (476). **Joint liability.**—The lessor and lessee are usually jointly liable for negligence in the management of the road where the lease under which it is operated is unauthorized.[36] There is a clear distinction between cases where the lease is authorized and cases where it is unauthorized. If the lease is unauthorized there is a joint wrong, for both parties assume to do what the law forbids. The one attempts to escape obligations the law imposes upon it by making a contract which it has no power to make; the other attempts to assume powers it cannot rightfully possess. The unauthorized lease being void, the lessor has not transferred any duty, and the lessee in assuming rights and powers to which it is not entitled is really an intruder and an usurper.

§ 541 (477). **Liability of company where it permits another company to use track in common with itself.**—It is held by the Supreme Court of the United States that a railroad company which permits another to make a joint use of its track is liable to a person injured by the negligence of the company to which the permission is granted.[37] The weight of authority supports

the lessor. Pittsburgh, &c. R. Co. v. Harbaugh, 4 Brewst. (Pa.) 115. But there is reason for doubting the soundness of this decision. See International, &c. Co. v. Thornton, 3 Tex. Civ. App. 197, 22 S. W. 67; Georgia R. &c. Co. v. Haas, 127 Ga. 187, 56 S. E. 313.

[36] Stickley v. Chesapeake, &c. R. Co., 93 Ky. 323, 20 S. W. 261, 52 Am. & Eng. R. Cas. 56; Little Miami, &c. R. Co. v. Hambleton, 40 Ohio St. 496, 14 Am. & Eng. R. Cas. 126. See Lockhart v. Little Rock, &c. R. Co., 40 Fed. 631; Spangler v. Atchison, &c. R. Co., 42 Fed. 305; Wisconsin, &c. R. Co. v. Ross, 142 Ill. 1, 31 N. E. 412, 34 Am. St. 49, 53 Am. & Eng. R. Cas. 73; Eaton v. Boston, &c. R. Co., 11 Allen (Mass.) 500, 87 Am. Dec. 730; Great Western &c. R. Co. v. Blake, 7 H. & N. 987; Buxton v. Northeastern &c. R. Co., L. R. 3 Q. B. 548; Thomas v. Rhymney R. Co., L. R. 5 Q. B. 226, and L. R. 6 Q. B. 266; Muschamp v. Lancaster, &c. R. Co., 8 M. & W. 421; Readhead v. Midland, &c. R. Co., L. R. 2 Q. B. 412; Illidge v. Goodwin, 5 C. & P. 190; Skinner v. London &c. R. Co., 15 Jur. 289. It is held in Chicago &c. R. Co. v. Darke, 148 Ill. 226, 35 N. E. 750, 57 Am. & Eng. R. Cas. 577, that the objection that the defendants are not jointly liable must be made in the trial court or it will not be considered on appeal.

[37] Railroad Co. v. Barron, 5 Wall. (U. S.) 90, 18 L. ed. 591. In the course of the opinion it was said:

the doctrine of the case referred to.[38] In the case to which we refer the question of the effect of an authorized lease was not considered, and as we believe, there was no such question in the case. The case of a joint use by two companies is essentially different from a case where the lessor company by an authorized lease parts with possession and control of the road. If it be true, as the authorities declare,[39] that the lease transfers possession and control to the lessee to the exclusion of the lessor, the case is entirely different from one wherein one company grants a privilege of common use to another or suffers

"The question is not whether the Michigan company is responsible, but whether the defendants, by giving to that company the privilege of using the road, have thereby, in the given case, relieved themselves from responsibility. The question has been settled, and we think rightly, in the courts of Illinois holding the company liable. The same principle has been affirmed in other states." Chicago, &c. R. Co. v. Whipple, 20 Ill. 337; The court cited the cases of Chicago &c. R. Co. v. McCarthy, 20 Ill. 385, 71 Am. Dec. 285; Chicago &c. R. Co. v. Whipple, 22 Ill. 105; McElroy v. Nashua &c. R. Co., 58 Mass. 400, 50 Am. Dec. 794; Nelson v. Vermont &c. R. Co., 26 Vt. 717, 62 Am. Dec. 614.

[38] Case v. Atlanta &c. R. Co., 225 Fed. 862; Central Trust Co. v. Denver, &c. R. Co., 97 Fed. 239; Peoria, &c. R. Co. v. Lane, 83 Ill. 448; Fort Wayne &c. Co. v. Hinebaugh, 43 Ind. 354; Delaware &c. R. Co. v. Salmon, 39 N. J. L. 299, 23 Am. Rep. 214; Maumee Valley R. &c. Co. v. Montgomery, 81 Ohio St. 426, 91 N. E. 181, 135 Am. St. 802, 26 L. R. A. (N. S.) 987; Quigley v. Toledo, &c. R. Co., 89 Ohio St. 68, 105 N. E. 185, L. R. A. 1918E, 249, 254 (citing text); Lakin v. Willamette &c. R. Co., 13 Ore. 436, 11 Pac. 68, 57 Am. Rep. 25; Stetler v. Chicago, &c. R. Co., 49 Wis. 609, 6 N. W. 303. And the text is cited and applied in Jefferson v. Chicago &c. R. Co., 117 Wis. 549, 94 N. W. 289, 290. See Illinois &c. R. Co. v. Kanouse, 39 Ill. 272, 89 Am. Dec. 307; Harper v. Newport &c. R. Co., 90 Ky. 359, 14 S. W. 346; Chicago &c. R. Co. v. Powell, 151 Ky. 313, 151 S. W. 950. Webb v. Portland &c. R. Co., 57 Maine 117; Peters v. Detroit &c. R. Co., 178 Mich. 481, 144 N. W. 827; Murch v. Concord &c. R. Co., 29 N. H. 9, 61 Am. Dec. 631; Parker v. Rensselaer &c. R. Co., 16 Barb. (N. Y.) 315; Midland R. Co. v. Toomer, 62 Okla. 162, 162 Pac. 1127; Hanover R. Co. v. Coyle, 55 Pa. St. 396; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424; note in 6 L. R. A. (N. S.) 787; Mills v. Orange &c. R. Co., 1 McArthur (D. C.) 285.

[39] State v. Central &c. R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806; New York &c. R. Co., In the Matter of, 49 N. Y. (4 Sickels) 414, 420, 10 Am. Rep. 389; Pennsylvania &c. Co. v. Sly, 65 Pa. St. 205; South Carolina &c. R. Co. v. Wilmington &c. R. Co., 7 S. Car. 410.

the latter company to operate the road in its name. Conceding the soundness of the conclusion in the case decided by the Supreme Court of the United States it cannot be justly regarded as affirming that the lessor who executes a lease under due authority is liable for the negligence of the lessee in operating the road.[40] In the one class of cases there is a change of possession and control, in the other possession is not changed, nor is the right of control surrendered.

§ 542 (478). **Fraudulent leases.**—A contract of lease, like any other contract, may be set aside for the fraud of the directors in executing it. Fraud, however, is not presumed but must be affirmatively proved. Circumstances may be established from which, under familiar rules, fraud may be inferred. The circumstances must be such that under the rules applicable to cases of a similar character, the court or jury may infer fraud. Fraud will not be presumed from the mere fact that a larger rent is reserved than the subsequent earnings of the road really justify, where it appears that the rent was fixed in accordance with the report of competent and disinterested experts, to whom the question was referred.[41] Nor will fraud be presumed from the fact that the directors failed to make the continuance of the lease dependent upon the construction of connecting roads, which were contemplated when the lease was

[40] The decision in Railroad Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675, does not oppose this conclusion, for there was no consideration in that case of the effect of an authorized lease. The real point in the case cited was that as there was no change of possession the company granting the privilege to use still remained liable. The fact that there was no change of possession clearly discriminates the case from one where there is an authorized lease, for the central idea of a lease is that it does change possession. In the above-named case the court said: "Besides, the company, having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts."

[41] Jessup v. Illinois Cent. R. Co., 43 Fed. 483. See also Middletown v. Boston &c. R. Co., 53 Conn. 351, 5 Atl. 706. Percentage of earnings is sometimes stipulated for as rent. Terre Haute, &c. R. Co. v. Cox, 102 Fed. 825; Catawissa R. Co. v. Philadelphia &c. R. Co., 168 Pa. St. 544, 32 Atl. 62.

executed, by which the leased road was expected to become part of an important through line.[42] It is held that a lease by a railroad company of a road constructed by a syndicate of its directors is presumed fraudulent and may be set aside at the suit of a person injured thereby.[43] But such a lease is voidable only and not void, and may be ratified by long acquiescence; and the lessee company cannot dispute its liability to pay the rent reserved under such lease while holding and operating the leased property.[44] A lease fraudulently executed may be avoided, but it cannot be justly said to be void.

§ 543 (479). Unauthorized lease—Injunction.—A stockholder of a corporation, or other party having an interest entitled to protection, has a right to an injunction prohibiting the execution of an unauthorized lease.[45] It is true that such a lease is void, but as it may cloud titles and rights, an injunction is rightly held to be the appropriate remedy. The tendency of the modern cases is to extend the remedy by injunction,[46] and

[42] Jessup v. Illinois Cent. R. Co., 43 Fed. 483.

[43] Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145. An application of stockholders to set aside a traffic contract for ninety-nine years, entered into by one railroad company with another having only a proposed road eighteen miles distant from the first, which has no present authority to build a connecting branch, even if the other had a road, said contract being entered into by the directors and officers for the personal profit and advantage of individual members, and known to be injurious to the company, will be granted. Bostwick v. Chapman, 60 Conn. 553, 24 Atl. 32.

[44] Barr v. New York &c. R. Co., 125 N. Y. 263, 26 N. E. 145.

[45] Pond v. Vermont &c. R. Co., 12 Blatchf. (U. S.) 280, Fed. Cas. No. 11265; Board v. Lafayette &c. R. Co., 50 Ind. 85. See Sorenson v. Chicago &c. R. Co., 183 Iowa 1123, 168 N. W. 313, holding the company liable under the facts, but distinguishing this section and the decision of the Supreme Court of the United States above cited. See also Franklin v. Havalena Min. Co., 16 Ariz. 200, 141 Pac. 727.

[46] Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787; Pom. Eq. § 1357. See generally Watson v. Sutherland, 5 Wall. (U. S.) 74, 18 L. ed. 580; Boyce v. Grundy, 3 Pet. (U. S.) 210, 7 L. ed. 655; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. ed. 1005; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. ed. 909; Allen v. Hanks, 136 U. S. 300, 10 Sup. Ct. 961, 34 L. ed. 414; Morse v. Morse, 44 Vt. 84; Kerr Injunctions, 32. See also Coe v.

there is certainly no other remedy so effective or complete in such cases as those of which we are speaking as an injunction. The general doctrine is that where an act is entirely beyond and outside of the scope of the corporate powers, and is one which will injure the public or defeat public policy, an injunction will lie at the suit of the state or its representative.[47]

East &c. R. Co., 52 Fed. 531; Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529.

[47] Attorney-General v. Delaware &c. R. Co., 27 N. J. Eq. 631, 633; Attorney-General v. Chicago &c. R. Co., 35 Wis. 425; Ware v. Regent's &c Co., 3 DeGex & J. 212; Fishmongers' Co. v. East India Co., 1 Dickens 163; Browne v. Monmouthshare R. Co., 13 Beav. 32; Attorney-General v. Johnson, 2 Wils. (Ch.) 87; Attorney-General v. Forbes, 2 Myl. & C. 123; Attorney-General v. Great Northern &c. R. Co., 4 DeGex & S. 75; Attorney-General v. Mid-Kent &c. R. Co., L. R. 3 Ch. App. 100.

CHAPTER XIX.

RAILROAD SECURITIES.

Sec.
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§ 545 (480). **Power of railroad companies to issue notes and bonds.**—In the absence of any provision upon the subject in the charter or statute, a railroad company has implied power to execute a promissory note in furtherance of its legitimate

business.[1] It likewise has implied power to issue bonds.[2] As said in a leading case:[3] "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restrictions, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement." So, as the corporation has power to issue such negotiable instruments in the first instance, it also has the power to indorse them when they have been received in the payment of debts due it, or the like, in the regu-

[1] Mitchell v. Rome R. Co., 17 Ga. 574; Hamilton v. Newcastle &c. R. Co., 9 Ind. 359; Smead v. Indianapolis &c. R. Co., 11 Ind. 104, 109; Olcott v. Tioga &c. R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Richmond &c. R. Co. v. Snead, 19 Grat. (Va.) 354, 10 Am. Dec. 670 (a due bill). See also Louisville &c. R. Co. v. Caldwell, 98 Ind. 245. The rule seems to be otherwise in England. Bateman v. Mid-Wales R. Co., L. R. 1 C. P. 499, 35 L. J. C. P. 205; Peruvian R. Co. v. Thames &c. Co., L. R. 2 Ch. 617, 36 L J. Ch. 864. See, as to accommodation indorsement, J. G. Brill Co. v. Norton &c. St. R. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525; Craft v. South Boston R. Co., 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641; note in 9 L. R. A. (N. S.) 193.

[2] Kelly v. Alabama &c. R. Co., 58 Ala. 489; Willoughby v. Chicago Junction R. Co., 50 N. J. Eq. 656, 25 Atl. 277; Miller v. New York &c. R. Co., 18 How. Prac. (N. Y.) 374; Olcott v. Tioga &c. R. Co., 27 N. Y. 546, 84 Am. Dec. 298; Commissioners of Craven v. Atlantic &c. R. Co., 77 N. Car. 289; Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574. See also Illinois Trust &c. Bank v. Pacific R. Co., 117 Cal. 332, 49 Pac. 197; Memphis &c. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. ed. 595; Coe v. East &c. R. Co., 52 Fed. 531; Toledo &c. R. Co. v. Continental Trust Co., 95 Fed. 497; Geddes v. Toronto &c. R. Co., 14 U. C. C. P. 513. As to the powers of public service commissioners over the issuance of stocks and bonds or other securities, see Kansas City &c. R. Co. v. Bristow, 101 Kans. 557, 167 Pac. 1138, P. U. R. 1918 A, 732, L. R. A. 1918 E, 342; and note to Laird v. Baltimore &c R. Co., 47 L. R. A. (N. S.) 1167.

[3] Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

lar course of its business.[4] Bonds secured by a mortgage which is unauthorized, or otherwise invalid, may nevertheless be valid as unsecured obligations,[5] and, so, on the other hand, may bonds which are issued without any accompanying mortgage under a statute simply giving authority "to borrow money on mortgage."[6] Indeed, the power to mortgage is said to imply and include the power to borrow money and issue bonds.[7]

§ 546 (481). **Power to guaranty bonds.**—As a general rule, one corporation has no implied authority to lend its credit to another by guaranty of dividends, or the like, especially if they are engaged in different lines of business.[8] But, after much litigation, it now seems to be reasonably well settled that one railroad company may guaranty the bonds of another under

[4] Olcott v. Tioga &c. R. Co., 27 N. Y. 546. See also Bonner v. New Orleans, 2 Woods (U. S.) 135, Fed. Cas. No. 1631; Florida Cent. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327; Tod v. Kentucky Union Land Co., 57 Fed. 47. The indorsement by the company of bonds issued by the state to aid in the construction of the road, although in the form of an express guaranty, gives no lien to the bondholders and in no way prevents the company from executing a mortgage to secure its own bonds which it is authorized to issue. McKittrick v. Arkansas Cent. R. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. ed. 518.

[5] Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574; Union Trust Co. v. New York &c. R. Co., (Ohio Com. Pl.) 1 R. & Corp. L. J. 50.

[6] McMasters v. Reed, 1 Grant Cas. (Pa.) 36, approved and followed in Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

[7] Gloninger v. Pittsburgh &c. R. Co., 139 Pa. St. 13, 21 Atl. 211, 46 Am. & Eng. R. Cas. 276.

[8] Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Louisville &c. R. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. ed. 1081; Humboldt Min. Co. v. American &c. Co., 62 Fed. 356; Smead v. Indianapolis &c. R. Co., 11 Ind. 104; Lucas v. White &c. Co., 70 Iowa 541, 30 N. W. 771, 59 Am. Rep. 449; Greene v. Middlesborough &c. Co., 121 Ky. 355, 89 S. W. 228; Western Md. R. Co. v. Blue Ridge Hotel Co., 102 Md. 307, 62 Atl. 351, 3 L. R. A. (N. S.) 887; Davis v. Old Colony R. Co., 131 Mass. 258, 41 Am. Rep. 221; Central Bank v. Empire Stone Co., 26 Barb. (N. Y.) 23; Polletz v. Public Utilities Com., 96 Ohio St. 49, 117 N. E. 149, L. R. A. 1918 D, 166, and note; Memphis &c. Co. v. Memphis &c. R. Co., 85 Tenn. 703, 5 S. W. 52, 4 Am. St. 798; Stark Bank v. U. S. Pottery Co., 34 Vt. 144; Colman v. Eastern &c. R. Co., 10 Beav. 1.

certain circumstances. Thus, where it has power to issue bonds of its own it also has implied power to guaranty the bonds of another railroad company, properly taken in payment of a debt, in order to enable it to sell them for an adequate price or to use them in payment of its own debt.[9] And it may be safely stated, we think, as a general rule, that such a guaranty may be valid, without an express grant of authority to make it, if it is supported by a valuable consideration of a kind that the guarantor company has authority to receive or invest in.[10] Some courts have gone even further in upholding such a guaranty,[11] and by some the doctrine of estoppel has been applied in favor of those who had made investments and acted upon the faith of the guaranty.[12] A railroad company authorized by statute to make contracts for leasing and operating the road of another company has implied power to include in the lease

[9] Rogers &c. Works v. Southern R. Assn., 34 Fed. 278. See also McKittrick v. Arkansas Cent. R. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. ed. 518 (guaranty of state railway aid bonds); Chicago &c R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596; Arnot v. Erie &c. R. Co., 67 N. Y. 315.

[10] Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Chicago &c. R. Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Green Bay &c. R. Co. v. Union &c. Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. ed. 413; Todd v. Kentucky Union Land Co., 57 Fed. 47; Marbury v. Kentucky Union Land Co., 62 Fed. 335; Low v. California Pac. R. Co., 52 Cal. 53, 28 Am. Rep. 629; Arnot v. Erie R. Co., 67 N. Y. 315; Pollitz v. Public Utilities Com., 96 Ohio St. 49, 117 N. E. 149, L. R. A. 1918 D, 166, 172 (quoting text). See also Foster v. Mansfield &c. R. Co., 36 Fed. 627; Mercantile Trust Co. v. Kiser, 91 Ga. 636, 18 S. E. 358; Ellerman v. Chicago &c. Stock Yards Co., 49 N. J. Eq. 217, 23 Atl. 292, 3 Thomp. Corp. (2nd. ed.), § 2295.

[11] See Mathesius v. Brooklyn Heights R. Co., 96 Fed. 792; Harrison v. Union Pac. R. Co., 13 Fed. 52; Madison, &c. R. Co. v. Norwich Sav. Society, 24 Ind. 457.

[12] See Cozart v. Georgia &c. R. Co., 54 Ga. 379; See State Board of Agriculture v. Citizens St. R., 47 Ind. 407, 17 Am. Rep. 702; Arnot v. Erie, &c. R. Co., 67 N. Y. 315. See also Connecticut Mut. L. Ins. Co. v. Cleveland &c. R. Co., 26 How. Pr. (N. Y.) 225, 41 Barb. (N. Y.) 9; Atchison &c. R. Co. v. Fletcher, 35 Kans. 236, 10 Pac. 596. But contra, see ante, §§ 426, 429; Louisville &c. R. Co. v. Louisville Trust Co., 174 U. S. 552, 557, 19 Sup. Ct. 817, 43 L. ed. 1081. See generally note in 38 L. R. A. (N. S.), 830, 3 Thomp. Corp. (2nd. ed.), § 2217.

a guaranty of the interest coupons of the latter as part of the rent to be paid.[13]

§ 547 (482). Income bonds.—The right to issue income bonds seems to have been conceded or assumed in many cases. Such bonds, with interest payable out of the company's income or net earnings, are frequently issued; but the power to issue irredeemable bonds, the interest on which is to be paid only after a specified dividend has been declared on the common stock is not unquestioned. The existence of such a power, in the absence of an express grant of authority, has been both denied[14] and affirmed.[15] It has been held that the holder of the bonds of a railroad company "payable to bearer, with interest semi-annually, secured on the income from the sale of its lands and the operation of its road and line" is a creditor having a specific lien upon the income, which he has a right to pursue, and a bill in equity will lie to reach it in the hands of another company to which the road and property of the old company has passed by consolidation.[16] Income bonds are not, how-

13 Eastern Townships Bank v. St. Johnsbury &c. R. Co., 40 Fed. 423, 40 Am. & Eng. R. Cas. 566. See also Opdyke v. Pacific R. Co., 3 Dill. (U. S.) 55, Fed. Cas. No. 10546; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Louisville Trust Co. v. Louisville &c. R. Co., 75 Fed. 433; United States Trust Co. v. Western Contract Co., 81 Fed. 454; Ante, § 500.

14 Taylor v. Philadelphia &c. R. Co., 7 Fed. 386, reported together with McCalmont v. Philadelphia &c. R. Co., 3 Am. & Eng. R. Cas. 163.

15 Philadelphia & Reading R. Co.'s Appeal (Pa.), 4 Am. & Eng. R. Cas. 118, 21 Am. L. Reg. 713. This case and those above cited grew out of the same transaction or scheme. The federal court conceded that the corporation had implied power to borrow money, but held that the scheme in question was not a loan because it was never to be paid back. A majority of the state court held that it was a loan, as it was a contract for the use of money, and that it made no difference that it was perpetual. The scheme, however, contemplated the payment of six per cent. interest on the face value of each bond after the payment of a six per cent. dividend on the stock, and that the bonds should then rank pari passu as to further interest with the common stock, although the bondholders were to pay for their bonds less than one-third of their face value, and a minority of the state court were of the opinion that this was unauthorized.

16 Rutten v. Union Pac. R. Co., 17

ever, the most desirable investments, for practically, at least, it is largely within the power of the company to prevent any net income from being realized. Even where the bonds are secured by an income mortgage, as is usually the case, although it may pledge tangible property for the principal, the real security for the payment of interest is little more than the pledge of the good faith of the company in the management and operation of its road.[17] Much, of course, depends upon the provisions of the bonds and mortgage in any particular case, but, in the absence of any valid limitation upon their powers, the directors of the company, necessarily, have a wide discretion in determining what shall be treated as net income.[18] Thus, if it appears that the income contemplated is the profit of future transactions of the company arising from all sources, the bondholders cannot complain if the profits which would have been realized by operating the original lines exclusively have been decreased by losses in the operation of new lines in conjunction therewith, deemed advisable because of competition or the demand for greater facilities.[19] Where, however, a specific lien is provided for upon the income from certain specified property

Fed. 480. See also Morse v. Bay States Gas Co., 91 Fed. 938, 946. Compare, however, Thomas v. New York &c. R. Co., 139 N. Y. 163, 34 N. E. 877, and Hart v. Ogdensburg &c. R. Co., 69 Hun 378, 23 N. Y. S. 639.

[17] Spies v. Chicago &c. R. Co., 40 Fed. 34, 38. In this case Judge Wallace, speaking of an income mortgage, says: "It necessarily contemplates such improvements as seem necessary to the efficient use and operation of such property, and such alterations in the corpus as appear desirable are to be made at the discretion of the directors; and, unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may see fit, subject only to the conditions of its organic law, is unqualified; and, consequently, the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property." See also Barry v. Missouri &c. R. Co., 27 Fed. 1.

[18] Spies v. Chicago &c. R. Co., 40 Fed. 34, 39; Thomas v. New York &c. R. Co., 139 N. Y. 163, 34 N. E. 877, 54 N. Y. S. 498; Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129, 13 N. E. 765.

[19] Spies v. Chicago &c. R. Co., 40 Fed. 34, 38; Buck v. Seymour, 46 Conn. 156; Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129, 13 N. E. 765.

or lines, to be ascertained by deducting specified expenses and liabilities from the gross earnings of such property or lines, a different rule applies and the directors have no right to deduct expenses, including interest charges, incurred in operating new lines acquired by the company out of the earnings of the original lines, from the specific income fund to which the bondholders have a right to look under their contract.[20] It is the duty of the company to keep a proper account and make an honest effort to ascertain the net earnings or income out of which the bondholders are entitled to receive their interest.[21] In the case just cited an accounting was directed, and it was held that upon such accounting the company should be disallowed any sums paid or charged on account of debts which it had contracted prior to the execution of the income mortgage, and that it should also be disallowed any charge against income arising from the sale of the income bonds at less than their face value, as well as interest, which it had not paid or become liable to pay, upon first mortgage bonds, which had been funded and was represented by the income bonds accepted by the first mortgage bondholders in lieu of interest. It was also held that the expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior incumbrances as stipulated, and that the holders of coupons for each separate interest period should be paid ratably out of the net income of that particular period.[22] It is sometimes provided that the coupons or interest shall be paid in money or in scrip at the option of the company, and, in such a case, if the company does not elect to pay in scrip when the interest becomes due, and the income is sufficient, the holder of the coupon may sue for the money.[23]

[20] Spies v. Chicago &c. R. Co., 40 Fed. 34.

[21] Barry v. Missouri &c. R. Co., 27 Fed. 1, 34 Fed. 829.

[22] Barry v. Missouri &c. R. Co., 27 Fed. 1. It has also been held that income bondholders are not entitled to make up a deficiency in the interest in one year out of a surplus in the next. Day v. Ogdensburgh &c. R. Co., 107 N. Y. 129, 13 N. E. 765. Much, of course, depends upon the particular contract or statute involved in each case. See State v. Cowen, 83 Md. 549, 35 Atl. 161, 354, 581.

[23] Texas &c. R. Co. v. Marlor, 123 U. S. 687, 8 Sup. Ct. 311, 31 L. ed.

§ 548 (483). **Convertible bonds.**—There seems to be no good reason why a corporation authorized to increase its stock may not lawfully receive its own bonds in payment for new shares which it issues under such authority.[24] Bonds are sometimes issued which expressly provide that the holder may surrender them to the company and receive a certain number of shares of stock in exchange. Where the charter authorizes the issue of such bonds convertible into stock, it is held that the power to increase the capital stock by issuing shares in exchange for the bonds is given by necessary implication.[25] If they provide that they may be exchanged for stock at or before maturity the holder will waive or forfeit his right to exchange them for stock if he fails to present them until after maturity.[26] It is said, however, that he may demand the stock in exchange at any time before maturity, and that if he makes such demand, just before a dividend is declared he is entitled to the dividend

303; Marlor v. Texas, &c. R. Co., 21 Fed. 383.

[24] Lohman v. New York &c. R. Co., 2 Sandf. Super. Ct. (N. Y.) 39; Reed v. Hayt, 51 N. Y. Super. Ct. 121.

[25] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637; Ramsey v. Erie R. Co., 38 How. Pr. (N. Y.) 193. See also Pratt v. American Bell Tel. Co., 141 Mass. 225, 5 N. E. 307, 55 Am. Rep. 465. But compare Chaffee v. Middlesex R. Co., 146 Mass. 224, 16 N. E. 34, holding that damages may be given but that specific performance will not be decreed if the company has no stock. In the first case cited it was held that if it clearly appeared that the bonds were about to be issued for the purpose of fraudulently increasing the capital stock, and not to borrow money to complete and operate the road, which was the purpose for which their issue was authorized, an injunction would lie to prevent them from being issued, or to restrain their conversion into stock while in the hands of persons having notice of the fraud. But see Jones Corp. Bonds and Mortg., § 62, and compare Great Western Min. Co. v. Harris, 111 Fed. 38.

[26] Chaffee v. Middlesex, R. Co., 146 Mass. 224, 16 N. E. 34. This case holds that where bonds were payable on the first day of February, 1895, which happened to be Sunday, it was too late to present them and demand stock in exchange on Monday, the second day of February, but that bonds which were presented a few minutes after three o'clock in the afternoon of Saturday, January 31, were presented in time, although the usual hour of closing the office of the company was three o'clock. The court said that the bonds could have been presented at "any reasonable time on that day."

as well as the stock.[27] But, where he has received interest up to that time, it is said to be unreasonable to hold that he is also entitled to the dividend.[28] An agreement merely extending the time of payment of the bond, before maturity, does not give the holder any right to insist that it shall be converted into stock after the expiration of the time to which his option was originally limited, or, in other words, merely extending the time of payment, does not, of itself, extend the time within which stock must be demanded according to the terms of the bond.[29] So, where a decree of foreclosure provided that bondholders who purchased at the sale might, if they saw fit, exchange their bonds for stock, it was held that a bondholder who did not become a purchaser and had overlooked the fact that he owned bonds until after the conveyance of the property to the purchasers could not then insist upon receiving stock in exchange, although he was not aware of the foreclosure suit and proceedings.[30] It seems that as the issue of bonds convertible into stock amounts, in effect, to an issue of stock, they cannot, ordinarily, be sold at a discount.[31] The right to demand a conversion of such a bond into stock cannot be assigned without the bond, and a petition in an action against the corporation for refusal to allow the conversion must allege that the plaintiff is the holder of the bond.[32] A bondholder who has a right to exchange his bonds for stock cannot be deprived of that right by a consolidation without being given an opportunity to exercise it,[33] and where a consolidation is effected by the new consolidated company assuming all the

[27] Jones v. Terre Haute &c. R. Co., 57 N. Y. 196.

[28] See Sutliff v. Cleveland &c. R. Co., 24 Ohio St. 147. Certainly this is true as to past dividends.

[29] Muhlenberg v. Philadelphia &c. R. Co., 47 Pa. St. 16.

[30] Landis v. Western Pa. R. Co., 133 Pa. St. 579, 19 Atl. 556. Where an option to exchange stock for bonds contains no express limitation it must nevertheless be exercised within some reasonable time. Catlin v. Green, 120 N. Y. 441.

[31] Compare Van Allen v. Illinois Cent. R. Co., 7 Bosw. (N. Y.) 515. See as to when bonds may be issued and sold for less than par. 3 Thomp. Corp. (2nd ed.), § 2241, et seq.

[32] Denney v. Cleveland &c. R. Co., 28 Ohio St. 108.

[33] Rosenkrans v. Lafayette &c. R. Co., 18 Fed. 513.

debts and liabilities of the old he may usually demand stock in the new company in exchange for his convertible bonds.[34]

§ 549 (484). Negotiability of bonds—Bona fide purchasers. —Railroad bonds, payable at a certain time and place, to bearer or to order, are regarded as negotiable instruments whether under seal or not.[35] This, it seems, is true, also, of convertible bonds giving the holder the option of exchanging them for stock,[36] and the negotiability of a bond is not destroyed by a provision that it may be registered and made payable by transfer only on the books of the company,[37] nor by a provision that it may be paid before maturity,[38] or that it shall be payable on

[34] Day v. Worcester &c. R. Co., 151 Mass. 302, 23 N. E. 824. See also John Hancock &c. Co. v. Worcester &c. R. Co., 149 Mass. 214, 21 N. E. 364; Cayley v. Cobourg &c. R. Co., 14 Grant Ch. (U. Can.) 571.

[35] White v. Vermont &c. R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Kneeland v. Lawrence, 140 U. S. 209, 11 Sup. Ct. 786, 35 L. ed. 492, 46 Am. & Eng. R. Cas. 319, and note; Reid v. Bank, 70 Ala. 199, 14 Am. & Eng. R. Cas. 554, and note; Junction R. Co. v. Cleneay, 13 Ind. 161; Connecticut &c. Co. v. Cleveland &c. R. Co., 41 Barb. (N. Y.) 9; Carr v. LeFevre, 27 Pa. St. 413; Ide v. Passumpsic &c. R. Co., 32 Vt. 297, 4 Elliott Cont., § 3585. Many other authorities are referred to in subsequent notes herein, and most of the cases are cited in the note to McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397, and in Morris Canal &c. Co. v. Fisher, 1 Stockt. Ch. (N. J.) 667, 64 Am. Dec. 423, and note. But coupons are not within a statute allowing days of grace on promissory notes. Chaffee v. Middlesex R. Co., 146 Mass. 224, 16 N. E. 34. In Everton v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9, it is held that the coupons are entitled to days of grace, while in Arents v. Commonwealth, 18 Grat. (Va.) 750, it is held that they are not. It is generally held that "the mortgage follows and partakes of the negotiability of the bonds." Kenicott v. Supervisors, 16 Wall. (U. S.) 452, 21 L. ed. 319; authorities cited in Chicago R. &c. Co. v. Merchants' Nat. Bank, 136 U. S. 268, 10 Sup. Ct. 999, 1003, 34 L. ed. 349. As shown in Spence v. Mobile &c. R. Co., 79 Ala. 576, the only authorities to the contrary are in Ohio and Illinois. See also 3 Thomp. Corp. (2nd. ed.), § 2270.

[36] Hotchkiss v. Nat. Banks, 21 Wall. (U. S.) 354, 22 L. ed. 645. See also Welch v. Sage, 47 N. Y. 143.

[37] Savannah &c. R. Co. v. Lancaster, 62 Ala. 555. See generally as to registered bonds, 3 Thomp. Corp. (2nd ed.), § 2264, 2265.

[38] Union Cattle Co. v. Internation-

or before a certain date,[39] nor by the fact that overdue coupons are attached to it.[40] Nor, it seems, is a mere recital in a bond which purports to be the absolute obligation of the company and is negotiable on its face, that it is one of a series of bonds secured by a trust deed necessarily sufficient to destroy its negotiability or to put the purchaser in good faith upon inquiry as to the conditions in the deed qualifying the terms of the bond.[41] But if the conditions in the trust deed had been incorporated in the bond or so clearly referred to therein as to notify

al Trust Co., 149 Mass. 492, 21 N. E. 962; Ackley School Dist. v. Hall, 113 U. S. 135, 5 Sup. Ct. 371, 28 L. ed. 954.

[39] Union &c. Co. v. Southern &c. Co., 51 Fed. 840. See also Dickerman v. Northern Trust Co., 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. 311. But compare Way v. Smith, 111 Mass. 523; McClellan v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397.

[40] Cromwell v. Sac, 96 U. S. 51, 24 L. ed. 681; Indiana &c. R. Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554; Morgan v. United States, 113 U. S. 476, 5 Sup. Ct. 588, 28 L. ed. 1044; State v. Cobb, 64 Ala. 127; Morton v. New Orleans &c. R. Co., 79 Ala. 590; Grand Rapids &c. R. Co. v. Sanders, 54 How. Pr. (N. Y.) 214; McElrath v. Pittsburgh &c. R. Co., 55 Pa. St. 189. But see First Nat. Bank v. Scott County Comrs, 14 Minn. 77, 100 Am. Dec. 194; Parsons v. Jackson, 99 U. S. 434, 25 L. ed. 457. While this is true as to the bond, the purchaser is not a bona fide purchaser of the overdue coupons so as to be protected from defenses as to them. Gilbough v. Norfolk &c. R. Co., 1 Hughes (U. S.) 410, Fed. Cas. No. 5419.

[41] Guilford v. Minneapolis &c. R. Co., 48 Minn. 560, 51 N. W. 658, 31 Am. St. 694, 51 Am. & Eng. R. Cas. 98. Distinguishing Manning v. Norfolk &c. R. Co., 29 Fed. 838; Caylus v. New York &c. R. Co., 10 Hun (N. Y.) 295, and McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397. The correctness of this decision is not, perhaps, beyond question, but it seems to us that as the recital called attention to nothing unusual, as such bonds are nearly always secured by a trust deed, and as they are intended to be negotiable, the purchaser was not obliged to look for unusual conditions in the trust deed. As bonds are sold as negotiable instruments all over the world any other rule would be impracticable and disastrous. If there had been anything in the bonds calling attention to the unusual provisions of the trust deed the purchaser would doubtless have been bound thereby, but that is a different question. See McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397; Caylus v. New York &c. R. Co., 10 Hun (N. Y.) 295.

the bondholder of their existence, and, in legal effect, import them into the bonds, he would doubtless have taken the bond subject thereto, and it may be stated as a general rule that bonds which contain special stipulations making their payment subject to contingencies not within the control of the holders, lose the character of negotiable instruments and are subject in the hands of a transferee to defenses which would have been available if they were still in the hands of the original payee.[42] The fact that the name of the payee is omitted and that the bonds are payable in blank does not affect their negotiability, and the holder may fill in his own name and maintain suit upon them.[43] The general rule is that the purchaser of negotiable bonds issued by a railroad company in good faith, before maturity, without notice and for a valuable consideration, takes them free from all defenses short of an absolute want of power in the company to issue negotiable bonds.[44] Thus, he is entitled to enforce them against the company, although they may have been stolen,[45] or sold to a prior holder

[42] McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397. See also Reid v. Bank, 70 Ala. 199; Kohn v. Sacramento Elec. Gas & R. Co., 168 Cal. 1, 141 Pac. 626. Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9.

[43] White v. Vermont &c. R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Chapin v. Vermont &c. R. Co., 8 Gray (Mass.) 575; note to Morris Canal &c. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423; Hubbard v. New York &c. R. Co., 14 Abb. Pr. (N. Y.) 275; note to McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397. See however Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9; Augusta Bank v. Augusta, 49 Maine 507.

[44] Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; McMurray v. Moran, 134 U. S. 150, 10 Sup. Ct. 427, 33 L. ed. 814; Rouede v. Mayor, 18 Fed. 719; First Nat. Bank v. Wheeler, 72 N. Y. 201; Stoney v. American Life Ins. Co., 11 Paige (N. Y.) 635; Webb v. Comrs., L. R. 5 Q. B. 642. But see Chicago &c. R. Co. v. Loewenthal, 93 Ill. 433, 450; General Estates Co., In re, L. R. 3 Ch. 758.

[45] Purchasers of stolen bonds were held to take a good title in the following cases: Carpenter v. Rommel, 5 Phila. (Pa.) 34; Murray v. Lardner, 2 Wall. (U. S.) 110, 7 L. ed. 857; Consolidated Assn. v. Avegno, 28 La. Ann. 552; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Seybell v. National &c. Bank, 2 Daly (N. Y.) 383; Dutchess &c. Co. v. Hachfield, 73 N. Y. 226; Raphael v. Governor &c., 17 C. B. 161. Notice

at less than par in violation of the charter or governing statute.[46] He is entitled to their full value no matter what he paid for them.[47] He is not affected in any way by a subsequent misapplication of the proceeds by the company to a purpose for which it is forbidden to issue bonds,[48] and it has been held that the fact that a merchant has taken bonds in payment for goods does not of itself prevent him from being a bona fide purchaser or holder of such bonds.[49] Good faith upon the part of the holder will usually be presumed and the burden of proving fraud or bad faith is upon the party charging it.[50] A bona

to trustee of defenses held not sufficient to destroy a bona fide holding of bonds under the trust deed. Comrs. of Johnson Co. v. Thayer, 94 U. S. 631, 24 L. ed. 133.

[46] Ellsworth v. St. Louis &c. R. Co., 98 N. Y. 553, approved in Gamble v. Queens &c. Co., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488. But see Riggs v. Pennsylvania &c. R. Co., 16 Fed. 804; Spence v. Mobile &c. R. Co., 79 Ala. 576. See generally as tending to uphold such a transaction, Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. ed. 227; Memphis &c. R. Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. ed. 595; Dickerman v. Northern &c. Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. ed. 423; Thompson &c. Co. v. Capital &c. Co., 65 Fed. 341; Savannah &c. R. Co. v. Lancaster, 62 Ala. 555; Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Rafferty v. Buffalo &c. Co., 37 App. Div. 618, 56 N. Y. S. 288; Seymour v. Spring &c. Assn, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Fidelity Ins. &c. Co. v. Western Penna. &c. R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. 911.

[47] Cromwell v. County of Sac, 96 U. S. 51, 24 L. ed. 681; Grand Rapids &c. R. Co. v. Sanders, 17 Hun (N. Y.) 552. But it is held that he must pay value for them in order to be protected as a bona fide purchaser. Baker v. Guarantee Trust &c. Co. (N. J.), 31 Atl. 174.

[48] Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Philadelphia &c. R. Co. v. Lewis, 33 Pa. St. 33, 75 Am. Dec. 574.

[49] Kennicott v. Wayne Co., 6 Biss. (U. S.) 138, Fed. Cas. No. 7710. See also Mercantile Trust Co. v. Zanesville &c. R. Co., 52 Fed. 342.

[50] Murray v. Lardner, 2 Wall. (U. S.) 110, 17 L. ed. 857; Kneeland v. Lawrence, 140 U. S. 209, 35 L. ed 492, 46 Am. & Eng. R. Cas. 319, 322; Spence v. Mobile &c. R. Co., 79 Ala. 576; Chicago &c. Co. v. Peck, 112 Ill. 408; Wickes v. Adirondack Co., 2 Hun (N. Y.) 112; Jones on Corp. Bonds and Mort., § 200. But compare Simmons v. Taylor, 38 Fed. 682; Gilman v. New Orleans &c. R. Co., 72 Ala. 566; Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443.

fide pledgee of negotiable bonds, for value and before maturity, is entitled to the same protection as a bona fide purchaser to the extent of his loan.[51] The pendency of a suit in which the validity of negotiable bonds, not yet due, is involved, is not constructive notice to one who subsequently purchases them in good faith before maturity.[52] But one who takes bonds after maturity or with notice of their illegality or other existing defenses is not protected as a bona fide purchaser of negotiable paper before maturity, unless he succeeds to the rights of such a purchaser. Thus, one who purchases stolen bonds after maturity is not a bona fide purchaser entitled to be protected in his purchase as against the true owner unless a bona fide purchaser has intervened before maturity.[53] So, a purchaser having knowledge of an equitable lien upon the bonds will usually be held to have taken them subject to such lien,[54] and if he has knowledge that they are issued or being disposed of for an unauthorized purpose or the like, he takes them at his peril;[55] but he may be protected as a bona fide purchaser of mortgage bonds

51 Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Claflin v. South Carolina R. Co., 8 Fed. 118; Morton v. New Orleans &c. R. Co., 79 Ala. 590, 621; Hayden v. Lincoln &c. R. Co., 43 Nebr. 680, 62 N. W. 73; Atwood v. Shenandoah Valley R. Co., 85 Va. 966, 9 S. E. 748, 38 Am. & Eng. R. Cas. 534. See Duncomb v. New York &c. R. Co., 84 N. Y. 190; Tyrell v. Cairo &c. R. Co., 7 Mo. App. 294.

52 Enfield v. Jordan, 119 U. S. 680, 7 Sup. Ct. 358, 30 L. ed. 523; Warren v. Marcy, 97 U. S. 96, 24 L. ed. 977; Marshal v. Elgin, 8 Fed. 783; Farmers &c. Co. v. Toledo &c. Co., 54 Fed. 759.

53 Northampton Nat. Bank v. Kidder, 106 N. Y. 221, 12 N. E. 577, 60 Am. Rep. 443, holding also that there is no presumption that the thief negotiated the paper before it was due. See also Hinckley v. Merchants' Nat. Bank, 131 Mass. 147.

54 Hervey v. Ill. Midland R. Co., 28 Fed. 169. So, where bonds are assigned after levy of execution. Hetherington v. Hayden, 11 Iowa 335.

55 Chew v. Henrietta &c. Co., 2 Fed. 5; City of Chicago v. Cameron, 120 Ill. 447, 11 N. E. 899. See also American &c. Co. v. St. Louis &c. R. Co., 42 Fed. 819; Smith v. Florida &c. R. Co., 43 Fed. 731; Knoxville v. Knoxville &c. R. Co., 22 Fed. 758; Trask v. Jacksonville &c. R. Co. 124 U. S. 515, 8 Sup. Ct. 574, 31 L. ed. 521; Silliman v. Fredericksburg &c. R. Co., 27 Grat. (Va.) 119; Garrard v. Pittsburgh &c. R. Co., 29 Pa. St. 154, for instances in which the purchaser was chargeable with knowledge preventing him from being protected as a bona fide purchaser.

notwithstanding the fact that he has knowledge of the claim of one who furnished material for the railroad if he bought them from a bona fide purchaser who had no such knowledge.[56]

§ 550 (485). Form and manner of issuing bonds—Effect of irregularities.—Railroad bonds are generally issued with interest coupons attached, which are substantially in the form of promissory notes. They are usually signed by the president and attested or countersigned by the secretary or other proper officer according to the statute or by-laws.[57] These signatures may be either written or printed,[58] although it is better that they should be written, and it has been held that if the bonds have been properly executed and signed by both of such officers the coupons may be valid notwithstanding the fact that they are signed by only one of them.[59] The presence or absence of a seal is generally immaterial, so far as the negotiability of the instrument is concerned.[60] The amount and time and place of payment should be stated with certainty;[61] but the figures denoting the number of a particular bond in a series are not, ordinarily, an essential or material part of it, and an immaterial alteration in such numbers will not affect the rights of a bona fide holder.[62] Persons dealing in negoti-

[56] Porter v. Pittsburgh &c. Co., 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. ed. 1210. See also Commissioners v. Bolles, 94 U. S. 104, 109, 24 L. ed. 46; Central R. &c. Co. v. Farmer's Loan & T. Co., 114 Fed. 263. Compare Shellenberger v. Altoona &c. R. Co., 212 Pa. St. 413, 61 Atl. 1000, 108 Am. St. 876.

[57] Of course the name of the corporation is in the body and should also, properly, be subscribed "by" the officers named.

[58] Lynde v. County, 16 Wall. (U. S.) 6, 21 L. ed. 272; McKee v. Vernon County, 3 Dill. (U. S.) 210, Fed. Cas. No. 8851; Pennington v. Baehr, 48 Cal. 565.

[59] Thayer v. Montgomery Co., 3 Dill. (U. S.) 389, Fed. Cas. No. 13870. The coupons may be in almost any form creating an indebtedness.

[60] Ante, § 549.

[61] Parsons v. Jackson, 99 U. S. 434, 25 L. ed. 457; Jackson v. Vicksburg &c. R. Co., 2 Woods (U. S.) 141, Fed. Cas. No. 7150, Ledwich v. McKim, 53 N. Y. 307; Maas v. Missouri &c. R. Co., 83 N. Y. 223, 3 Am. & Eng. R. Cas. 30.

[62] Morgan v. United States, 113 U. S. 476, 5 Sup. Ct. 588, 28 L. ed. 1044; Wylie v. Missouri Pac. R. Co., 41 Fed. 623; Commonwealth v. Emigrant &c. Bank, 98 Mass. 12,

able bonds of a corporation must take notice of any charter or statutory prohibition or want of power to issue instruments of that character, and so, if the bonds show upon their face that the provisions of the governing statute have not been complied with, the purchaser is chargeable with notice;[63] but, if the corporation has power to issue instruments of that class, and the particular bonds in question appear to be regular and in compliance with the law, a purchaser in good faith usually has a right to assume that all the preliminary proceedings were regular.[64] Thus, a requirement that the issue of bonds shall be authorized or ratified by the stockholders or by a resolution of the board of directors may be assumed to have been complied with.[65] So, generally, if the corporation has power under any circumstances to issue negotiable bonds, a bona fide holder has a right to presume, in the absence of anything to the contrary, that they were issued under those circumstances and that all conditions within the scope of the authority of the officers of the company have been fulfilled.[66] This, it seems, is true, and

93 Am. Dec. 126; Elizabeth v. Force, 29 N. J. Eq. 587; Birdsall v. Russell, 29 N. Y. 220.

[63] See Nesbit v. Riverside Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. ed. 562; Gilman v. New Orleans &c. R. Co., 72 Ala. 566; Spence v. Mobile &c. R. Co., 79 Ala. 576; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Duke v. Brown, 96 N. Car. 127, 1 S. E. 873; 3 Thomp. Corp. (2nd ed.), § 2286.

[64] Bank v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. ed. 552; Pearce v. Madison R. Co., 21 How. (U. S.) 441, 16 L. ed. 184; Railway Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866; Ellsworth v. St. Louis &c. R. Co., 98 N. Y. 553; Atwood v. Shenandoah &c. R. Co., 85 Va. 966, 9 S. E. 748; Land Credit Co., In re, L. R. D Ch. 460; Fountaine v. Carmarthen R. Co., L. R. 5 Eq. 316. See also National Loan &c. Co. v. Rockland Co., 94 Fed. 335.

[65] Zabriskie v. Cleveland &c. R. Co., 23 How. (U. S.) 381, 16 L. ed. 488; Connecticut Life Ins. Co. v. Cleveland &c. R. Co., 41 Barb. (N. Y.) 9; Royal British Bank v. Turquand, 6 E. & B. 327; Tyson's Reef Co., In re, 3 W. W. & A'B (Vict. Sup. Ct.) Cas. at Law 162. Directors ordinarily have power to authorize the execution of bonds and mortgages. Thompson v. Natchez &c. Co., 68 Miss. 423, 9 So. 821; Hodder v. Kentucky &c. R. Co., 7 Fed. 793.

[66] Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Athenaeum Soc., In re, 4 K. & J. 549.

a bona fide holder may enforce their payment, although the bonds may have been wrongfully put in circulation in the first instance[67] and it has been so held even where they were issued in excess of the amount authorized or prescribed by statute.[68] But securities issued in a form materially different from that prescribed by the statute giving the authority, or without compliance with a condition to be performed by some one other than the corporation, may generally be avoided even as against a so-called bona fide purchaser.[69] Thus, where the statute requires them to be certified on their face by a trust company and registered, and provides that no bond shall be valid until it is so certified and registered they will not be enforced even in the hands of a purchaser in good faith.[70] Interest coupons in the ordinary form, having the requisite certainty of negotiable instruments, may be severed from the bonds to which they are attached and pass by delivery from hand to hand so as to vest a complete title in the bona fide purchaser before maturity with all the rights of a holder of ordinary commercial paper.[71]

[67] Long Island L. & T. Co. v. Columbus &c. R. Co., 65 Fed. 455; Grand Rapids &c. R. Co. v. Sanders, 17 Hun (N. Y.) 552; Webb v. Comrs., L. R. 5 Q. B. 642. But see Athenaeum &c. Ins. Soc. v. Pooley, 3 DeG. & J. 294.

[68] Warfield v. Marshall &c. Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. 263; Baker v. Guarantee &c. Co. (N. J.), 31 Atl. 174; Fidelity &c. Co. v. West Pa. &c. R. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. 911; Allis v. Jones, 45 Fed. 148. But see Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Nesbit v. Riverside Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. ed. 562. All bona fide bondholders participate in the mortgage security, notwithstanding some of the bonds are overissued. Stephens v. Benton, 1 Duv. (Ky.) 112; Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 523, Fed. Cas. No. 13297.

[69] Singer v. St. Louis &c. R. Co., 6 Mo. App. 427; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548. See also Maas v. Missouri &c. R. Co., 83 N. Y. 223.

[70] Morrison v. Inhabitants &c. of Bernards, 36 N. J. L. 219; Maas v. Missouri &c. R. Co., 83 N. Y. 223.

[71] Mercer County v. Hackett, 1 Wall. (U. S.) 83, 17 L. ed. 548; Commonwealth v. Chesapeake, &c. Co., 32 Md. 501; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; and numerous authorities cited in note to Morris Canal &c. Co. v. Fisher, 9 N. J. Eq. 667, 64 Am. Dec. 423, 432, and in note to McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R.

§ 551 (486). Interest coupons.—The negotiability of interest coupons is not necessarily affected by a statement that they represent interest upon certain bonds specified by their numbers.[72] They are in a sense independent securities and may be negotiated as such, yet their character as negotiable instruments and the rights of their holders are sometimes determined by the bonds to which the coupons are attached or to which they refer,[73] and a purchaser may be required to take notice of matters to which they refer in the bonds or mortgage.[74] The peculiar relation of coupons to their bonds is further illustrated by the rules governing the application of the statute of limitations to such instruments. Thus, the period of limitation applicable to the bond is also applied to the coupon and if, for instance, the statute bars simple contract debts, such as the coupon would be except for its relation to the bond, in six years, while it does not bar debts in the nature of the bond short of twenty years, the coupon will not be barred until the expiration of the twenty years;[75] but the statute begins to run

A. 299, 6 Am. St. 397; Brainerd v. New York &c. R. Co., 25 N. Y. 496; Jones Corp. Bonds & Mort., § 238. See generally upon the subject of this section, 4 Elliott Cont. §§ 3582-3586; 8 Elliott Cont, §§ 3585, 3586.

[72] Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9. But see McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397.

[73] McCoy v. Washington Co., 3 Wall. Jr. (U. S.) 381, Fed. Cas. No. 8731, and Smith v. County of Clark, 54 Mo. 58, holding particular coupons negotiable because the bonds were negotiable; Kenosha v. Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725; Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; McClure v. Oxford, 94 U. S. 429, 24 L. ed. 129; Bailey v. Buchanan Co., 115 N. Y. 297, 22 N. E. 155; State v. Spartanburg &c. R. Co., 8 S. Car. 129. See also 4 Elliott Cont., § 3587. Though overdue they may still be negotiated like other overdue commercial paper so long as the bonds have not matured. Thompson v. Perrine, 106 U. S. 589, 1 Sup. Ct. 564, 567, 27 L. ed. 298; Grand Rapids &c. R. Co. v. Sanders, 54 How. Pr. (N. Y.) 214. See Worth v. Marshall Field Co., 240 Fed. 395.

[74] McClure v. Oxford, 94 U. S. 429, 24 L. ed. 129; McClelland v. Norfolk &c. R. Co., 110 N. Y. 469, 18 N. E. 237, 1 L. R. A. 299, 6 Am. St. 397; Silliman v. Fredericksburg &c. R. Co., 27 Grat. (Va.) 119.

[75] City of Kenosha v. Lamson, 9 Wall. (U. S.) 477, 483, 19 L. ed. 725; City of Lexington v. Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809;

against a detached coupon from its own maturity and an action upon coupons may, therefore, be barred before an action upon the bonds which mature later, although the length of the period of limitation is the same.[76] Coupons are so far independent instruments, however, that when complete in themselves, with the requisite certainties of negotiable paper, they may be sued upon, and when severed from the bond before maturity a separate action may be maintained upon them,[77] even though the bond has been paid.[78] This rule has also been applied by some of the courts in favor of the holder of coupons that did not contain words of negotiability or any independent promise to pay the bearer or holder,[79] but others have held that in such a case the coupon must be declared on in connection with the bond.[80] Coupons, although detached from the bond, do not lose their right to participate in the mortgage security,[81]

Huey v. Macon County, 35 Fed. 481. See also Meyer v. Porter, 65 Cal. 67, 2 Pac. 884, 1 West Coast 784; Thompson v. Perrine, 106 U. S. 589, 1 Sup. Ct. 564, 568, 27 L. ed. 298.

[76] Clark v. Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427; Amy v. Dubuque, 98 U. S. 470, 25 L. ed. 228; Koshkonong v. Burton, 104 U. S. 668, 26 L. ed. 886; Huey v. Macon County, 35 Fed. 481. See also Griffin v. Macon County, 36 Fed. 885. Although the bondholders are given the option to sue for both principal and interest six months after default in the payment of interest, this does not, of itself, set the statute of limitations to running against the bonds. Nebraska &c. Bank v. Nebraska &c. Co., 14 Fed. 763.

[77] Commissioners of Knox County v. Aspinwall, 21 How. (U. S.) 539, 546, 16 L. ed. 208; Thomson v. Lee County, 3 Wall. (U. S.) 327, 18 L. ed. 177; Commonwealth v. State and Chesapeake &c. R. Co., 32 Md. 501; Beaver v. Armstrong, 44 Pa. St. 63; North Penna. R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 677.

[78] National Exch. Bank v. Hartford &c. R. Co., 8 R. I. 375, 5 Am. Rep. 582. See also Walnut v. Wade, 103 U. S. 683, 696, 26 L. ed. 526, quoting from Clark v. Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 429.

[79] Woods v. Lawrence County, 1 Black (U. S.) 386, 17 L. ed. 122; Queensbury v. Culver, 19 Wall. (U. S.) 83, 22 L. ed. 100; Smith v. County of Clark, 54 Mo. 58; Mayor v. Potomac Ins. Co., 2 Baxt. 296; 2 Daniels' Negot. Instr. §§ 1511, 1512.

[80] Crosby v. New London &c. R. Co., 26 Conn. 121; Jackson v. York &c. R. Co., 48 Maine 147; Evertson v. Nat. Bank, 66 N. Y. 14, 23 Am. Rep. 9. Approved in Jones Corp. Bonds and Mortg. §§ 242, 262.

[81] Stevens v. New York &c. R. Co., 13 Blatchf. (U. S.) 412, Fed. Cas. No. 13406; Champion v. Hartford &c. Co., 45 Kans. 103, 25 Pac. 950,

but the fact that they are secured by mortgage does not deprive the holder of the right to sue on them at law when due;[82] nor is a suit on one coupon ordinarily a bar to a subsequent suit on another which was also due at the time of such suit.[83] But neither a bondholder nor the holder of a coupon can enforce his judgment by levying an execution upon the mortgaged property and selling it to the disadvantage of the other bondholders.[84] Overdue coupons usually draw interest at the legal rate,[85] and it has been held that such interest is covered by the

10 L. R. A. 754; Haven v. Grand Junction R. Co., 109 Mass. 88; Union Trust Co. v. Monticello &c. R. Co., 63 N. Y. 311, 20 Am. Dec. 541; Miller v. Rutland &c. R. Co., 40 Vt. 399, 94 Am. Dec. 413.

[82] Manning v. Norfolk &c. R. Co., 29 Fed. 838; Welsh v. First Division &c. R., 25 Minn. 314; Montgomery &c. Soc. v. Francis, 103 Pa. St. 378. Where the coupons are payable to bearer the holder is not necessarily an assignee and his right to sue in the United States courts does not depend upon the citizenship of any particular holder. Thompson v. Perrine, 106 U. S. 589, 1 Sup. Ct. 564, 568, 27 L. ed. 298, 103 U. S. 806, 26 L. ed. 612.

[83] Butterfield v. Ontario, 44 Fed. 171. See also Cromwell v. County of Sac., 94 U. S. 351, 24 L. ed. 195; Stewart v. Lansing, 104 U. S. 505, 26 L. ed. 866.

[84] Butler v. Rahm, 46 Md. 541; Fish v. New York Paper Co., 29 N. J. Eq. 16; Commonwealth v. Susquehanna &c. R. Co. 122 Pa. St. 306; Bowen v. Brecon Railw. L. R. 3 Eq. 541; Philadelphia &c. R. Co. v. Woelper, 64 Pa. St. 366, 3 Am. Rep. 596; and cases cited in Pugh v. Fairmount, &c. Co., 112 U. S. 238, 5 Sup. Ct. 131, 135, 28 L. ed. 684. In the first two cases above cited it was held that injunction would lie at the suit of other bondholders.

[85] Aurora City v. West, 7 Wall. (U. S.) 82, 19 L. ed. 42; Walnut v. Wade, 103 U. S. 683, 26 L. ed. 526; Rich v. Seneca Falls, 8 Fed, 852; Farmers Loan & Trust Co. v. Northern Pac. R. Co., 94 Fed. 454; Ashuelot R. Co. v. Elliott, 57 N. H. 397; Philadelphia &c. R. Co. v. Smith, 105 Pa. St. 195; Langston v. South Carolina R. Co., 2 S. Car. 248, and numerous authorities cited in note to Morris Canal &c. Co. v. Fisher, 99 N. J. Eq. 667, 64 Am. Dec. 411. Even where the bonds continue to draw interest after maturity at the same rate they did before, which is greater than the rate fixed by statute in the absence of contract. Cromwell v. Sac, 96 U. S. 51, 24 L. ed. 681; Spencer v. Pierce, 5 R. I. 63; Langston v. South Carolina R. Co., 2 S. Car. 248. But see Ohio v. Frank, 103 U. S. 697, 26 L. ed. 531, as to when the coupons may draw the contract rate of the bond. Some courts hold that coupons do not bear interest, and it generally concluded that it may be defeated or abated where they were not presented for payment as required and the corporation shows that it was pre-

mortgage which secures the bonds and coupons.[86]

§ 552 (487). **Payment of bonds and interest.**—The authorities are conflicting as to whether interest coupons are entitled to days of grace,[87] but, aside from this question, they are payable at the time fixed in the coupons and bond, and a provision in the bond that the interest shall be paid when the coupon is presented and surrendered does not change the rule as to the maturity of the coupon or require its presentment for payment at the time designated in order to hold the maker.[88] Coupons are usually paid in the order in which they fall due,[89] but, ordinarily, upon foreclosure of the mortgage mere priority of maturity gives no priority of satisfaction either over other coupons or over the bond, and the rule of distribution is that the bonds and coupons all share pro rata or pari passu in the proceeds.[90] Where, however, coupons have been presented for

pared and ready and willing to pay. 3 Thomp. Corp. (2nd ed.), § 2325.

86 Gibert v. Washington City &c. R. Co., 33 Grat. (Va.) 586. It is generally held, as shown by the authorities cited in the preceding note, that a demand is unnecessary to start interest to running where the coupons are payable at a fixed time and place; but if no demand has been made interest may be defeated or abated by the mortgagor showing that he had the funds ready and was able and willing to pay at the time and place designated. North Penna. R. Co. v. Adams, 54 Pa. St. 94, 93 Am. Dec. 656; Emlen v. Lehigh &c. Co., 47 Pa. St. 76, 86 Am. Dec. 518; Walnut v. Wade, 103 U. S. 683, 26 L. ed. 526.

87 Holding that they are not: Arents v. Commonwealth, 18 Grat. (Va.) 750; 2 Daniels' Negot. Instr. (3d ed.) §§ 1490a, 1505. Holding that they are: Evertson v. National Bank, 66 N. Y. 14, 23 Am. Rep. 9; Jones Corp. Bonds and Mort. § 245. In Massachusetts they are not, under the statute, and the soundness of the New York decision is questioned. Chaffee v. Middlesex R. Co., 146 Mass. 224, 16 N. E. 34.

88 Green v. Daniel, 102 U. S. 187, 26 L. ed. 99; City of Jeffersonville v. Patterson, 26 Ind. 15, 89 Am. Dec. 448; Langston v. South Carolina R. Co., 2 S. Car. 248; Arents v. Commonwealth, 18 Grat. (Va.) 750, 776. See also Frank v. Wessels, 64 N. Y. 155.

89 Jones Corp. Bonds and Mort. § 247.

90 Dunham v. Cincinnati &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Ketchum v. Duncan, 96 U. S. 671, 24 L. ed. But compare Stevens v. New York &c. R. Co., 13 Blatch. (U. S.) 412, Fed. Cas. No. 13406; State v. Spartanburg &c. R. Co., 8 S. Car. 129; Sewall v. Brainerd, 38 Vt. 364.

payment and cashed they are not entitled to share equally with the bondholders and coupon holders who had reason to suppose that they were paid and cancelled, and not merely purchased, although a third person advanced the money to take them up under an agreement with the company that they should be kept alive and delivered to him.[91] But, as against the corporation, they may exist as valid securities and be entitled to be paid out of any surplus remaining after the payment of the other bonds and coupons,[92] and where the persons who present the coupons for payment have knowledge at the time of facts showing that some one else is advancing the money and that the transaction is, in effect, a purchase rather than a final payment of the coupons, they cannot complain if such third person is treated as a bona fide purchaser and permitted to share pro rata with them in the mortgage security.[93] The pledgee of bonds with coupons attached may collect the coupons as they fall due although the debt secured thereby has not yet matured.[94] In a proper case the payment of a lost bond will be enforced, and a court of chancery, it seems, may even compel the execution of a duplicate bond in place of a lost bond not yet due, upon proper indemnity being furnished.[95] Bondholders cannot be compelled to accept payment and relinquish their lien before maturity,[96]

[91] South Covington &c. R. Co. v. Gest, 34 Fed. 628; Lloyd v. Wagner, 93 Ky. 644, 21 S. W. 334; Commonwealth v. Chesapeake &c. Co., 32 Md. 501; Cameron v. Tome, 64 Md. 507, 2 Atl. 837; Bockes v. Hathorn, 20 Hun (N. Y.) 503; Union Trust Co. v. Monticello &c. R. Co., 63 N. Y. 311, 20 Am. Rep. 541; Fidelity &c. Co. v. West &c. R. Co., 138 Pa. 494, 21 Atl. 21.

[92] Haven v. Grand Junction R. &c. Co., 109 Mass. 88; Union Trust Co. v. Monticello &c. R. Co., 63 N. Y. 311, 20 Am. Rep. 541.

[93] Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868. See also Wood v. Guarantee &c. Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. ed. 472; Claflin v. South Carolina R. Co., 8 Fed. 118; Hand v. Savannah &c. R. Co., 17 S. Car. 219.

[94] Warner v. Rising Fawn &c. Co., 3 Woods (U. S.) 514, Fed. Cas. No. 17188.

[95] New Orleans &c. R. Co. v. Mississippi College, 47 Miss. 560; Rogers v. Chicago &c. R. Co., 6 Abb. N. Cas. (N. Y.) 253. See also Chesapeake &c. Co. v. Blair, 45 Md. 102; Miller v. Rutland &c. R. Co., 40 Vt. 399; Adams' Equity, 166, 168.

[96] Randolph v. Middleton, 26 N. J. Eq. 543.

and a clause in a bond payable at a certain time providing that it "will be redeemed, if desired," at an earlier date, is for the benefit of the holder rather than the maker.[97] Bonds may be made payable in gold,[98] but this is not to be implied from the mere expectation of the holders where there is nothing in the contract to that effect or justifying such an implication.[99] The substitution of new bonds for the old ones does not, necessarily, operate as a payment nor prevent the holders from sharing to the same extent in the mortgage security,[1] but the rule is otherwise where a railroad company issues new bonds in order to fund its indebtedness and bondholders accept second mortgage bonds in exchange for first mortgage bonds knowing that the transaction is intended as a satisfaction of the first mortgage bonds.[2]

§ 553 (488). No power to mortgage without legislative authority.—Railroad bonds are usually secured by mortgage or trust deed, and mortgages are frequently executed for other purposes as well. As a railway company receives from the state special privileges because of its public purpose, and has public duties to perform in person, and as a mortgage may become in effect an absolute conveyance or result in a sale by foreclosure, such a company cannot, without legislative authority, mortgage its franchises and property essential to their exercise.[3] This rule is not, however, applicable to property

[97] Allentown School Dist. v. Derr, 115 Pa. St. 439, 5 Atl. 55. See also Chicago &c. R. Co. v. Pyne, 30 Fed. 86.

[98] Trebilcock v. Wilson, 12 Wall. (U. S.) 687, 20 L. ed. 460; State v. Hays, 50 Mo. 34, 11 Am. Rep. 402.

[99] Knox v. Lee, 12 Wall. (U. S.) 457, 20 L. ed. 287.

[1] Ames v. New Orleans &c. R. Co., 2 Woods (U. S.) 206, Fed Cas. No. 329; Farmers' &c. Co. v. Green, &c. R. Co., 6 Fed. 100; Blair v. St. Louis &c. R. Co., 23 Fed. 524; Gibert v. Washington City R. Co., 33 Grat. (Va.) 586; Stevens v. Mid-Hants &c. R. Co., L R. 8 Ch. 1064. See also Gibles v. Greenville &c. R. Co., 15 S. Car. 304 (refunding bonds have the security of the first mortgage bonds for which they are substituted).

[2] Fidelity &c. Co. v. Shenandoah &c. R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. 858.

[3] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35; Fed. Cas. No. 11461; Hays v. Ottawa &c. R. Co., 61 Ill. 422; State v. Mexican Gulf R. Co., 3 Rob. (La.) 513;

which is not essential to or of use in the fulfillment of the corporation's public purpose and not necessary to enable the company to perform its duties to the public.[4]

Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672, and note; Richardson v. Sibley, 11 Allen (Mass.) 65, 87 Am. Dec. 700, and note; East Boston &c. R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422; Daniels v. Hart, 118 Mass. 543; New Orleans &c. R. Co. v. Harris, 27 Miss. 517; Stewart v. Jones, 40 Mo. 140; Pierce v. Emery, 32 N. H. 484; Black v. Delaware &c. Canal Co., 22 N. J. Eq. 130; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Stewart's Appeal, 56 Pa. St. 413; Carpenter v. Black Hawk G. M. Co., 65 N. Y. 43, 50; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, and note; Atkinson v. Marietta &c. R. Co., 15 Ohio St. 21; Wood v. Bedford &c. R. Co., 8 Phila. (Pa.) 94; Randolph v. Wilmington &c. R. Co., 11 Phila. (Pa.) 502; Susquehanna C. Co. v. Bonham, 9 W. & S. (Pa.) 27; Frazier v. East Tenn. &c. R. Co., 88 Tenn. 138, 12 S. W. 537; Naglee v. Alexandria &c. R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. 308, 32 Am. & Eng. R. Cas. 401; Hall v. Sullivan R., 21 Law R. 138; Wyatt v. St. Helen's &c. R. Co., 2 Q. B. 364; Hart v. Eastern U. R. Co., 7 Exchq. 246. In a number of cases in the Supreme Court of the United States, most of which involved the question of the power to lease, it is stated in general terms that a railroad company has no implied power to alienate its franchises in any way, whether by sale, mortgage or lease. One of the most recent of these cases is Snell v. City of Chicago, 152 U. S. 191, 14 Sup. Ct. 489, 492, 38 L. ed. 408, in which the others are cited. See also ante, §§ 82, 83; Jennings v. Dark, 175 Ind. 332, 92 N. E. 778; Attorney General v. Haverhill Gaslight Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914C, 1266n. Some cases, however, hold that railroad companies may mortgage their property and franchises other than that of existing as a corporation, at least to secure indebtedness incurred for the legitimate purpose of construction or operation. Savannah &c. R. Co. v. Lancaster, 62 Ala. 555; Kelly v. Ala. &c. R. Co., 58 Ala. 489; Memphis &c. R. Co. v. Dow, 22 Blatch. (U. S.) 48, 19 Fed. 388; Bardstown &c. R. Co. v. Metcalfe, 61 Ky. 199, 81 Am. Dec. 541; Shepley v. Atlantic &c. R. Co., 55 Maine 395; Kennebec &c. R. Co. v. Portland &c. R. Co., 59 Maine 9, 23; Commissioners v. Atlantic &c. R. Co., 77 N. Car. 289; Miller v. Rutland &c. R. Co., 36 Vt. 452; Bickford v. Grand Junction R. Co., 1 Sup. Ct. of Canada 696, 738, reversing Grand Junction R. Co. v. Bickford, 23 Grant's Ch. (Ont.) 302. See also New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Owensboro v. Cumberland Tel. &c. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; Cooper v. Utah Light &c. Co., 35 Utah 570, 102 Pac. 202.

[4] Platt v. Union Pac. R. Co., 99 U. S. 48, 57, 25 L. ed. 424; Tucker

§ 554 (489). Legislative authority to mortgage.—In almost all of the states general laws have been enacted authorizing railroad companies to mortgage their property and franchises.[5] The authority may, sometimes, be implied or inferred from the terms of the statute,[6] although not expressly mentioned; but, by expressly giving authority to mortgage to a certain amount the implication of an authority to mortgage beyond that amount may be forbidden.[7] Charter authority to mortgage real estate refers to real estate acquired in whatsoever manner;[8] and a part of a railroad may be mortgaged under authority to mortgage the whole.[9] It has been held that power to pledge property also authorizes a mortgage of the prop-

v. Ferguson, 22 Wall. (U. S.) 527, 572, 22 L. ed. 805; Farnsworth v. Minnesota &c. R. Co., 92 U. S. 49, 23 L. ed. 530; Taber v. Cincinnati &c. R. Co., 15 Ind. 459; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Pierce v. Emery, 32 N. H. 484; Bickford v. Grand Junction R. Co., 1 Sup. Ct. of Canada 696, 735. See also Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, and note 550. This exception, it is said, includes surplus land acquired by eminent domain. Jones Corporate Bonds and Mortgages, 12, citing Bickford v. Grand Junction R. Co., 1 Supreme Court of Canada 696, 735.

[5] Jones Corporate Bonds and Mort. § 27.

[6] East Boston &c. R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422. See also Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279; Willamette &c. Co. v. Bank 119 U. S. 191, 7 Sup. Ct. 187, 30 L. ed. 384; Farmers' Loan &c. Co. v. Toledo &c. R. Co., 54 Fed. 759; Pierce v. Milwaukee &c. R. Co., 24 Wis. 551, 1 Am. Rep. 203.

[7] Brice Ultra Vires (2d Eng. ed.), 273. It is said, however, and rightly, as we think, that an express authority to mortgage for certain purposes does not necessarily negative or qualify a general authority to borrow for other purposes for which the implied powers of a corporation are usually sufficient. Jones Corporate Bonds and Mortgages, 7; Allen v. Montgomery R. Co., 11 Ala. 437; Mobile &c. R. Co. v. Talman, 15 Ala. 472; Phillips v. Winslow, 57 Ky. 431, 68 Am. Dec. 729. See Pooley Hall Colliery Co., In re, 21 L. T. (N. S.) 690.

[8] Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[9] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, 45, Fed. Cas. No. 11461; Chartiers R. Co. v. Hodgens, 85 Pa. St. 501, 506; Bickford v. Grand Junction &c. R., 1 Can. Sup. Ct. 696. But see East Boston &c. R. Co. v. Hubbard, 10 Allen (Mass.) 459, note.

erty,[10] and so does a grant of power to borrow money and execute "such securities in amount and kind" as the company may deem expedient.[11] A mortgage, though made with charter authority, has been held not to be good against the state which has taken possession of the road under provisions of the charter entitling it to declare a forfeiture.[12]

§ 555 (490). Distinction between authority to mortgage franchises and authority to mortgage property.—Authority to mortgage a prerogative franchise may not be inferred from a company's express right to sell and consequent[13] right to mortgage its property.[14] But, from the power to mortgage a corporation's franchises may be implied the power to transfer both franchises and property to a purchaser at a foreclosure sale.[15]

[10] Mobile &c. R. Co. v. Talman, 15 Ala. 472.

[11] Pierce v. Milwaukee &c. R. Co., 24 Wis. 551, 1 Am. Rep. 203.

[12] Silliman v. Fredericksburg &c. R. Co., 27 Grat. (Va.) 119. See also Farnsworth v. Minnesota &c. R. Co., 92 U. S. 4966, 23 L. ed. 530. But see People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; Mower v. Kemp, 42 La. Ann. 1007, 8 So. 830.

[13] Willamette M. Co. v. Bank of British Columbia, 119 U. S. 191, 7 Sup. Ct. 187, 30 L. ed. 384.

[14] Branch v. Atlantic &c. R. Co., 3 Woods (U. S.) 481, Fed. Cas. No. 1807; McAllister v. Plant, 54 Mass. 106. Generally, it would seem that a statute authorizing a mortgage of corporation property does not by implication authorize a mortgage of franchises. Dunham v. Isett, 15 Iowa 284; Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; Pollard v. Maddox, 28 Ala. 321; Randolph v. Wilmington &c. R. Co., 11 Phil. (Pa.) 502. But see Kavanaugh v. St. Louis, 220 Mo. 496, 119 S. W. 552. A mortgage covering property and franchise, having been authorized by charter as to the former but not as to the latter, is not entirely void, but will operate to convey the corporation's property. Randolph v. Wilmington &c. R. Co., 11 Phila. (Pa.) 502; Gloninger v. Pittsburgh &c. R. Co., 139 Pa. 13, 21 Atl. 211, 46 Am. & Eng. R. Cas. 276. See Butler v. Rahm, 46 Md. 541; Carpenter v. Black Hawk G. M. Co., 65 N. Y. 43; Central G. M. Co. v. Platt, 3 Daly (N. Y.) 263.

[15] Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Traer v. Clews, 115 U. S. 528, 6 Sup. Ct. 155, 29 L. ed. 467; Phillips v. Winslow, 57 Ky. 431, 68 Am. Dec. 729. See also Chadwick v. Old Colony R. Co., 171 Mass. 239, 50 N. E. 629. But not, ordinarily the franchise to be a corporation. See also Rogers v.

Authority to mortgage a railroad company's "means, property and effects," has been held sufficient to authorize a mortgage of all its franchises except that of being a corporation,[16] but the soundness of some of these decisions, in so far as they hold that a mortgage of any prerogative or true franchise was authorized, is not entirely beyond question. There must certainly be a very clear grant of power to authorize a mortgage of the franchise to be a corporation. But it has been held that the power to pledge the franchises and rights of a corporation implies, as incident thereto, the power to pledge everything necessary to the enjoyment of the franchise and upon which its real value depends.[17] If the statute conferring power to mortgage specifies or enumerates the particular property to be included it gives no authority to include other kinds.[18]

§ 556 (491). Who may execute the mortgage.—The authority of a corporation to mortgage its property may, unless reserved to the stockholders, be exercised by its directors,[19] even

Nashville &c. R. Co., 91 Fed. 299; Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 619, 5 Sup. Ct. 299, 28 L. ed. 837.

[16] Meyer v. Johnston, 53 Ala. 237; Bradstown &c. R. Co. v. Metcalfe, 61 Ky. 199, 81 Am. Dec. 541. See also Wilmington R. Co. v. Reid, 13 Wall. (U. S.) 264, 20 L. ed. 568; Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; McAllister v. Plant, 54 Miss. 106. So authority to mortgage "the entire road, fixtures, and equipments, with all the appurtenances, income and resources thereof," does not include the right to mortgage the franchise to be a corporation, but does include, according to another decision, the right to mortgage the franchise to maintain a railroad and take compensation as a carrier. Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[17] Phillips v. Winslow, 57 Ky. 431.

[18] See Georgia Southern &c. R. Co. v. Barton, 101 Ga. 466, 28 S. E. 842; Morris v. Cheney, 51 Ill. 451; Taber v. Cincinnati &c. R. Co., 15 Ind. 459; Bath v. Miller, 51 Maine 341; Lloyd v. European &c. R. Co., 18 New Bruns. 194. Compare also Gloninger v. Pittsburgh &c. R. Co., 139 Pa. St. 13, 21 Atl. 211; Fidelity Ins. &c. Co. v. Western Penna. Co., 138 Pa. St. 494, 21 Atl. 21, 21 Am. St. 911; Grand Junction R. Co. v. Bickford, 23 Grant Ch. (U. C.) 302.

[19] Hodder v. Kentucky &c. R. Co., 7 Fed. 793; Phinizy v Augusta &c. R., 62 Fed. 678; Taylor v. Agricultural &c. Assn., 68 Ala. 229; Blood v. La Serena &c. Co., 113

outside the state of its creation,[20] or outside the state in which the railroad is situated.[21] Even where the authorization of the stockholders is required, it is held that the public has no interest in the requirement;[22] that it cannot be pleaded by the corporation's creditors,[23] and that the stockholders cannot complain after the issuance of bonds[24] to bona fide purchasers. The president of a railroad company cannot mortgage its property to secure its debt, even though he be authorized generally to act as its financial agent.[25] The use of the corporate seal in

Cal. 221, 41 Pac. 1017, 45 Pac. 252; Wood v. Whelen, 93 Ill. 153; Thomas v. Citizens' Horse R. Co., 104 Ill. 462; Hendee v. Pinkerton, 14 Allen (Mass.) 381; Tripp v. Swanzey Paper Co., 13 Pick. (Mass.) 291; Burrill v. Nahant Bank, 2 Met. (Mass.) 163, 35 Am. Dec. 395; Thompson v. Natchez &c. Co., 68 Miss. 423, 9 So. 821; Ohio &c. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; McCurdy's Appeal, 65 Pa. St. 290; Bank of Middlebury v. Rutland &c. R. Co., 30 Vt. 149.

[20] Galveston R. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Hodder v. Kentucky &c. R. Co., 7 Fed. 793; McCall v. Byram Mfg. Co., 6 Conn. 428; Wright v. Bundy, 11 Ind. 398; Ohio &c. R. Co. v. McPherson, 35 Mo. 13, 86 Am. Dec. 128; Bassett v. Monte Christo M. Co., 15 Nev. 293; Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105; Arms v. Conant, 36 Vt. 744. In some of the states, however, charters and general laws prohibit the action of the directors without the authorization of the stockholders. Mass. Pub. Stat. Ch. 106, § 23. It has been held that this does not apply to a mortgage of property in Massachusetts owned by a corporation of Vermont. Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316, 4 R. & Corp. Law J. 151; Romford Canal, In re, 24 Ch. Div. 85; Landowners' &c. Co. v. Ashford, 16 Ch. Div. 411; Fountaine v. Carmarthen R. Co., 5 Eq. 316; Tex. Rev. Stat. Art. 4220; 8 Vict. Ch. 16, § 38.

[21] Hervey v. Illinois Midland R. Co., 28 Fed. 169. But it is held that a foreign corporation must comply with the statute of a state in which it does business, requiring the authorities of stockholders to the execution of the mortgage, Williams v. Gaylord, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. 798.

[22] Thomas v. Citizens' Horse R. Co., 104 Ill. 462. See also Central Trust Co. v. Condon, 67 Fed. 84; Beecher v. Marquette &c. Mill Co., 45 Mich. 103, 7 N. W. 695.

[23] Hervey v. Illinois Midland R. Co., 28 Fed. 169.

[24] Hodder v. Kentucky &c. R. Co., 7 Fed. 793; McCurdy's Appeal, 65 Pa. St. 290; Texas &c. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98.

[25] Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Hoyt v. Thompson, 5 N. Y. 320; Luse v. Isthmus Transit R. Co., 6 Ore. 125, 25 Am. Rep.

such a case only raises a rebuttable presumption that the mortgage has been authoritatively executed.[26] The individual signature of an executive officer, empowered to execute the mortgage, may, however, bind the corporation whose instrument it purports to be, though the corporate name be omitted.[27] Where the authority of the agent to execute the mortgage is in general terms he must include in it usual provisions only, and the company will not, ordinarily, be bound by any unusual provisions which may be included.[28]

§ 557 (492). Ratification by stockholders of unauthorized or improperly executed mortgage.—An unauthorized mortgage, which the corporation has power to execute, may be ratified by the stockholders, either directly by vote or indirectly as by the payment of interest or the receipt and retention of the pro-

506; Whitwell v. Warner, 20 Vt. 425. But it might be otherwise if he were authorized to borrow the money. Hatch v. Coddington, 95 U. S. 48, 24 L. ed. 339. See also Bell &c. Co. v. Kentucky Glass Works, 106 Ky. 7, 50 S. W. 2, 1092, 51 S. W. 180. And see as to estoppel where the money is used by the company, Augusta &c. R. Co. v. Kettel, 52 Fed. 63; Pomeroy v. New York &c Co. (N. J.), 48 Atl. 395; Murray v. Beal, 23 Utah 548, 65 Pac. 726.

[26] Wood v. Whalen, 93 Ill. 153; Northern C. R. Co. v. Bastian, 15 Md. 494; Gorder v. Plattsmouth Canning Co., 36 Nebr. 548, 54 N. W. 830; Fidelity Ins. Co. v. Shenandoah Valley R. Co., 32 W. Va. 244, 9 S. E. 180. See also Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. ed. 339; Reed v. Bradley, 17 Ill. 321. It has been held that it may be enforced as an equitable mortgage if the requisite seal is not attached. Brown v. Farmers' &c. Co., 23 Ore. 541, 32 Pac. 548; Pullis v. Pullis Bros., 157 Mo. 565, 57 S. W. 1095.

[27] Savannah, &c. R Co. v. Lancaster, 62 Ala. 555; Haven v. Adams, 4 Allen (Mass.) 80; Despatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203. See also Anten v. City, &c. R. Co., 104 Fed. 395; Sioux City Terminal R. Co. v. Trust Co., 173 U. S. 99, 19 Sup. Ct. 341, 43 L. ed. 628. Of course this is not true when the instrument purports to be the officers'. Brinley v. Mann, 56 Mass. 337, 48 Am. Dec. 669; Miller v. Rutland, &c. R. Co., 36 Vt. 452.

[28] Pacific Rolling Mill v. Dayton, &c. R. Co., 5 Fed. 852; Jesup v. City Bank of Racine, 14 Wis. 331. See also Savannah, &c. R. Co. v. Lancaster, 62 Ala. 555; Hart v. Eastern Un. R. Co., 7 Ex. 246. But see Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105.

ceeds, or other acts recognizing the obligation.[29] The receipt of the proceeds of an unauthorized mortgage has been held to be such a ratification that a corporation may not thereafter repudiate it, even though executed in violation of a statute forbidding a mortgage without the approval of two-thirds of the stock.[30] So, where a corporation is authorized to increase its capital stock, and attempts to do so, but fails to give the statutory notice required in such a case, both the corporation and its stockholders who acquiesce therein, are estopped to question the validity of a mortgage executed to secure obligations greater in amount than the original capital, but less than the capital as increased, notwithstanding the statute prohibits a mortgage exceeding the amount of the capital stock; and such a mortgage is ratified by the acquiescence of the stockholders for several years, although it was not originally authorized by them at a legally called meeting.[31]

[29] Merchants' Bank v. State Bank, 10 Wall. (U. S.) 604, 19 L. ed. 1008; Railway Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; National Bank v. Matthews, 98 U. S. 621, 25 L. ed. 188; Mahoney Mining Co. v. Anglo-Californian Bank, 104 U. S. 192, 26 L. ed. 707; Page v. Fall River, &c. R. Co., 31 Fed. 257; Farmers', &c. Co. v. Toledo, &c. R. Co., 67 Fed. 49; Foulke v. San Diego, &c. R. Co., 51 Cal. 365; Lewis v. Hartford Silk Mfg. Co., 56 Conn. 25, 12 Atl. 637; Southern, &c. Transp. Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448; City Fire Insurance Co. v. Carrugi, 41 Ga. 660; Thomas v. Citizens' Horse R. Co., 104 Ill. 462; Ottawa, &c. R. Co. v. Murray, 15 Ill. 336; Thompson v. Lambert, 44 Iowa 239; Perkins v. Portland, &c. R. Co., 47 Maine 573, 74 Am. Dec. 507; Harrison v. Annapolis, &c. R. Co., 50 Md. 490; Kelley v. Newburyport, &c. R. Co., 141 Mass. 496, 6 N. E. 745; Lester v. Webb, 1 Allen (Mass.) 34; Singer v. St. Louis, &c. R. Co., 6 Mo. App. 427; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Elwell v. Grand St., &c. R. Co., 67 Barb. (N. Y.) 83; Hays v. Galion Gas Light, &c. Co., 29 Ohio St. 330; McCurdy's Appeal, 65 Pa. St. 290; Trader v. Jarvis, 23 W. Va. 100.

[30] Forbes v. San Rafael T. Co., 50 Cal. 340; Texas, &c. R. Co. v. Gentry, 69 Texas 625, 8 S. W. 98. See also Gribble v. Columbus, &c. Co., 100 Cal. 67, 34 Pac. 527. But see Alta, &c. Co. v. Alta, &c. Co., 78 Cal. 629, 21 Pac. 373; Duke v. Markham, 105 N. Car. 131, 10 S. E. 1017, 18 Am. St. 889.

[31] Farmers', &c. Co. v. Toledo, &c. R. Co., 67 Fed. 49.

§ 558 (493). **When ultra vires mortgage may be made effective.**—An ultra vires mortgage may be ratified by the legislature either directly,[32] or indirectly, by an act authorizing the trustees to sell the road[33] or by other recognition of the obligation.[34] Where the want of power is not apparent in the charter, or in any statute, or in the instrument itself, it has been held that the corporation may not plead ultra vires against an innocent holder for value.[35] An ultra vires mortgage may, however, be enjoined in a suit in equity brought by a stockholder.[36] But stockholders may estop themselves from questioning the validity of a mortgage either upon the ground that the corporation was not legally organized or upon the ground that the mortgage was not properly authorized, where they take part in an attempt to organize under a valid law and acquiesce in the

[32] White Water Valley Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Gross v. United States, &c. Co., 108 U. S. 477, 2 Sup. Ct. 940, 27 L. ed. 795; Hatcher v. Toledo, &c. R. Co., 62 Ill. 477; Kennebec, &c. R. Co. v. Portland, &c. R. Co., 54 Maine 173; Shepley v. Atlantic, &c. R. Co., 55 Maine 395; Shaw v. Norfolk Co. R. Co., 5 Gray (Mass.) 162; St. Paul, &c. R. Co. v. Parcher, 14 Minn. 297; Richards v. Merrimack, &c. R., 44 N. H. 127; Pierce v. Milwaukee, &c. R. Co., 24 Wis. 551, 1 Am. Rep. 203.

[33] Richards v. Merrimack, &c. R. Co., 44 N. H. 127.

[34] Ander v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. ed. 996; Troy, &c. R. Co. v. Boston, &c. R. Co., 86 N. Y. 107; Gardner v. London, &c. R. Co., Law R. 2 Ch. App. 201; Shrewsbury, &c. R. Co. v. Northwestern R. Co., 6 H. L. Cas. 113; East Anglian R. Co. v. Eastern Counties R. Co., 11 Com. B. 775; Winch v. Birkenhead, &c. R. Co., 5 DeGex & S. 562; Bagshaw v. Eastern Union R. Co., 7 Hare 114; Great Northern R. Co. v. Eastern Counties R. Co., 21 Law J. Ch. 837.

[35] Monument National Bank v. Globe Works, 101 Mass. 57, 3 Am. Rep. 322; Singer v. St. Louis, &c. R. Co., 6 Mo. App. 427; Bissell v. Michigan, &c. R. Co., 22 N. Y. 258; Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504; Hays v. Galion, &c. Co., 29 Ohio St. 330. See Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548. Ratification of an ultra vires mortgage by the stockholders is held not to validate it in Curtin v. Salmon, &c. Co., 130 Cal. 345, 62 Pac. 552, 80 Am. St. 132, and this would seem to be correct where they themselves have no power to make a mortgage.

[36] McCalmont v. Philadelphia, &c. R. Co., 27 Int. Rev. Rec. 162, 3 Am. & Eng. R. Cas. 163.

mortgage.[37] A statutory provision requiring notice of a meeting to authorize a mortgage is for the benefit of the stockholders, and if they do not complain of the failure to give such notice no one else can do so.[38] Creditors holding debentures and standing in the same right as the mortgagee may, it has been held, by a bill in equity filed by any of them, secure an equal distribution of property mortgaged ultra vires.[39]

§ 559 (494). **Recording mortgages.**—Railroad mortgages, like other mortgages—and in the case of real property subject ordinarily to the same laws and rules—must be recorded in order to charge third parties with constructive notice; but a mortgage expressly recognizing another unrecorded mortgage is entitled to no priority over it.[40] In some states railroad mortgages are recorded with the secretary of state. An unrecorded mortgage, drawn in the form of a lease, covering rolling stock to be paid for by annual rental, is not good against attachment and execution by creditors, nor against bona fide purchasers from the mortgagor.[41] A state's interests will not be prejudiced by the neglect of an agent to record a mortgage made by a railroad corporation in pursuance of a public statute.[42] An agreement to furnish supplies to a railroad company, the title remaining in the vendor while they are being paid for in instalments, if not recorded in conformity with the Illinois chattel mortgage act, gives the vendor no lien against third persons.[43] Railroad mortgages covering the corporate fran-

[37] Farmers', &c. Co. v. Toledo, &c. R. Co., 67 Fed. 49. See also Boyce v. Montauk Gas, &c. Co., 37 W. Va. 73, 16 S. E. 501; Texas, &c. R. Co. v. Gentry, 69 Tex. 625.

[38] Central Trust Co. v. Condon, 67 Fed. 84.

[39] De Winton v. Brecon, 26 Beav. 533, 5 Jur. N. S. 882. See also Firbank v. Humphreys, 18 Q. B. Div. 54.

[40] Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. But see Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494.

[41] Heryford v. Davis, 102 U. S. 235, 2 Am. & Eng. R. Cas. 386, 26 L. ed. 160; Hervey v. Rhode Island &c. Works, 93 U. S. 664, 23 L. ed. 1003; Frank v. Denver, &c. R. Co., 23 Fed. 123.

[42] Memphis and Little Rock R. Co. v. State, 37 Ark. 632.

[43] Green v. Van Buskirk, 5 Wall. (U. S.) 307, 18 L. ed. 599; Hervey

chises and realty, as well as the personalty connected therewith and used for railroad purposes, are not, ordinarily, subject to statutes regarding the acknowledgment and recording of chattel mortgages.[44] And so it has been held that a mortgage covering both the road and the rolling stock and recorded as a real estate mortgage need not be also recorded as a chattel mortgage,[45] but there is conflict among the authorities and it is generally safer to record it as both,[46] unless, as in many of the states, the question is set at rest by legislative enactment. The institution of foreclosure proceedings will not interfere with the right of creditors, without actual notice of an unrecorded mortgage, to levy upon the corporate property.[47]

v. Rhode Island, &c. Works, 93 U. S. 664, 23 L. ed. 1003; Fosdick v. Schall, 99 U. S. 235, 250, 25 L. ed. 339; Murch v. Wright, 46 Ill. 487, 95 Am. Dec. 455. See also Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160.

[44] Hammock v. Loan, &c. Co., 105 U. S. 77, 26 L. ed. 1111; Peoria, &c. R. Co. v. Thompson, 103 Ill. 187; Cooper v. Corbin, 105 Ill. 224. Thus it has been held that they are not subject to statutes requiring record in the county where the property is situated. Metropolitan Trust Co. v. Pennsylvania, &c. R. Co., 25 Fed. 760. But see Radebaugh v. Tacoma, &c. R., 8 Wash. 570, 36 Pac. 460; Union, &c. Co. v. Southern, &c. Co., 51 Fed. 840. Nor, where a special statute provides that railroad companies may "mortgage their corporate property and franchises," is a mortgage of personal property in connection with the real estate and franchises subject to the provisions of a general chattel mortgage statute requiring an affidavit of good faith. Southern California, &c. Co. v. Union, &c. Co., 64 Fed. 450.

[45] Farmers', &c. Co. v. St. Joseph, &c. R. Co., 3 Dill. (U. S.) 412, Fed. Cas. No. 4669; Union, &c. Co. v. Southern, &c. Co., 51 Fed. 840; Palmber v. Forbes, 23 Ill. 301. But see Hoyle v. Plattsburg, &c. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Williamson v. New Jersey, &c. R. Co., 29 N. J. Eq. 311; Radebaugh v. Tacoma, &c. R. Co., 8 Wash. 570, 36 Pac. 460; Jones Corp. Bonds & Mort., Chapter V, where the question is discussed and the conflicting authorities are rereviewed. See also ante, § 450.

[46] See Union, &c. Co. v. Southern, &c. Co. 51 Fed. 840; Bishop v. McKillieau, 124 Cal. 321, 57 Pac. 76, 71 Am. St. 68; Williamson v. New Jersey So. R. Co., 29 N. J. Eq. 211; Hoyle v. Plattsburgh, &c. R. Co., 54 N. Y. 314; Radebaugh v. Tacoma, &c. R. Co., 8 Wash. 570, 36 Pac. 460.

[47] Coe v. New Jersey Midland R. Co., 31 N. J. Eq. 105.

§ 560 (495). Generally as to what property is covered by the mortgage.—The extent of property covered by a railroad mortgage is a matter of interpretation under the rules applicable to the interpretation of mortgages by individuals, reference, however, being had to the authorizing statute.[48] Nothing appearing to the contrary in a mortgage, whose terms are general, it has been held that all the property is included when the statute authorizes an encumbrance of the whole.[49] Of course, however, general words cannot extend the lien beyond the limita-

[48] Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Coe v. New Jersey Midland, &c. R. Co., 31 N. J. Eq. 105.

[49] Coe v. New Jersey Midland, &c. R. Co., 31 N. J. Eq. 105. See also Columbia, &c. Co. v. Kentucky Union R. Co., 60 Fed. 794; Barnard v. Norwich, &c. R. Co., 4 Cliff. (N. S.) 351, 2 Fed. Cas. No. 1007; Scott v. Clinton, &c. R. Co., 6 Biss. (U. S.) 529, 21 Fed. Cas. No. 12527. But compare Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637; St. Paul, &c. R. Co. v. United States, 112 U. S. 733, 5 Sup. Ct. 366, 28 L. ed. 861; Emerson v. European, &c. R. Co., 67 Maine 387, 24 Am. Rep. 39. In a recent case a railroad company chartered to build a road contracted with a construction company to pay for the construction of the road in specified bonds secured by mortgage. Part of the road was built, a proportionate part of the bonds delivered, and a mortgage executed and recorded covering all the property of the railroad company then owned or afterwards acquired. The contract was then cancelled and the chief promoter of the railroad company, who was also the president and only stockholder of the construction company, conveyed all the property of the construction company, including all rights of way acquired or contracted for on behalf of the railroad company, by deed duly recorded, to a firm which then conveyed it to a new railroad company chartered to build a road between two points on the same route, S. to L. A similar disposition was made of the remainder of the property of the construction company south of L., which passed into the hands of a third railway company, chartered to build the road over the remainder of the proposed route; and the two new companies completed the road on the line originally projected. The court held that they took with knowledge of the interest of the original company and that the mortgage executed by it secured to its bondholders a lien on the whole of the road as completed, prior to that of a mortgage executed by the new companies. Wade v. Chicago, &c. R. Co., 149 U. S. 327, 13 Sup. Ct. 892, 37 L. ed. 755.

tion of the statute.[50] Where a railroad company's property has been, without the execution of a formal instrument, mortgaged by the legislature, the statute itself interpreted with regard to the condition of the road will determine the extent of the lien.[51] Only such property as is helpful or essential in the operation of the road is, as a rule, included in a general mortgage of the railroad, and, therefore, it has been held not to cover property bought from a steamboat company for the purpose of stifling competition,[52] or unused land bought for shops and depots,[53] or a temporary track,[54] or woodland.[55] A specific enumeration of the property covered is generally exclusive of all other property.[56] Thus, the words "all other property" following a grant of "all lands granted by the United States" to the company do not include other lands not particularly described,[57] nor, it seems, do they include choses in action not specifically enumerated in a chattel mortgage.[58] Fuel pur-

[50] Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401.

[51] State v. Florida, &c. R. Co., 15 Fla. 690.

[52] Morgan v. Donovan, 58 Ala. 241.

[53] Youngman v. Elmira, &c. R. Co., 65 Pa. St. 278.

[54] Van Keuren v. Central R. Co., 38 N. J. L. 165.

[55] Dinsmore v. Racine, &c. R. Co., 12 Wis. 649.

[56] Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637; Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. ed. 1000; Spies v. Chicago, &c. R. Co., 40 Fed. 34; Boston, &c. R. Co. v. Coffin, 50 Conn. 150; Brainerd v. Peck, 34 Vt. 496. But see Calhoun v. Memphis, &c. R., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309. Thus, in the case first cited, supra, it was held that a mortgage of "all the present and in future to be acquired property" of a railroad company, containing a clause enumerating many articles having connection with the management and operation of the road after its construction, did not include municipal bonds issued in aid of the construction of the road. See also Wilkes v. Ferris, 5 Johns. (N. Y.) 335, 4 Am. Dec. 364, and note; Bock v. Perkins, 28 Fed. 123; Mims v. Armstrong, 31 Md. 87, 1 Am. Rep. 22; Driscoll v. Fiske, 21 Pick. (Mass.) 503; Price v. Haynes, 37 Mich. 487.

[57] Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. ed. 1000. See also Wilson v. Boyce, 92 U. S. 320, 23 L. ed. 608; St. Louis, &c. R. Co. v. McGee, 115 U. S. 469, 6 Sup. Ct. 123, 29 L. ed. 446.

[58] Milwaukee, &c. R. Co. v. Milwaukee, &c. R. Co., 20 Wis. 174, 88 Am. Dec. 740.

chased with the common earnings of a main line and its extension is not subject to the lien of a mortgage of all the property of the extension.[59] "All other corporate property * * * appertaining" or "appurtenant" to a railroad means only such property as is indispensable or at least useful in the exercise of the franchise;[60] and does not include town lots,[61] or an elevator[62] or canal boats used beyond the road's termini.[63] Land grants which the company cannot accept,[64] or the conditions of which have not been realized,[65] are not included in such a mortgage. "All the real and personal property" has been held to include earnings and profits;[66] and necessary office furniture is subject to a mortgage of a road, its franchises and property.[67] A mortgage of a road and its fixtures, together with "all other property now owned and which may be hereafter owned by the railroad company," includes cars, locomotives, and other rolling stock purchased by the company from time to time after the making of the mortgage.[68] And a mortgage of an entire

[59] Bath v. Miller, 53 Maine 308. See Hunt v Bullock, 23 Ill. 320.

[60] Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. 911, 29 L. ed. 1000; New Orleans Pac. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 6 Lewis' Am. R. & Corp. 43, 36 L. ed. 66; Morgan v. Donovan, 58 Ala. 241; Boston, &c. R. Co. v. Coffin, 50 Conn. 150; Mississippi Val. Co. v. Chicago, &c. R. Co., 58 Miss. 896, 38 Am. Rep. 348; Millard v Burley, 13 Nebr. 259, 13 N. W. 278; State v. Glenn, 18 Nev. 34, 1 Pac. 186.

[61] Calhoun v. Memphis, &c. R., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309; Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465, 471, 86 Am Dec. 552; Gardner v. London, &c. R Co., L. R. 2 Ch. App. 201. But see Knevals v. Florida Cent. &c. R. Co., 66 Fed. 224.

[62] Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. ed. 473.

[63] Parish v. Wheeler, 22 N. Y. 494

[64] Meyer v. Johnson, 53 Ala. 237.

[65] Campbell v. Texas, &c. R. Co., 2 Woods (U. S.) 263, Fed. Cas. No. 2369. See also New Orleans Pac. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66, 6 Lewis' Am. R. & Corp. 43, and authorities cited in the opinion of the court.

[66] Kelly v. Alabama, &c. R. Co., 58 Ala. 489.

[67] Raymond v. Clark, 46 Conn. 129; Wood v. Whelen, 93 Ill. 153; Ludlow v. Hurd, 1 Dis. (Ohio) 552. See Hunt v. Bullock, 23 Ill. 320.

[68] Meyer v. Johnston, 53 Ala. 237, 332, 64 Ala. 603. See also Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333; Hamlin v. Jerrard, 72 Maine 62.

line of railroad, "with all the revenue or tolls thereof," has been held to cover all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenues.[69] Net earnings may be mortgaged, but so long as they are retained by the mortgagor are subject to trustee process in favor of the road's general creditors.[70] In a recent case,[71] a railroad company had leased its unfinished road to a company operating a connecting line and mortgaged its property, rights and franchises to secure certain bonds which were to be disposed of by the lessee, and the latter, in order to insure the prompt payment of interest and the ready sale of the bonds, being advised that it had no power to guarantee them, mortgaged to the lessor for that purpose all the net earnings of its own lines which might accrue to it "by reason of business coming to it from or over" the lines of the lessor. It was held that this included not only the profits of the business which came literally from off the lessor's road onto the lessee's road, but, also, the net earnings or business which came to the latter from both directions by reason of the fact that the leased road was an important feeder and brought new business to the lessee's road by opening up new markets and giving increased facilities. The court also held that, as there was nothing in the mortgage prescribing the method of ascertaining the net earnings, they must be determined in the usual way, that is, from the gross

[69] Maryland v. Northern Central R. Co., 18 Md. 193. See also Pullan v. Cincinnati, &c. R. Co., 4 Biss. (U. S.) 35, 43, Fed. Cas. No. 11461.

[70] Gilman v. Illinois, &c. R. Co., 91 U. S. 603, Fed. Cas. No. 5443; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Mississippi, &c. R. v. United States Exp. Co., 81 Ill. 534; Dunham v. Isett, 15 Iowa 284; Bath v. Miller, 51 Maine 341; Noyes v. Rich, 52 Maine 115; Galena, &c. R. Co. v. Menzies, 26 Ill. 121; Smith v. Eastern R. Co., 124 Mass. 154; Ellis v. Boston, &c. R. Co., 107 Mass. 1; Emerson v. European &c. R. Co., 67 Maine 387, 24 Am. Rep. 39; Clay v. East Tenn., &c. R. Co., 6 Heisk. (Tenn.) 421. Operating expenses must first be paid. Parkhurst v. Northern Central R. Co., 19 Md. 472, 18 Am. Dec. 648.

[71] Schmidt v. Louisville, &c. R. Co, 95 Ky. 289, 25 S. W. 494, 26 S. W. 547, 61 Am. & Eng. R. Cas. 680.

receipts must be deducted the cost of producing them, and that it knew of "no way to arrive at all this, save, approximately, by a proportion distributing the total operating expense over the whole business," thus treating the business of the entire system as a unit.[72]

§ 561 (496). **What is covered by a mortgage of the undertaking.**—In England it is held that neither a mortgage of a railroad "undertaking"[73] nor one of the "undertaking, and all and singular the rates, tolls and other sums arising,"[74] includes the land on which the road is built; or the surplus lands;[75] or stock or property belonging to the company as a common carrier of passengers or goods for hire;[76] or future calls on the shareholders, they not being mortgageable without express legislative authority.[77] But it has been held that a mortgage of the undertaking may include the rails, stations, works and other buildings.[78] The undertaking is a going concern created by the incorporating act;[79] and it cannot be broken up by the mort-

[72] St. John v. Railway Co., 22 Wall. (U. S.) 136, 22 L. ed. 743; United States v. Kansas Pac. R. Co., 99 U. S. 455, 25 L. ed. 289; Pullan v. Railroad Co., 5 Biss. (U. S.) 237, Fed. Cas. No. 11462.

[73] Doe v. St. Helen's, &c. R. Co., 2 Eng. R. & Can. Cas. 756.

[74] Myatt v. St. Helen's, &c. R. Co., 2 Q. B. 364.

[75] Gardner v. London, &c. R. Co., L. R. 2 Ch. App. 201, 217, 36 L J. Ch. 323; King v. Marshall, 33 Beav. 565; Stanley, Ex parte, 33 Law J. Ch. 535; Moor v. Anglo-Italian Bank, L. R. 10 Ch. Div. 681; Wickham v. New Brunswick, &c. R. Co., L. R. 1 P. C. 64; 1 Cox's Joint Stock Cas. 519; Doe v. St. Helen's, &c. R. Co., 1 Gale & D. 663, 2 Q. B. 364, 42 E. C. L. 715.

[76] Hart v. Eastern Union R. Co., 7 Ex. 246.

[77] Lewis v. Glenn, 84 Va. 947, 6 S. E. 866; British Provident L. & F. Assn. Co., In re, 4 DeG., J. & S. 407; Sankey Brook Coal Co., In re, L. R. 10 Eq. 381; Companies Clauses Consolidation Act 1845, 8 and 9 Vict. Ch. 16, § 43; Gardner v. London, &c. R. Co., L. R. 2 Ch. 201, 212. But see Pickering v. Ilfracombe R. Co., L. R. 3 Com. P. 235. A mortgage of "all the lands, tenements and estates of the company, and all their undertakings," was held not to include calls, either future or existing, unpaid. King v. Marshall, 33 Beav. 565.

[78] Legg v. Mathieson, 2 Giff. 71. See Wickham v. New Brunswick, &c. R. Co., Law. R. 1 P. C. 64.

[79] Gardner v. London, &c. R. Co., L. R. 2 Ch. 201. A mortgage of the undertaking is different from a mortgage of the company's

gagees, nor can they, by ejectment, take from the corporation property essential to the undertaking's continuance.[80] That which is pledged under a mortgage of the undertaking is rather the income of the property than the corpus of it.[81]

§ 562 (497). Mortgage of after-acquired property.—It has been decided that, on the doctrine of accession, a railroad company will, in a mortgage of all its property, be held, even in the absence of express words of futurity, to have included essential property subsequently acquired under authority given before the execution of the mortgage. This doctrine is not very well settled,[82] and is supported by the cases only when by virtue of some legislative authority the road's franchises and property may be treated as an indivisible entity.[83] Unquestionably a

property. Jones Corporate Bonds and Mortgages 62; Perkins v. Pritchard, 3 Eng. Ry. & Can. Cas. 95; Hart v. Eastern Union R. Co., 6 Eng. R. & Can. Cas. 818, 7 Exch. 246, 265.

[80] Myatt v. St. Helen's R. Co., 2 Q. B. 364, 2 Eng. R. & Can. Cas. 756.

[81] Panama, &c. Royal Mail Co., In re, L. R. 5 Ch. 318, 321.

[82] See Shaw v. Bill, 95 U. S. 10, 24 L. ed. 333; Calhoun v. Memphis, &c. R. Co., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309; Parker v. New Orleans, &c. R. Co., 33 Fed. 693; Phillips v. Winslow, 57 Ky. 431, 68 Am. St. 729; Pierce v. Emery, 32 N. H. 484; Boston, &c. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336; Ludlow v. Hurd, 1 Dis. (Ohio) 552, 560; Dinsmore v. Racine, &c. R. Co., 12 Wis. 649; Farmers', &c. Co. v. Commercial Bank, 11 Wis. 207, 212, 689; Panama, &c. R. M. Co., In re, L. R. 5 Ch. App. 318, 322; 4 Cox's Joint Stock Cas. 35. See also Galveston, &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; United States v. New Orleans R., 12 Wall. (U. S.) 362, 20 L. ed. 434; Barnard v. Norwich, &c. R. K. Co., 4 Cliff. (U. S.) 351, Fed. Cas. No. 1007; Scott v. Clinton, &c. R. Co., 6 Biss. (U. S.) 529, Fed. Cas. No. 12527; Dillon v. Barnard, 1 Holmes 386. Of course, the rule applies with particular force to property acquired for a changed location of the road, the lien being discharged as to the abandoned route. Elwell v. Grand St., &c. R. Co., 67 Barb. (N. Y.) 83; Meyer v. Johnston, 53 Ala. 237. It is not applicable where mortgages are placed on separate divisions. Farmers', &c. Co. v. Commercial Bank, 11 Wis. 207. See also Louisville Trust Co. v. Cincinnati, &c. R. Co., 91 Fed. 699, and note in 99 Am. St. 253, citing text.

[83] Phillips v. Winslow, 57 Ky. 431, 68 Am. Dec. 729; Pierce v.

railroad company having power to borrow money and secure it by mortgage on its property may by express terms mortgage property to be acquired subsequently.[84] In a recent case,[85] this doctrine was applied to a de facto corporation, and it was held that, as a corporation created under the general railroad law of the state might mortgage after-acquired property, a mortgage or trust deed of such property by the de facto corporation, which was created by an unconstitutional special act but might have been organized under the general law, was valid not only as against the corporation but also as against creditors.[86]

§ 563 (497a). After-acquired property—When lien attaches —What it includes.[87]—The lien attaches to the property as soon

Emery, 32 N. H. 484; Willink v. Morris Canal & Banking Co., 3 Green (N. J.) Ch. 377, 657. Ordinarily it would seem that, while it is not necessary to describe the future acquired property, yet the terms of the mortgage should be broad enough to cover it and not merely operate in praesenti. Thompson v. White, &c. R. Co., 132 U. S. 68, 10 Sup. Ct. 29, 33 L. ed. 256; Maxwell v. Wilmington, &c. Co., 77 Fed. 938; Louisville Trust Co. v. Cincinnati, &c. R. Co., 91 Fed. 699, and note in 99 Am. St. 253.

[84] Dunham v. Cincinnati, &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; McGourkey v. Toledo, &c. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079; Campbell v. Texas, &c. R. Co., 2 Woods (U. S.) 263, Fed. Cas. No. 2369; Parker v. New Orleans, &c. R. Co., 33 Fed. 693; Central Trust Co. v. Chattanooga, &c. R. Co., 94 Fed. 275; Farmers' Loan, &c. Co. v. Metropolitan St. R. Co., 181 Fed. 575; Kelly v. Ala. & Cin. R. Co., 58 Ala. 489; Buck v. Seymour, 46 Conn. 156; Bell v. Chicago, &c. R. Co., 34 La. Ann. 785; Hamlin v. European, &c. R. Co., 72 Maine 83; Omaha, &c. R. Co. v. Wabash, &c. R. Co., 108 Mo. 298, 18 S. W. 1101; Baker v. Guarantee, &c. Co. (N. J.), 31 Atl. 174; Coopers v. Wolf, 15 Ohio St. 523; Ludlow v. Hurd, 1 Dis. (Ohio) 552; Philadelphia, &c. R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596; Covey v. Pittsburg, &c. R. Co., 3 Phila. (Pa.) 173; Haynes v. Kenosha St. R. Co., 139 Wis. 227, 119 N. W. 568, 121 N. W. 124; General South American Co., In re, L. R. 2 Ch. Div. 337; Panama, &c. Mail Co., In re, L. R. 5 Ch. 318.

[85] McTighe v. Macon Const. Co., 94 Ga. 306, 21 S. E. 701, 47 Am. St. 153.

[86] The text is cited in Detroit, &c. R. Co. v. Campbell, 140 Mich. 384, 103 N. W. 856, 860, although the point there decided is that a de facto corporation may condemn lands and only the state can question the incorporation.

[87] A large part of this section was part of § 497 in the first edition.

as it is acquired;[88] and is superior to that of a subsequent mortgage or of a judgment.[89] A mortgage of "after-acquired" property has been held to include a lease of another road;[90] net earnings;[91] another company's capital stock purchased to effect a consolidation;[92] a hotel open to the general public as well as to passengers and employes;[93] land acquired for the location

[88] Parker v. New Orleans, &c. R. Co., 33 Fed. 693; McGourkey v. Toledo, &c. R. Co., 146 U. S. 536, 13 Sup Ct. 170, 23 L. ed. 1079; Bear Lake, &c. Co. v. Garland, 164 U. S. 1, 15, 17 Sup. Ct. 7, 41 L. ed. 327; Frost v. Galesburg, 167 Ill. 161, 47 N. E. 357; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; Seymour v. Canandaigua, &c. R Co., 25 Barb. (N. Y.) 284. But see New Orleans, &c. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66, reversing the former case on the ground that the property (a land grant) was not appurtenant, and that it was not contemplated by the parties or definitely located.

[89] Dunham v. Cincinnati & P. R. Co., 1 Wall. (U. S.) 254, 266, 17 L. ed. 584; Pennock v. Coe, 23 How. (U. S.) 117, 127, 16 L. ed. 436; Scott v. Clinton, &c. R., 6 Biss. (U. S.) 529, 535, Fed. Cas. No. 12527; Michigan Central R. Co. v. Chicago, &c. R. Co., 1 Brad. (Ill.) 399; Stevens v. Watson, 4 Abb. App. Dec. (N. Y.) 302; Nichols v. Mase, 94 N. Y. 160; Coe v. Pennock, 6 Am. Law Reg. 27, 2 Redf. Am. R. Cas. 667. But it generally attaches to the property in the condition in which it comes to the mortgagor and does not displace existing liens. Williamson v. New Jersey, &c. R. Co., 28 N. J. Eq. 277, 29 N. J. Eq. 311, 317; Bear Lake, &c. Co. v. Garland, 164 U. S. 1, 16, 17 Sup. Ct. 7, 41 L. ed. 327. Compare Porter v. Pittsburg, &c. Co., 122 U. S. 267, 283, 7 Sup. Ct. 1206, 30 L. ed. 1210.

[90] Buck v. Seymour, 46 Conn. 156; Barnard v. Norwich, &c. R. Co., 4 Cliff. (U. S.) 351, 14 N. Bank R. 469, Fed. Cas. No. 1007; Hamlin v. European, &c. R. Co., 72 Maine 83; Columbia Finance, &c. Co. v. Kentucky, &c. R. Co., 60 Fed 794. But not a lease of the mortgaged road executed by the mortgagor to another company.

[91] Tompkins v. Little Rock, &c. R. Co., 15 Fed. 6; Addison v. Lewis, 75 Va. 701. Contra, Emerson v. European, &c. R. Co., 67 Maine 387, 24 Am. Rep. 39; Pullan v. Cincinnati, &c. R. Co., 5 Biss. (U. S.) 237, Fed. Cas. No. 11462; DeGraff v. Thompson, 24 Minn. 452.

[92] Williamson v. N. J. Southern R. Co., 26 N. J. Eq. 398. But not unpaid subscriptions to the company's capital stock. Dean v. Biggs, 25 Hun (N. Y.) 122. It was held in Williamson v. New Jersey Southern R. Co., 26 N. J. Eq. 398, that it was unnecessary to record the mortgage in accordance with the chattel mortgage act.

[93] United States Trust Co. v. Wabash, &c. R. Co., 32 Fed. 480;

of car-houses which were never built;[94] a completed road afterwards purchased which might have been constructed if it had not been purchased.[95] It does not extend to property acquired by fraud, so that the title thereto does not vest in the mortgagor;[96] nor does a mortgage of a road and its appurtenances existing or to be afterwards acquired extend to woodland seven miles from the road;[97] or to land acquired for a canal basin;[98] or to other property not properly appurtenant to the road.[99]

Omaha, &c. R. Co. v. Wabash, &c. R. Co., 108 Mo. 298, 18 S. W. 1101. But not as an appurtenance unless it is used in connection with the road. Mississippi Valley Co. v. Chicago, &c. R. Co., 58 Miss. 896, 38 Am. Rep. 348. A grain elevator has been held not to be included as an appurtenance. Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. ed. 473.

94 Hamlin v. European, &c. R. Co., 72 Maine 83, 4 Am. & Eng. R. Cas. 503. See also Hawkins v. Mercantile Trust Co., 96 Ga. 580, 23 S. E. 498.

95 Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279. See also Central Trust Co. v. Washington, &c. R. Co., 124 Fed. 813; Chalmers v. Littlefield, 103 Maine 271, 69 Atl. 100; Hinchman v. Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867. But compare Murray v. Farmville, &c. R. Co., 101 Va. 262, 43 S. E. 553; New York Sec. Co. v. Louisville, &c. R. Co., 102 Fed. 382.

96 Williamson v. New Jersey Southern R. Co., 28 N. J. Eq. 277, 29 N. J. Eq. 311, 321; Frazier v. Frederick, 24 N. J. L. 162; Field v. Post, 38 N. J. L. 346. See also as to property where the mortgagor company was merged or consolidated with another. New York Sec. Co. v. Louisville, &c. R. Co., 102 Fed. 382.

97 Dinsmore v. Racine, &c. R. Co., 12 Wis. 649. See also Aldridge v. Pardee, 24 Tex. Civ. App. 254, 60 S. W. 789; Pardee v. Aldridge, 189 U. S. 429, 23 Sup. Ct. 514, 47 L. ed. 883; Boston, &c. R. Co. v. Coffin, 60 Conn. 150; Shirley v. Waco Tap. R. Co., 78 Tex. 131, 10 S. W. 543.

98 Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

99 Calhoun v. Memphis, &c. R. Co., 2 Flip. (U. S.) 442, Fed. Cas. No. 2309; Morgan v. Donovan, 58 Ala. 241; Mississippi Valley Co. v. Chicago, &c. R. Co., 58 Miss. 896, 38 Am. Rep. 348; Millard v. Burley, 13 Nebr. 259, 13 N. W. 278; Seymour v. Canandaigua, &c. R. Co., 25 Barb. (N. Y.) 284; Walsh v. Barton, 24 Ohio St. 28; Shamokin Valley R. Co. v. Livermore, 47 Pa. St. 465, 86 Am. Dec. 552; Brainerd v. Peck, 34 Vt. 496; Farmers' Loan, &c. Co. v. Commercial Bank, 11 Wis. 207. Affirmed in Dinsmore v. Racine, &c. R. Co., 12 Wis. 649; Farmers', &c. Co. v. Cary, 13 Wis. 110; Farmers',

Thus, it has been held not to extend to property adjacent to a depot which the company leases for a store and other purposes foreign to the operation of the road.[1] But a mortgage of an entire road, "as said railroad now is or may be hereafter constructed, maintained, operated or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars, and other appurtenances thereto belonging," has been held to include real estate separated from the right of way by a street, but of easy access to the station and side tracks, which real estate had been subsequently purchased by the company and upon which it had built a restaurant for the accommodation of its employes and passengers.[2] A lease by a mortgagor of the mortgaged road to another company has been held not to be included in the after-acquired property.[3] But, on the other hand, it has been held that a railroad mortgage of "all property, both real and personal, of every kind and description, which shall hereafter be acquired for use on said railroad, and all the corporate rights, privileges, franchises and immunities, and all things in action, contracts, claims, and demands, whether now owned or hereafter acquired in connection or relating to the said railroad," includes an after-acquired lease of terminal facilities to the mortgagor.[4] A branch road is held to be included

&c. Co. v. Commercial Bank, 15 Wis. 424, 82 Am. Dec. 689; Calhoun v. Paducah, &c. R. Co., 9 Cent. L. J. 66.

[1] Chicago, &c. R. Co. v. McGuire, 31 Ind. App. 110, 65 N. E. 932, 99 Am. St. 249, and note.

[2] Omaha, &c. R. Co. v. Wabash, &c. R. Co., 108 Mo. 298, 18 S. W. 1101. See also Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. ed. 1014. And land for right of way and stockyards. St. Joseph, &c. R. Co. v. Smith, 170 Mo. 327, 70 S. W. 700.

[3] Moran v. Pittsburgh, &c. R. Co., 32 Fed. 878; St. Paul, &c. R. Co. v. United States, 112 U. S. 733, 5 Sup. Ct. 366, 28 L. ed. 861.

[4] Citing Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. 357, 34 L. ed. 1014; Toledo, &c. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905; Branch v Jesup, 106 U. S. 468, 27 L. ed. 279; Columbia Finance, &c. Co. v. Kentucky, &c. R. Co., 69 Fed. 794, 61 Am. & Eng. R. Cas. 690. And so as to a subsequent franchise authorizing the company to sell electricity, as against the city. Old Colony Trust Co. v. Tacoma, 219 Fed. 775. See also Lewis v. Weidenfeld, 114 Mich. 581, 72 N. W. 604.

if the authority to construct it antedates the mortgage;[5] otherwise, not.[6] Iron rails, though still at a distant port, have been held subject to the lien of a mortgage of "all materials whatsoever."[7] The specification of certain after-acquired articles which shall be subject to the lien excludes all others.[8] A mortgage of after-acquired property only attaches to such interest as the mortgagor acquires, and so does not displace a lien existing when the property was acquired by the mortgagor.[9] This rule, applicable to all property capable of separate ownership, including real estate not used for railroad purposes, does not, however, ordinarily at least, apply to fixtures used in the opera-

[5] Parker v. New Orleans, &c. R. Co., 33 Fed. 693; Coe v. Delaware, &c. R. Co., 34 N. J. Eq. 266, 4 Am. & Eng. R. Cas. 513; Seymour v. Canandaigua, &c. R. Co., 25 Barb. (N. Y.) 284; Texas, &c. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98.

[6] Meyer v. Johnston, 53 Ala. 237, 331, 64 Ala. 603.

[7] Weetjen v. St. Paul, &c. R. Co., 4 Hun (N. Y.) 529. See Haven v. Emery, 33 N. H. 66. Compare Brainerd v. Peck, 34 Vt. 496; Phillips v. Winslow, 57 Ky. 431, 68 Am. Dec. 729; Bath v. Miller, 53 Maine 308; Pierce v. Emery, 32 N. H. 484.

[8] Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637; Raymond v. Clark, 46 Conn. 129; Buck v. Seymour, 46 Conn. 156; Brainerd v. Peck, 34 Vt 496; Hare v. Horton, 5 Barn. & Ad. 715.

[9] Dunham v. Cincinnati, &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Galveston R. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; United States v. N. O. R., 12 Wall. (U. S.) 362, 20 L. ed. 434; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Myer v. Car Co., 102 U. S. 1, 26 L. ed. 59; Branch v. Jesup, 106 U. S. 468, 1 Sup. Ct. 495, 27 L. ed. 279; Western Union Tel. Co. v. Burlington, &c. R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1; Branch v. Atlantic, &c. R. Co., 3 Woods (U. S.) 481, Fed. Cas. No. 1807; Boston Safe Deposit, &c. Co. v. Bankers', &c. Co., 36 Fed. 288; Lake Erie, &c. R. Co. v. Priest, 131 Ind. 413, 31 N. E. 77; Haven v. Emery, 33 N. H. 66; Williamson v. New Jersey Southern R. Co., 28 N. J. Eq. 277, 29 N. J. Eq. 311; Willink v. Morris Canal & Banking Co., 3 Green (N. J.) Ch. 377. It is subject to a vendor's lien for unpaid purchase money on realty, the mortgagee not being considered a purchaser for value. Loomis v. Davenport, &c. R. Co., 17 Fed. 301. See Pierce v. Milwaukee, &c. R. Co., 24 Wis. 551, 1 Am. Rep. 203. A mortgagee has no greater right than the company to enforce an illegal traffic contract made prior to the execution of the mortgage. Central Trust Co. v. Wheeling, &c. R. Co., 211 Fed 515.

tion of the road,[10] unless an agreement has been made as to their legal character.[11]

§ 564 (498). **Fixtures—Rolling stock.**—Fixtures, whether acquired before or after the execution of such mortgage, are ordinarily subjected to its lien.[12] On the principle that fixtures, though subsequently severed, are subject to the lien of a mortgage of the freehold, worn-out rails replaced by new ones have been held to be included in a railroad mortgage; and so of new rails not yet laid.[13] A track laid merely for a temporary use has been held not to come under the lien as part of the realty;[14]

[10] Porter v. Pittsburg, &c. Co., 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. ed. 1210, 30 Am. & Eng. R. Cas. 495; United States v. N. O. R. Co., 12 Wall (U. S.) 362, 20 L. ed. 434; Wood v Whelen, 93 Ill. 153. See also Toledo, &c. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L ed. 905; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. 867.

[11] Boston Safe Deposit, &c. Co. v. Bankers', &c. Co., 36 Fed. 288; Western Union Tel. Co. v. Burlington, &c. R. Co., 3 McCrary (U. S.) 130, 11 Fed. 1. See also Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. ed. 767; Detroit, &c. Cooperage Co. v. Sisterville Brew. Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. ed. 1166; State Bank v. Idaho-Oregon Light, &c. Co., 219 Fed. 594. These later cases seem to qualify the doctrine that the mortgage takes precedence where the property is in the nature of a fixture, or at least they confine the doctrine to narrower limits than some of the older cases.

[12] Porter v. Pittsburg, &c. R. Co., 122 U. S. 267, 283, 7 Sup. Ct. 1206, 30 L. ed. 1210; Wood v. Whelen, 93 Ill. 153; Haynes v. Kenosha St. R. Co., 139 Wis. 227, 119 N. W. 568. But see late cases cited in note to last preceding section.

[13] First Nat. Bank v. Anderson, 75 Va. 250. So held, if proper management requires that they be recast. Lehigh, &c. Co. v. Central R. Co., 35 N. J. Eq. 379; Palmer v. Forbes, 23 Ill. 301; Weetjen v. St. Paul, &c. R. Co., 4 Hun (N. Y.) 529. See Farmers' Loan, &c. Co. v. Commercial Bank, 11 Wis. 207, 15 Wis. 424; Dinsmore v. Racine, &c. R. Co., 12 Wis. 649; Farmers' Loan, &c. Co. v. Cary, 13 Wis. 110; Brainerd v. Peck, 34 Vt. 496.

[14] Van Keuren v. Central R. Co., 38 N. J. L. 165.

so have repair tools,[15] fuel[16] and furniture.[17] A mortgage of a railroad, if its terms cover such future acquisitions, will, however, be held in equity to apply to after-acquired rolling stock[18] even if not specially mentioned; although it has been held that loose rolling stock, such as engines and cars, is, in such a case, subject to the liens on it[19] when it comes into the mortgagor's hands.[20]

§ 565 (499). Reserved power to create prior lien or to dispose of unnecessary property.—A provision in a railroad mortgage permitting the company to sell, pledge, or otherwise dis-

[15] Lehigh, &c. Co. v. Central R. Co., 35 N. J. Eq. 379; Williamson v. New Jersey, &c. R. Co., 29 N. J. Eq. 311, 28 N. J. Eq. 277; Brainerd v. Peck, 34 Vt. 496. But see Delaware, &c. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452.

[16] Hunt v. Bullock, 23 Ill. 320. But see Coe v. McBrown, 22 Ind. 252; Phillips v. Winslow, 18 B. Mon. (Ky.) 431, 448, 68 Am. Dec. 729.

[17] Raymond v. Clark, 46 Conn. 129; Titus v. Mabee, 25 Ill. 257; Hunt v. Bullock, 23 Ill. 320; Southbridge Savings Bank v. Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; Lehigh, &c. Co. v. Central R. Co., 35 N. J. Eq. 379; Ludlow v. Hurd, 1 Disn. (Ohio) 552. But see Wood v. Whelen, 93 Ill. 153.

[18] Pennock v. Coe, 23 How. (U. S.) 117, 16 L. ed. 436; Dunham v. Cincinnati, &c. R. Co., 1 Wall. (U. S.) 254, 266, 17 L. ed. 584; Galveston R. v. Cowdrey, 11 Wall. (U. S.) 459, 481, 20 L. ed. 199; Scott v. Clinton, &c. R. Co., 6 Biss. (U. S.) 529, 535, Fed. Cas. No. 12527; Meyer v. Johnston, 53 Ala. 237, 64 Ala. 603; Michigan Central R. Co. v. Chicago, &c. R. Co., 1 Brad. (Ill.) 399; Phillips v. Winslow, 57 Ky. 431, 448, 68 Am. Dec. 729; Morrill v. Noyes, 56 Maine 458, 471, 96 Am. Dec. 486; Hamlin v. Jerrard, 72 Maine 62; Nichols v. Mase, 94 N. Y. 160; Coe v. Pennock, 6 Am. Law Reg. 27, 2 Redf. Am. R. Cas. 667; Jones Corp. Bonds and Mortgages 120.

[19] Pullan v. Cincinnati, &c. R. Co., 4 Biss. (U. S.) 35, 43, Fed. Cas. No. 11461; Meyer v. Johnston, 53 Ala. 237, 332, 64 Ala. 603; Maryland v. Northern Central R. Co., 18 Md. 193. But see Miller v. Rutland, &c. R. Co., 36 Vt. 452.

[20] United States v. New Orleans R., 12 Wall. (U. S.) 362, 20 L. ed. 434; Boston Safe Deposit, &c. Co. v. Bankers'; &c. Co., 36 Fed. 288; Contracting, &c. Co. v. Continental Trust Co., 108 Fed. 1. See also Bear Lake, &c. Co. v. Garland, 164 U. S. 1, 16, 17 Sup. Ct. 7, 41 L. ed. 327; Myer v. Car Co., 102 U. S. 1, 26 L. ed. 59 (subject to rights of vendor under conditional sale); Frank v. Denver, &c. R. Co., 23 Fed. 123.

pose of any property not essential to the operation of the road, applying the proceeds in any manner not prejudicial to the interests of the mortgagee is not fraudulent or invalid.[21] Such provision does not, however, nullify the mortgage and withdraw the lien as unnecessary articles like broken rails, ties and wheels are cast aside.[22]

§ 566 (500). Priority of mortgages.—We shall discuss the subject of preferred claims for operating expenses and the like in a subsequent chapter,[23] but it may be well at this place to consider briefly the subject of the priority of one mortgage over another and over other claims and equities. As we have already shown, one of a series of bonds has no priority over others of the same series merely because it bears a smaller number.[24] It seems, however, that first mortgage bonds, although issued after a second mortgage is executed, have priority over the second mortgage bonds, unless the second mortgage in terms limits the lien of the prior mortgage to bonds actually out, and provides against reissues.[25] One who purchases from a railroad company part of a series of bonds secured by mortgage on the road, under an agreement that no more bonds shall be issued, is entitled to be preferred over purchasers of the other bonds with notice of the agreement, but not over bona fide purchasers who have no notice of the agreement, either actual or

[21] Butler v. Rahm, 46 Md. 541. See also Nickerson v. Atchison, &c. R. Co. 3 McCrary (U. S.) 455, 17 Fed. 408. As to reservation of power to create a prior lien, see Campbell v. Texas, &c. R. Co., 2 Woods (U. S.) 263, Fed. Cas. No. 2369.

[22] Coopers v. Wolf, 15 Ohio St. 523. See also Salem First Nat. Bank v Anderson, 75 Va. 250, 68 Am. Dec. 729.

[23] See, however, on the general subject, the recent cases of Virginia, &c. Coal Co. v. Central R. Co., 170 U. S. 355, 18 Sup. Ct. 657, 42 L. ed. 1068; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458; Messick v. Hartford, &c. R. Co., 76 Conn 11, 55 Atl. 664, 100 Am. St. 977, and note in 54 Am. St. 400-433.

[24] Stanton v. Ala., &c. R. Co., 2 Woods (U. S.) 523, Fed. Cas. No. 13297; Commonwealth v. Susquehanna, &c. R. Co., 122 Pa. St. 306, 321. See also Pittsburgh, &c. R. Co. v. Lynde, 55 Ohio St. 23.

[25] Claflin v. South Carolina R. Co., 4 Hughes (U. S.) 12, 8 Fed. 118.

constructive.[26] The general rule, of course, is that mortgages have priority in the order of their execution,[27] but bona fide second mortgage bondholders may obtain priority over prior mortgagees if the prior mortgage is unrecorded and there is nothing charging them with notice of the prior mortgage. Where, however, a subsequent mortgage is expressly made subject to a former mortgage such former mortgage has priority, although not legally recorded.[28] So, a subsequent mortgage may be given priority over a former mortgage by agreement between the old bondholders and the mortgagor company.[29] This is sometimes done in order to enable the company to complete its road or to reorganize. A mortgage trustee, however, has no power to agree that an unsecured debt or a subsequent mortgage debt shall be paid in preference to the first mortgage bonds.[30] As a general rule, a fixed legal right under a mortgage cannot be impaired by any equities subsequently arising,[31] although, as we shall hereafter see, there is an apparent exception to this rule in the case of operating expenses, and, by statute, employes are frequently given preferred claims. Thus, the priority of a first mortgage is not affected by the fact that the road was completed or part of it wholly built by money obtained by means of a junior mortgage,[32] nor are unsecured claims of

[26] McMurray v. Moran, 134 U. S. 150, 10 Sup. Ct. 427, 33 L. ed. 814.

[27] Wade v. Chicago, &c. R. Co., 149 U. S. 327, 13 Sup. Ct. 892, 37 L. ed. 755; Columbus, &c. R. Co.'s Appeal, 109 Fed. 177.

[28] Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[29] Poland v. Lamoille Valley R. Co., 52 Vt. 144.

[30] Duncan v. Mobile, &c. R. Co., 2 Woods (U. S.) 542, Fed. Cas. No. 4137; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782.

[31] Jones Corp. Bonds and Mort. § 579. But see ante, §§ 561, 562. As to mechanics' liens, see Brooks v. Burlington, &c. R. Co., 101 U. S. 443, 25 L. ed. 1057; Meyer v. Hornby, 101 U. S. 728, 25 L. ed. 1078, with which compare Bear v. Burlington, &c. R. Co., 48 Iowa 619; Tommey v. Spartanburg, &c. Co., 1 Am. & Eng. R. Cas. 632, note.

[32] Galveston, &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; Dunham v. Cincinnati, &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584; Thompson v. White Water Valley R. Co., 132 U. S. 68, 10 Sup. Ct. 29, 33 L. ed. 256. See also McGourkey v. Toledo, &c. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079 (mortgage has priority over car trust cer-

contractors or material men who have furnished money or material for building or repairing it ordinarily entitled to priority over a prior mortgage.[33] It has also been held that a claim for money borrowed to pay the interest on the bonds is not entitled to priority over the principal.[34] Taxes may, of course, constitute a lien superior to a prior mortgage,[35] and it has also been held that a landholder's claim for damages for land condemned for the road is superior to a mortgage given before the damages have been assessed.[36] We have elsewhere considered the subject of the priority of liens in cases of consolidation,[37] but the question of priority sometimes arises in cases of mere succession or where separate mortgages are made on different divisions of a road. A mortgage on all property, materials, rights and privileges of a railroad company then or thereafter appertaining to the road, to secure bonds for money with which to construct it, has priority over a subsequent mortgage of the earnings of a particular division or section of the road, executed

tificates); Manhattan Trust Co. v. Sioux City, &c. R. Co., 68 Fed. 72.

[33] Dunham v. Cincinnati, &c. R. Co., 1 Wall. (U. S.) 254, 17 L. ed. 584, and cases cited in note 32, supra. See also New Jersey Midland R Co. v. Wortendyke, 27 N. J. Eq. 658; Denniston v. Chicago, &c. R. Co., 4 Biss. (U. S.) 414, Fed. Cas. No. 3800; Peninsular Iron Co. v. Eells, 68 Fed. 24.

[34] Contracting, &c. Co. v. Continental Trust Co., 108 Fed. 1.

[35] Georgia v. Atlantic, &c. R. Co., 3 Wood (U. S.) 434, Fed. Cas. No. 5351; Stevens v. New York, &c. R. Co., 13 Blatch. (U. S.) 104, Fed. Cas. No. 13405; Farmers', &c. Co. v Vicksburg, &c. R. Co., 33 Fed. 778; Farmers' Loan & T. Co. v. Stuttgart R. Co., 92 Fed. 246; Central Trust Co. v. New York, &c. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260. But see Binkert v. Wabash, &c. R. Co., 98 Ill. 205, 5 Am. & Eng. R. Cas. 113.

[36] Western Penna. R. Co. v. Johnston, 59 Pa. St. 290. See also Mercantile Trust Co. v. Pittsburgh, &c. R. Co., 29 Fed. 732; Central Trust Co. v. Louisville, &c. R. Co., 81 Fed. 772; Central Trust Co. v. Hennen, 90 Fed. 593; Penn. Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. 273; Buffalo, &c. R. Co. v. Harvey, 107 Pa. St. 319; Crosby v. Morristown, &c. R. Co. (Tenn.), 42 S. W. 507.

[37] Ante, § 387. See also Kneeland v. Lawrence, 140 U. S. 209, 11 Sup. Ct. 786, 35 L. ed. 492; Wabash, &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. ed. 235.

to secure money used in constructing such section by a lessee who had agreed to construct it as part of the consideration for the lease, even though the lessor company which executed the first mortgage may have agreed to recognize the subsequent mortgage as having priority.[38] And a mortgage on the property of a railroad company given by its successor has priority over claims for services and advances to the old company, by a creditor who did not obtain a judgment until after the execution of such mortgage, and whose services and advances were not such as to entitle him to a statutory lien.[39]

§ 567 (501). **Trust deeds.**—A railroad mortgage is now generally made to trustees who take the mortgage title for the bondholders, thus securing to them all the benefits they would have had if named in the instrument.[40] The trustee may be an individual or a trust company.[41] It has also been held that a director or an officer of the mortgagor company may be a trustee,[42] and so may a non-resident.[43] Upon the death of one of two or more trustees, his interest has been held to vest according to the right of survivorship, notwithstanding a statute abolishing joint tenancies without expressly embracing trust estates.[44] Equity will not permit a trust to fail for want of a

[38] Thompson v. White Water, &c. R. Co., 132 U. S. 68, 10 Sup. Ct. 29, 33 L. ed. 256. The court held that this agreement as to priority could not affect the first mortgage bondholders. See also Wade v. Chicago, &c. R. Co., 149 U. S 327, 13 Sup. Ct. 892, 37 L. ed. 755; Farmers' Loan, &c. Co. v. Newman, 127 U. S. 649, 8 Sup. Ct 1364, 32 L. ed. 303; Farmers' Loan, &c. Co. v. Canada, &c. R. Co., 127 Ind 250, 26 N. E. 784.

[39] Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. ed. 721.

[40] McLane v. Placerville, &c. R. Co., 66 Cal 606, 6 Pac. 748; Chamberlain v. Conn. Cent. R. Co., 54 Conn. 472; Butler v. Rahm, 46 Md. 541; Jones Corporate Bonds and Mort. § 28.

[41] Hervey v. Illinois, &c. R. Co., 28 Fed. 169; Farmers' Loan, &c. Co. v. Chicago, &c. R. Co., 27 Fed. 146.

[42] Ellis v. Boston, &c. R. Co., 107 Mass. 1; Bassett v. Monte, &c. Co., 15 Nev. 293.

[43] A statute prohibiting citizens of other states from acting as trustees is unconstitutional. Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792, 31 Am. St. 439; Farmers' Loan, &c. Co. v. Chicago, &c. R. Co., 27 Fed. 146; Shirk v. La Fayette, 52 Fed. 857.

[44] McAllister v. Plant, 54 Miss 106.

trustee.[45] A trust deed is regarded as in effect a mortgage,[46] and the right of possession remains in the grantor.[47] Authority to mortgage is authority to execute a deed of trust,[48] and statutes regulating the recording of mortgages embrace deeds of trust.[49] The power to sell without legal proceedings should be unequivocally and definitely expressed in the deed.[50] Foreclosure in an equity court is the more usual and the safer method. It is frequently provided, however, that upon default of payment the trustee may take possession without suit and hold the property until the debt be satisfied, and this is sometimes done.[51]

§ 568 (502). **Equitable and defective mortgages.**—An instrument which was intended to be the mortgage deed of a corpora-

[45] 3 Pom. Eq. Jur. (4th ed.), §§ 988, 1007, 1026.

[46] White Water, &c. Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; McLane v. Placerville, &c. R. Co., 66 Cal. 606, 6 Pac. 748; Coe v. Johnson, 18 Ind. 218; Coe v. McBrown, 22 Ind. 252; Wisconsin Cent. R. Co. v. Wisconsin Riv. L. Co., 71 Wis. 94, 36 N. W. 837. See also Smead v. Chandler, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353, and other cases cited in note.

[47] Southern Pacific R. Co. v. Doyle, 8 Sawyer 60, 11 Fed. 253.

[48] Turner v. Watkins, 31 Ark. 429; Wright v. Bundy, 11 Ind. 398; Bennett v. Union Bank, 5 Humph. (Tenn.) 612.

[49] Sheffey v. Lewisburg Bank, 33 Fed. 315; Magee v. Carpenter, 4 Ala. 469; Schultze v. Houfes, 96 Ill. 335; Woodruff v. Robb, 19 Ohio 212. See also as to car trust agreements: Chicago, &c. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 34 L. ed. 349; 3 Thomp. Corp. §§ 2572, 2689.

[50] Mason v. York, &c. R. Co., 52 Maine 82.

[51] See Dow v. Memphis, &c. R. Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. ed. 5651; Fee v. Swingly, 6 Mont. 596, 13 Pac. 375. See also Etna Coal, &c. Co. v. Marting Iron, &c. Co., 127 Fed. 32. But a bill in equity is usually resorted to even in such cases. See Shepley v. Atlantic, &c. R. Co., 55 Maine 395; Land, &c. Co. v. Asphalt Co., 127 Fed. 1; McLane v. Placerville, &c. R. Co., 66 Cal. 606, 615, 6 Pac. 748; Shaw v. Norfolk, &c R Co., 5 Gray (Mass.) 162. As to responsibilities of trustees generally, see Sturges v. Knapp, 31 Vt. 1; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424. As to liability of company where trustees do not take actual or exclusive possession, see Pennsylvania R. Co. v. Jones, 155 U. S. 333, 353, 15 Sup. Ct. 136, 39 L. ed. 176. As to remedies of individual bondholders, see 5 Thomp. Corp. (2nd ed.) §§ 2594-2599.

tion, but which, not being properly executed by the corporation, or in its name, cannot take effect as its deed, may nevertheless be regarded as an equitable mortgage and entitle the holders of it in equity to the full benefit of the security intended to be given.[52] An agreement, even by word of mouth as to personalty, to give a mortgage for certain sums, may be enforceable in equity as a mortgage,[53] and so are bonds which recite that they are a lien,[54] and so is an agreement to place in a third person's hands certain earnings or property to meet specified obligations;[55] and so is a contract for the purchase of rolling stock by the payment of an annual rental with provision for forfeiture upon non-payment.[56] The holder of an old bond, to whom a new bond can-

[52] Randolph v. New Jersey, &c. R., 28 N. J. Eq. 49; Miller v. Rutland, &c. R. Co., 36 Vt. 452; Jones Corp. Bonds and Mortgages, 32. See also Pullis v. Pullis Bros., 157 Mo. 565, 57 S. W. 1095; Brown v. Farmers', &c. Co., 23 Ore. 541, 32 Pac. 548. A mortgage expressly recognizing another is subsequent thereto, notwithstanding the prior mortgage is not legally executed and recorded. Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[53] Waco Tap R. Co. v. Shirley, 45 Tex. 355, 13 Am. Railw. R. 233; Texas, &c. R. Co. v. Gentry, 69 Tex. 625, 8 S. W. 98; Ashton v. Corrigan, L. R. 13 Eq. 76; Peto v. Brighton, &c. R. Co., 1 H. & Miller 468.

[54] White Water Valley Canal Co. v. Vallette, 21 How. (U. S.) 414, 16 L. ed. 154; Poland v. Lamoille Val. R. Co., 52 Vt. 144, 171; Dundas v. Desjardins Canal Co., 17 Grant's Ch. (Upper Can.) 27.

[55] Ketchum v. Pacific R., 4 Dill. (U. S.) 78, 86, Fed. Cas. No. 7739; Dillon v. Barnard, 1 Holmes (U. S.) 386, Fed. Cas. No. 3915; Ketchum v. St. Louis, 101 U. S. 306, 317, 25 L. ed. 999; Pinch v. Anthony, 8 Allen (Mass.) 536; Watson v. Wellington, 1 Rus. & Myl. 602; Yeates v. Groves, 1 Ves. Jr. 280; Lett v. Morris, 4 Sim. 607; Alderson, Ex parte, 1 Madd. 39; Legard v. Hodges, 1 Ves. Jr. 477.

[56] Hervey v. Rhode Island, &c. Works, 93 U. S. 664, 23 L. ed. 1003; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Heryford v. Davis, 102 U. S. 235, 26 L. ed. 160; Frank v. Denver, &c. R. Co., 23 Fed. 123. But it is held that there is no mortgage where a railway company sells rolling stock, contemporaneously hiring the same stock at an annual rental of one-fifth of the selling price, with provision for repurchase at the end of five years for a nominal price. Yorkshire R. Wagon Co. v. Maclure, 21 Ch. Div. 309; North Central Wagon Co. v. Manchester, &c. R. Co., 35 Ch. Div. 191.

not be issued because the refunding scheme provides none so small, has also been held entitled to a lien for the amount of the indebtedness to him equal to the other mortgage creditor's lien.[57] Where no words of inheritance appear in the mortgage, but it is the evident intention that the trustees should take the fee, the instrument will be reformed in a proper case by a court of equity.[58]

§ 569 (503). **Statutory mortgages.**—A statute expressing its purpose in certain[59] terms may constitute a mortgage without the execution of any instrument of conveyance.[60] A statutory mortgage to the state may provide that it shall receive the income by way of interest, without foreclosure,[61] and may make

[57] Blair v. St. Louis, &c. R. Co., 23 Fed. 524.

[58] Coe v. New Jersey, &c. R. Co., 31 N. J. Eq. 105; Randolph v. New Jersey, &c. R. Co., 28 N. J. Eq 49; Miller v. Savage, 60 N. J. Eq. 204, 46 Atl. 632.

[59] Cincinnati City v. Morgan, 3 Wall. (U. S.) 275, 18 L. ed. 146; Colt v, Barnes, 64 Ala. 108; Brunswick and Albany R. Co. v. Hughes, 52 Ga. 557; Collins v. Central Bank of Georgia, 1 Kelly (Ga.) 435; Whitehead v. Vineyard. 50 Mo. 30.

[60] Cunningham v. Macon, &c. R., 156 U. S. 400, 15 Sup. Ct. 361, 39 L. ed. 471; Woodson v. Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716; United States v. Union Pacific R. Co., 91 U. S. 72, 23 L. ed. 224; Murdock v. Woodson, 2 Dill. (U. S.) 188, Fed. Cas. No. 9942; Wilson v. Boyce, 92 U. S. 320, 2 Dill. (U. S.) 539, Fed. Cas. No. 17793; Tompkins v. Little Rock, &c. R. Co., 15 Fed. 6; State v. Florida, &c. R. Co., 15 Fla. 690. An example is Act of July 1, 1862, 12 Stat. at Large, 489, mortgaging the Union Pacific Railroad. Such a mortgage may include after-acquired property. Whitehead v. Vineyard, 50 Mo. 30; Colt v. Barnes, 64 Ala. 108. The lien may be released by the legislature. Woodson v. Murdock, 22 Wall. (U. S.) 351, 22 L. ed. 716; Darby v. Wright, 3 Blatchf. (U. S.) 170, Fed. Cas. No. 3574; Gibbes v. Greenville, &c. R. Co., 13 S. Car. 228. By agreement a new lienholder may be substituted. Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999. It is not necessary that the bonds which are secured shall mention the lien of the mortgaging act. Dundas v. Desjardins, &c. Co., 17 Grant (U. C.) 27. The holder of bonds secured by statutory mortgage can avail himself of the security only by means of foreclosure instituted by the trustees in conformity with the statute. Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290.

[61] Macalester v. Maryland, 114 U. S. 598, 5 Sup. Ct. 1065, 24 L. ed. 233.

such provisions as will constitute an equitable assignment thereof to which subsequent mortgages will be subject.[62] State aid bonds giving a lien in favor of the state do not entitle the purchasers to enforce the lien where it is waived or released by the state.[63] The bondholders cannot enforce the lien either upon the principle of subrogation or under the claim that they have a specific lien as direct mortgage creditors.[64]

§ 570 (504). Debentures.—Debentures, which are the commonest form of security issued by English corporations, are defined to be instruments under seal, creating a charge, according to their wording, upon the property of the corporation, and to that extent conferring a priority over subsequent creditors and over existing creditors not possessed of such a charge.[65] They are, in fact, equitable mortgages, being enforceable only in equity.[66] Their holder has no lien upon the corporation's traffic receipts and no right to a receiver of them.[67] The debenture is generally not accompanied by any separate instrument. Instead of securing the payment in one instrument of a debt which there is a promise to pay in another or others, each mortgage debenture ordinarily includes both the provisions in regard to the security and a covenant for the payment of the debt.[68] In England debentures are not required to be recorded, but in most of our states they would be very dangerous investments on this

[62] Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999.

[63] Tennessee Bond Cases, 114 U. S. 663, 5 Sup. Ct. 974, 1098, 29 L. ed. 28.

[64] Cunningham v. Macon, &c. R. Co., 156 U. S. 400, 15 Sup. Ct. 361, 39 L. ed. 471. But see Railroad Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327.

[65] 3 Thomp. Corp. (2nd. ed.), § 2266.

[66] Holroyd v. Marshall, 10 H. L. C. 191; General South American Co., In re, L. R. 2 Ch. D. 337.

[67] Imperial Mercantile Credit Assn. v. Newry, &c. R. Co., 2 Ir. Rep. Eq. 524; Preston v. Great Yarmouth, L. R. 7 Ch. 655. See, as bearing on rights of debenture holders prior to the Railway Companies Act of 1867, Bowen v. Brecon R. Co., L. R. 3 Eq. 541; Russell v. East Anglian R. Co., 3 Mac. & G. 104, 151.

[68] Hart v. Eastern Union R. Co., 6 Eng. R. & Can. Cas. 818, 7 Exch. 246, 265;

account, and the fact that an attachment of property in this country may take precedence over an unrecorded debenture, was admitted in a recent English case.[69] A so-called debenture is, however, said to be coming into use in the United States, which is in effect a bond or note secured by pledge of collaterals deposited with a trustee.[70] In a case in Indiana, a so-called debenture is set out in the opinion of the court. The instrument provided for its receipt in payment of freight charges and tickets for a certain period, and the court held that upon repudiation by the company of the whole arrangement the company was liable for the face value of the debentures in money.[71] A form of debenture bond bearing interest payable out of earnings and entitling the holder to the surplus assets after payment of debts on liquidation or dissolution has been held to be, in effect, preferred stock.[72]

[69] Empire, &c. Co., In re, 62 L. T. R. 493. For further consideration of the general subject of English debentures see 3 Thomp. Corp. (2nd ed.) § 2266.

[70] 2 Cook Corp. (7th ed.), § 777. See also Clarke v. Central R., &c. Co., 50 Fed. 338, 15 L. R. A. 683; Ward v. Johnson, 95 Ill. 215; Smith v. New Hampshire, &c. Co., 68 N. H. 424, 41 Atl. 174.

[71] Evansville, &c. R. Co. v. Frank, 3 Ind. App. 96, 29 N. E. 419.

[72] In re Fechheimer Fishel Co., 212 Fed. 357.

CHAPTER XX.

FORECLOSURE.

Sec.
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590. Final and appealable decrees.

§ 575. (505). **Foreclosure—Default.**—In order to maintain a suit for the foreclosure of a mortgage, the plaintiff must be able to show a default within its terms. An allegation that interest coupons are unpaid has been held insufficient, where it does not appear that any demand for payment has been made or that the company neglected or refused to pay at the place or in the manner provided.[1] But a demand is usually unnecessary before

[1] Davies v. New York, &c. Co., 41 Hun (N. Y.) 492; Jones Corp. Bonds and Mort. § 381. See also Doyle v. Phoenix Ins. Co., 44 Cal. 264; United States, &c. Stock Co. v. Atlantic, &c. Co., 34 Ohio St. 450, 467, 32 Am. Rep. 380. But see Mayes v. Goldsmith, 58 Ind. 94; Douthit v. Mohr, 116 Ind. 482, 18 N. E. 449, and compare Carey v. Houston, 45 Fed. 438. See generally as to foreclosure for non-payment of interest, Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 10 Sup. Ct. 235, 33 L. ed. 561; Louisville, &c. R. Co. v. Schmidt (Ky.), 52 S. W. 835; McFadden v. Mays Landing, &c. R. Co., 49 N. J. Eq. 176, 22 Atl. 932. In a recent case a railroad company alleged its insolvency, and prayed for a sale of its property

instituting a suit to foreclose a mortgage,[2] at least where the company is insolvent and has no funds with which to pay, and the right to foreclose arises as soon as the condition of the defeasance is broken.[3] Railroad mortgages and trust deeds, however, generally provide that no suit to foreclose shall be instituted for failure to pay interest until after the default shall have continued for a specified period. A default may be waived,[4]

and distribution of the proceeds among its creditors. A receiver was appointed. A mortgagee filed a cross-bill to foreclose two mortgages, on both of which default in the interest had been made, but the debt secured by the second only was due. The court held that both mortgages might be foreclosed, although by its terms the first was not subject to foreclosure until default in payment of the principal at maturity. McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705. Where the mortgage bonds have become the property of the railroad company's lessee, such lessee will be held to a strict accounting before it will be permitted to foreclose for an alleged default in the payment of interest, since there could be no default so long as the rent that was unaccounted for equaled the unpaid interest. Chamberlain v. Connecticut, &c. R. Co., 54 Conn. 472, 9 Atl. 244.

[2] Clemens v. Luce, 101 Cal. 432, 35 Pac. 1032; Gillett v. Balcom, 6 Barb. (N. Y.) 370; Union, &c. Co. v. Curtis, 35 Ohio St. 357; Elliott's Gen. Pr., § 313. See also Marlor v. Texas, &c. R. Co., 21 Fed. 383; Savannah, &c. R. Co. v. Lancaster, 62 Ala. 555. But the instrument may, of course, be so drawn as to require a demand. Potomac, &c. Co. v. Evans, 84 Va. 717, 6 S. E. 2; Bolman v. Lohman, 79 Ala. 63. Thus, there may be no default under the provisions of the particular instrument until demand and refusal or failure to comply with it. So a provision in bonds requiring a demand has been held to control the mortgage securing them. Railway Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554. See as to what is a sufficient compliance with a requirement of written notice to the officers at their principal office as a condition to foreclosure, Real Estate Trust Co. v. Wilmington, &c. Elec. R. Co. (Del.), 77 Atl. 756.

[3] Richards v. Holmes, 18 How. (U. S.) 143, 15 L. ed. 304; Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Pomeroy v. Winship, 12 Mass. 513, 7 Am. Dec. 91; Central Trust Co. v. New York, &c. R. Co., 33 Hun (N. Y.) 513.

[4] Dow v. Memphis, &c. R. Co., 20 Fed. 260; Nebraska City Bank v. Nebraska Gas, &c. Co., 14 Fed. 763; Randolph v. Middleton, 26 N. J. Eq. 543. Where a railroad trust deed provided that if the default occurred in payment of in-

but the waiver, if by parol and without consideration, may be revoked, and then, after a demand of payment, the payment waived will become due.[5] So, it has been held that an agreement not to exercise the option given in a trust deed to declare the entire debt due for default in payment of interest, when limited to a specified instalment, although made in consideration of the assignment of rents accruing from the mortgaged premises does not prevent the mortgagee from declaring the entire debt due upon default in the payment of a subsequent instalment.[6] Failure to pay taxes or to perform other conditions may also be

terest or principal of the bonds, the trustees were to act on the requisition of the holders of 25 per cent. of the bonds, and if "the default be in the omission of any act or thing required by article 12 of these presents for the further assurance of the title of the trustees to any property or franchise now possessed or hereafter acquired, or in any provisions herein contained to be performed by said company, then and in either of such cases the requisition shall be as aforesaid; but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of such bondholders to instruct the said trustees to waive such default," it was held that the right of a majority to waive default extended only to failure to make further assurance, and not to failure to pay interest or principal of the bonds. Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782. Delay for three months in bringing suit after failure to pay instalment of interest is not a waiver of a stipulation making the whole debt due at once upon such default. Atkinson v. Walton, 162 Pa. St. 219, 29 Atl. 898. See also Fletcher v. Dennison, 101 Cal. 292, 35 Pac. 868; Brown v. McKay, 151 Ill. 315, 37 N. E. 1037. But compare French v. Row, 77 Hun 380, 28 N. Y. S. 849, where long delay, coupled with other circumstances, was held to be a waiver. Acceptance of the defaulted interest before instituting suit to foreclose is a waiver of the right of forfeiture on account of such default. Smalley v. Renken, 85 Iowa 612, 52 N. W. 507. But see Moore v. Sargent, 112 Ind. 484, 14 N. E. 466.

[5] Albert v. Grosvenor Investment Co., L. R. 3 Q. B. 123; Union Trust Co. v. St. Louis, &c. Co., 5 Dill. (U. S.) 1, Fed. Cas. No. 14403; Jones Corp. Bonds and Mort. § 383. See also Sharpe v. Arnott, 51 Cal. 188; Gardner v. Watson, 13 Ill. 347; Massaker v. Mackerley, 9 N. J. Eq. 440.

[6] Martin v. Land, &c. Bank, 5 Tex. Civ. App. 167, 23 S. W. 1032. See also Malcolm v. Allen, 49 N. Y. 448.

made a cause for declaring the entire debt due and justify a foreclosure for the whole amount,[7] but where there is no agreement by the mortgagor to pay taxes,[8] or where they are paid by him before the option is exercised by foreclosure or otherwise, the mortgagee cannot foreclose merely because of such failure.[9]

§ 576 (506). Option to declare whole debt due—Election.—Where an option is given to the mortgagee to declare the whole debt due, that is, the principal as well as the interest, upon the failure to pay the interest or any instalment when due, he must, of course, in some way, indicate his election. There is some conflict among the authorities as to whether merely instituting suit to foreclose for the entire debt without giving any previous notice or otherwise showing an election to exercise the option, is sufficient. Much depends upon the provisions of the particular mortgage or trust deed in question. It may doubtless provide that notice shall be given or a declaration made of the mortgagee's intention to take advantage of the option before the institution of proceedings to foreclose. But, in the absence of any such provision, that is, where the mortgage merely provides that, upon failure to pay interest, or any instalment, when due, the entire debt shall become due, or that the mortgagee shall have the option of declaring it due, the commencement of a suit to foreclose for the entire debt is, according to the better rule and the weight of authority, a sufficient election without a previous declaration thereof.[10] A written notice given by the holders

[7] Brickell v. Batchelder, 62 Cal. 623; Pope v. Durant, 26 Iowa 233; Martin v. Clover, 63 Hun 628, 17 N. Y. S. 638; Williams v. Townsend, 31 N. Y. 411. See also Bonner Springs, &c. Co. v. McClelland, 59 Kans. 778, 53 Pac. 866, without opinion.

[8] Noble v. Greer, 48 Kans. 41, 28 Pac. 1004. A provision requiring the mortgagor company to pay taxes and assessments does not require it to pay an income tax upon the interest on the bonds. Haight v. Railroad Co., 6 Wall. (U. S.) 15, 18 L. ed. 818.

[9] Smalley v. Renken, 85 Iowa 612, 52 N. W. 507; Fleming v. Franing, 22 Okla. 644, 98 Pac. 961, 22 L. R. A. (N. S.) 360, and cases there cited in note. See also as to acceleration provision generally, notes in 22 L. R. A. (N. S.) 1110, 35 L. R. A. (N. S.) 390, 42 L. R. A. (N. S.) 108.

[10] Sichler v. Look, 93 Cal. 600;

of the note or bonds secured by the trust deed to the trustee, requesting him to foreclose for the entire debt, has been held to be sufficient declaration of an intention to exercise the option.[11] So, where a mortgage provided that until default in the payment of interest for six months after written demand by the trustee the mortgagor should remain in possession, but that after such default the trustee might take possession, it was held that this was a limitation merely upon the right of the trustee to take possession, and that he might institute proceedings to foreclose without giving notice and without waiting six months.[12] Decisions may be found which seem to go still further in this direction.[13] The fact that the mortgaged property is in the possession of a receiver appointed at the suit of a third person will not prevent the mortgagee from exercising his option to declare the entire debt due, upon default in the payment of one instalment, by instituting a suit to foreclose.[14] We doubt, however, if the mort-

29 Pac. 220, 223; Brown v. McKay, 151 Ill. 315, 37 N. E. 1037; Buchanan v. Berkshire, &c. Co., 96 Ind. 510; Taylor v. Alliance Trust Co., 71 Miss. 694, 15 So. 121; Morling v. Bronson, 37 Nebr. 608, 56 N. W. 205; New York Security, &c. Co. v. Saratoga, &c. Co., 88 Hun 569, 34 N. Y. S. 890; Young v. McLean, 63 N. Car. 576. See also Morgan's Louisiana, &c. Co. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625. Contra, Basse v. Gallegger, 7 Wis. 442, 76 Am. Dec. 225; Macloon v. Smith, 49 Wis. 200, 5 N. W. 336; Dean v. Applegarth, 65 Cal. 391, 4 Pac. 375 (distinguished in Hewitt v. Dean, 91 Cal. 5, 27 Pac. 423).

[11] Heffron v. Gage, 149 Ill. 182, 36 N. E. 569. See also Mallory v. West Shore, &c. R. Co., 3 J. & S. (N. Y. Super. Ct.) 174; Fellows v. Gilman, 4 Wend. (N. Y.) 414; American Tube, &c. Co. v. Kentucky, &c. Co., 51 Fed. 826.

[12] Farmers' Loan, &c. Co. v. Winona, &c. R. Co., 59 Fed. 957. To the same effect is Alabama, &c. Co. v. Robinson, 56 Fed. 690, affirming Robinson v. Alabama, &c. Co., 48 Fed. 12.

[13] See, for instance, Mercantile Trust Co. v. Chicago, &c. R. Co., 61 Fed. 372. But see post, § 577.

[14] Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702. It was also held in this case that the failure to obtain leave to sue the receiver did not deprive the court of jurisdiction and that the objection was waived. Where the receiver is a party, however, leave should be obtained, for even if it is not jurisdictional, the failure to obtain it may be fatal where the question is properly raised. See for contract by a majority of bondholders held not to prevent trustee from foreclosing. Las Vegas R. Co. v. Trust Co., 15 N. Mex. 634, 110 Pac. 856.

gagee could sell the property, under a decree of foreclosure, while it is in the hands of the receiver.

§ 577 (507). Foreclosure for default in payment of interest.— A foreclosure may usually be had for unpaid interest, although the principal debt is not due.[15] A railroad mortgage, providing that the bonds shall become due on default in the payment of interest, may be foreclosed on default, unless the statute authorizing the bonds states a minimum period, not yet elapsed, during which they must run, in which case the mortgage may be foreclosed for the default in the payment of interest, the decree directing a sale if payment is not made within a period appointed by the court, and the remainder of the proceeds, after the satisfaction of the defaulted interest and expenses, being held by the court subject to the mortgagee's lien for the payment of the subsequently maturing interest coupons and the principal.[16] But it seems that such a suit may generally be arrested by payment of the accrued interest and costs.[17] It is frequently provided in

[15] Union Trust Co. v. St. Louis, &c. R. Co., 5 Dill. (U. S.) 1, Fed. Cas. No. 14403; Howell v. Western, &c. R. Co., 94 U. S. 463, 24 L. ed. 254; Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 68, 1 Sup. Ct. 10, 27 L. ed. 47; Farmers' Loan & T. Co. v. Chicago, &c. R. Co., 27 Fed. 146; Central T. Co. v. New York, &c. R. Co., 33 Hun (N. Y.) 513. Where a railroad mortgage contains no provision making the principal due on default in the payment of interest, powers given to the trustee, after default in the payment of interest, to take possession of the mortgaged property and sell the same and apply the proceeds to the payment of interest and principal, do not accelerate the maturity of the principal so as to authorize foreclosure for the entire debt on such default. McFadden v. Mays Landing, &c. R. Co., 49 N. J. 176, 22 Atl. 932.

[16] Howell v. Western R. Co., 94 U. S. 463, 24 L. ed. 254; Wilmer v. Atlanta, &c. R. Co., 2 Woods (U. S.) 409, 447, Fed. Cas. No. 17775; Wood v. Consolidated, &c. Co., 36 Fed. 538; Macon & Augusta R. Co. v. Georgia R. Co., 63 Ga. 103; Central Trust Co. v. New York, &c. R. Co., 33 Hun (N. Y.) 513.

[17] See Philips v. Bailey, 82 Mo. 639; Tillinghast v. Troy, &c. R. Co., 48 Hun 420, 1 N. Y. S. 243. In Grape Creek Coal Co. v. Farmers', &c. Co., 63 Fed. 891, 895, it is said that such right doubtless exists "down to the entry of the decree," but it can not be exercised after a decree is entered declaring the whole debt due.

the mortgage or trust deed that upon default in the payment of interest the mortgage may be foreclosed for the entire debt. Such a provision is valid,[18] but it does not, at least unless it clearly makes the entire debt due for all purposes, authorize a personal judgment for any deficiency in the amount of the mortgaged property to pay the principal not yet due. Its effect is rather to make the principal due merely for the purposes of the foreclosure or entry and sale by the trustee under the provisions of the mortgage.[19] But, where the mortgaged property cannot be sold in parcels, as is usually the case with railroads, the entire road may be sold even upon foreclosure for default in the interest alone, and the proceeds applied to the principal as well as the interest.[20] Practically, therefore, to this extent a default in pay-

[18] Richards v. Holmes, 18 How. (U. S.) 143, 15 L. ed. 304; Indiana, &c. R. Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554; McLean v. Presley, 56 Ala. 211; Marye v. Hart, 76 Cal. 291, 18 Pac. 325, 23 Am. & Eng. Corp. Cas. 506, and note; Hoodless v. Reid, 112 Ill. 105; Pope v. Durant, 26 Iowa 233. In some jurisdictions this is the rule even in the absence of any express provision upon the subject. Farmers' Loan, &c. Co. v. Nova Scotia, &c. R. Co., 24 N. S. 542. Where the provision is that the entire debt may be declared due and collected by the trustee, after default in payment of interest, at the request of a certain number of bondholders, or the like, the condition must be performed before advantage can be taken of the provision. Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Batchelder v. Council, &c. Co., 131 N. Y. 42, 29 N. E. 801; Farmers' Loan, &c. Co. v. Bankers', &c. Co., 44 Hun (N. Y.) 400. See as to effect of acceleration provision on statute of limitations, McCarty v. Goodsman (N. Dak.), 167 N. W. 503, L. R. A. 1918E, 160, and note.

[19] Railway Co. v. Sprague, 103 U. S. 756, 26 L. ed. 554; Ohio Cent. R. Co. v. Central T. Co., 133 U. S. 83, 10 Sup. Ct. 235, 33 L. ed. 561; White v. Miller, 52 Minn. 367, 54 N. W. 736; Morgan v. Martien, 32 Mo. 438; Mallory v. West Shore, &c. R. Co., 35 N. Y. Super. Ct. 174; McClelland v. Bishop, 42 Ohio St. 113; Grape Creek Coal Co. v. Farmers' Loan, &c. Co., 63 Fed. 891. (Provision held insufficient to authorize a decree declaring principal due and compelling its payment in order to redeem.) But see Wheeler, &c. Co. v. Howard, 28 Fed. 741; Noell v. Gaines, 68 Mo. 649.

[20] Olcott v. Bynum, 17 Wall. (U. S.) 44, 21 L. ed. 570; Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 68, 1 Sup. Ct. 10, 27 L. ed. 47;

ment of interest may cause the entire debt to become due whether there is a provision in the mortgage to that effect or not. It is not to be inferred from this, however, that such a provision is unimportant. While it is proper, even in its absence, to direct the payment of the whole debt out of the proceeds of the sale of the property as an entirety, yet, in such a case, the amount of overdue interest should be stated in the decree and provision made for the mortgagor to redeem before the sale upon the payment of such interest and costs, whereas the presence of a provision expressly making the entire debt due upon default in payment of interest will authorize a decree declaring it all due and ordering a sale, unless the whole amount is paid within a reasonable time therein specified.[21]

§ 578 (508). Parties to foreclosure suit—Plaintiffs.—Where the mortgage is made to trustees they may sue to foreclose it without joining the bondholders.[22] Where a bill in equity is filed by the trustees for the foreclosure of a mortgage, the individual

Farmers' Loan, &c. Co. v. Oregon, &c. R. Co., 24 Fed. 407; Pennsylvania R. Co. v. Allegheny, &c. R. Co., 48 Fed. 139; McLean v. Presley, 56 Ala. 211; McTighe v. Macon, &c. Co., 94 Ga. 306, 21 S. E. 701, 706, 707, 32 L. R. A. 208, 47 Am. St. 153; Bridges v. Ballard, 62 Miss. 237.

[21] Grape Creek Coal Co. v. Farmers' Loan, &c. Co., 63 Fed. 891; Chicago, &c. R. Co. v. Fosdick, 106 U. S. 47, 75, 1 Sup. Ct. 10, 27 L. ed. 47; Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 10 Sup. Ct. 235, 33 L. ed. 561.

[22] Richter v. Jerome, 123 U. S. 233, 8 Sup. Ct. 106, 31 L. ed. 132; Savannah, &c. R. Co. v. Lancaster, 62 Ala. 555; Boston &c. R. Co. v. Coffin, 50 Conn. 150; Chicago &c. Land Co. v. Peck, 112 Ill. 408; Hale v. Nashua &c. R. Co., 60 N. H. 333; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. See also Grand Trunk R. Co. v. Central Vermont R. Co., 88 Fed. 622; Rumsey v. People's R. Co., 154 Mo. 215, 55 S. W. 615. A trustee under successive mortgages to secure different issues of bonds may, as trustee of the first mortgage, in good faith foreclose it and bind the second mortgage bondholders by the decree so far as represented by him. Robinson v. Iron R. Co., 135 U. S. 522, 531, 10 Sup. Ct. 907, 34 L. ed. 276. But is it said that he should make both himself as trustee under the second mortgage and some of the second mortgage bondholders parties defendant. See generally as to parties plaintiff in such suits, leading article in 54 Cent. Law Jour. 364.

bondholders are not necessary nor, as a rule, even proper parties to the suit.[23] They may be admitted as parties, however, where the trustee is guilty of misconduct or shows himself incompetent to properly execute the trust,[24] or where he is shown to have interests adverse to those of the bondholders.[25] If a part of the trustees refuse to act, the suit may be prosecuted by the remaining trustee or trustees, and those refusing to act may be made

[23] Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117; Shaw v. Little Rock &c. R. Co., 100 U. S. 605, 25 L. ed. 757; Wetmore v. St. Paul &c. R. Co., 1 McCrary (U. S.) 466, 3 Fed. 177; Shaw v. Norfolk &c. R. Co., 5 Gray (Mass.) 162. In a railroad foreclosure suit the mortgage trustee represents the bondholders, and, if he acts in good faith, whatever binds him binds them, so that they have no right to be made parties except when the trustee is not acting in good faith. Farmers' Loan &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182; Beals v. Illinois &c. R. Co., 133 U. S. 290, 10 Sup. Ct. 314, 33 L. ed. 608; Elwell v. Fosdick, 134 U. S. 500, 10 Sup. Ct. 598, 33 L. ed. 998; McElrath v. Pittsburgh &c. R. Co., 68 Pa. St. 37. See also Central Trust Co. v. Peoria &c. R. Co., 104 Fed. 420; Baltimore v. United R. &c. Co., 108 Md. 64, 69 Atl. 436, 16 L. R. A. (N. S.) 1006, and other authorities there cited on the general subject in the note. This rule has been applied where the trustee was made defendant to a suit to cancel and satisfy the mortgage under a reorganization agreement. Pollitz v. Farmers' &c. Co., 53 Fed. 210. But it is said that the trustee represents the bondholders only for the protection of their lien under the trust deed and not after he has denied their right. Moran v. Hagerman, 64 Fed. 499.

[24] Skiddy v. Atlantic &c. R. Co., 3 Hughes (U. S.) 320, Fed Cas. No. 12922. See also next following section. The simple fact that a single trust company is trustee under twelve mortgages given by different corporations which have united to form a single system, is not sufficient reason for admitting a committee of the bondholders of the principal corporation by which the other roads in the system are owned or controlled to become party plaintiffs in a suit to foreclose. Clyde v. Richmond &c. R. Co., 55 Fed. 445.

[25] American Tube &c. Co. v. Kentucky &c. Co., 51 Fed. 826; Webb v. Vermont &c. R. Co., 9 Fed. 793; DeBetz's Petition, 9 Abb. N. Cas. (N. Y.) 246. See also Farmers' Loan &c. Co. v. Cape Fear &c. R. Co., 71 Fed. 38; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 66 Fed. 169.

defendants.[26] So, where one of several trustees dies the surviving trustee or trustees may maintain the suit.[27]

§ 579 (509). Bondholders as plaintiffs.—In case the trustees neglect or refuse to bring a foreclosure suit, or the trustee's office becomes vacant, and there is no provision in the mortgage forbidding such a course, one of the bondholders may bring a suit on behalf of himself and all others who choose to join him, to foreclose the mortgage for a default in the payment of the principal or interest of his bonds.[28] Such neglect, refusal, or

[26] Tillinghast v. Troy &c. R. Co., 48 Hun 420, 1 N. Y. S. 243; Robinson v. Alabama &c. Co., 48 Fed. 12. See also note in 16 L. R. A. (N. S.) 1014, et seq.

[27] Alabama &c. Co. v. Robinson, 56 Fed. 690, affirming Robinson v. Alabama &c. Co., 48 Fed. 12; Gibbes v. Greenville &c. R. Co., 13 S. Car. 228. Or if no trustee is left it is held that one or more bondholders may foreclose for all. Wheelwright v. St. Louis &c. Co., 56 Fed. 164; Galveston &c. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[28] Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917; Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Brooks v. Vermont Cent. R. Co., 14 Blatchf. (U. S.) 463, Fed. Cas. No. 1964; Wheelwright v. St. Louis &c. Co., 56 Fed. 164; Mason v. York &c. R. Co., 52 Maine 82; Seibert v. Minneapolis &c. R. Co., 52 Minn. 148, 53 N. W. 1134, 20 L. R. A. 535 and note, 38 Am. St. 530, 57 Am. & Eng. R. Cas. 208; March v. Eastern R. Co., 40 N. H. 548, 566, 77 Am. Dec 732; Van Benthuysen v. Central N. E. &c. R. Co., 63 Hun 627, 17 N. Y. S. 709; Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225; Chickering, In re, 56 Vt. 82. See also Young v. Haviland, 215 Mass. 120, 102 N. E. 338. In Alexander v. Central R. Co., 3 Dill. (U. S.) 487, Fed. Cas. No. 166, the mortgage gave the trustee a power of sale to be exercised at the request of a majority of the stockholders, upon default in the payment of interest. It was held that this remedy was merely cumulative to the ordinary legal remedies, and that upon refusal of the trustee to bring a suit to foreclose the mortgage for a default in the payment of interest, any one of the bondholders could maintain a suit in equity for that purpose on behalf of himself and others, making the trustee a party defendant. Such a suit should usually be brought by the bondholder in behalf of himself and all other bondholders, but an averment to this effect is unnecessary when default has been made only on the bonds held by the complainant. McFadden v. Mays Landing &c. R. Co., 49 N. J. Eq.

vacancy must be alleged and proved or the court will refuse to grant relief.[29] Bondholders have also been permitted to main-

176, 22 Atl. 932. See also Tyler v. Yreka &c. Co., 14 Cal. 212. In a recent case the Supreme Court of the United States held that a foreclosure was not invalid because one of the trustees was a director and the others stockholders in the company that procured the foreclosure; because one person was president of both companies; because a majority of the directors of one company were directors of the other; because the president of one company owned most of the other company's stock; or because the attorneys who instituted the foreclosure suit in the name of the trustees were in other matters attorneys for or directors of the company that procured it. Leavenworth County v. Chicago &c. R. Co., 134 U. S. 688, 10 Sup. Ct. 708, 33 L. ed. 1064. The fact that the bondholder purchased his bonds at the request of the lessee of the mortgaged railroad, and that the suit was instituted as a means of relieving it from the inconvenience and loss attending the operation of the road does not deprive the bondholder of his remedy of foreclosure on default in the payment of the bonds. McFadden v. Mays Landing &c. R. Co., 49 N. J. Eq. 176, 22 Atl. 932.

[29] Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917; Clyde v. Richmond &c. R. Co., 55 Fed. 445; Morgan v. Kansas Pac. R. Co., 15 Fed. 55. See also Virginia Passenger &c. Co. v. Fisher, 104 Va. 121, 51 S. E. 198. In Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47, where the terms of the mortgage gave the trustees the right, upon a default for six months in the payment of interest, and at the request of a majority of the bondholders, to take possession of the railroad property and sell the same, the court, by Mr. Justice Matthews, said: "But inasmuch as by the terms of the first article the conveyance is declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor's right of possession terminates upon a default in the payment of interest as well as principal on the bonds, we are of opinion, independent of the provisions of the other articles, that the trustees, or on their failure to do so, any bondholder, on nonpayment of any instalment of interest on any bond, might file a bill for the enforcement of the security by a foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is "not dependent upon the co-operation or consent of any others, or of the trustees. It is properly and strictly enforceable by and in the name of the latter, but if necessary may be prosecuted without and even against them."

tain the suit where the only trustee has gone beyond the jurisdiction of the court and it is shown that an emergency exists for immediate action and that great loss will result to the complainants before he can be reached.[30] Where a foreclosure suit has been commenced by bondholders on behalf of themselves and all others who desire to join them, the other bondholders may, upon petition, be permitted to become complainants.[31] But it is not necessary that they should do so, as the interests of all the bondholders are represented by the actual complainants, and by the trustees, who must, in such a suit, be made parties defendant.[32] The bondholder who brings the suit cannot, by so doing, obtain an undue advantage over the other bondholders whose rights in the security are the same as his own; he is bound, in such a case, to act for all and not merely for himself.[33] In an action by a holder of bonds, suing on behalf of himself and others, to foreclose a mortgage securing the bonds, for a default in payment of interest thereon, a tender, unless of interest due on all the bonds, has been held insufficient to arrest the action.[34] Where a minority of the bondholders bring a foreclosure suit against the wishes of the majority, the court may grant a stay of proceedings upon application on condition that the bonds sued

[30] Ettlinger v. Persian &c. Co., 142 N. Y. 189, 36 N. E. 1055, 40 Am. St. 587. But mere non-residence of the trustee has been held insufficient. Morgan v. Kansas Pac. R. Co., 15 Fed. 55.

[31] Chickering, In re, 56 Vt. 82.

[32] First Nat. Ins. Co. v. Salisbury, 130 Mass. 303; Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548; Jones Mortgages, § 1385.

[33] Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492; New Orleans Pac. R. v. Parker, 143 U. S. 42, 58, 12 Sup. Ct. 364, 36 L. ed. 66, 6 Lewis' Am. R. & Corp. 43; Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225. See also Railroad Co. v. Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810, where it was held that a single bondholder could not maintain the suit without notice to others who were named in the mortgage. As he acts for all, he should be reimbursed out of the trust fund for expenses so incurred to the same extent as the trustee would have been entitled to be reimbursed. Seibert v. Minneapolis &c. R. Co., 52 Minn. 246, 53 N. W. 1151. See Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. ed. 940.

[34] Van Benthuysen v. Central, &c. R. Co., 63 Hun 627, 17 N. Y. S. 709.

on shall be paid together with accrued costs.[35] It is competent for the bondholders to agree among themselves upon what conditions the right to sue may be exercised by an individual bondholder; and a provision in the mortgage that no proceedings in law or equity shall be taken by any bondholder secured thereby, to foreclose the equity of redemption independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. Such provisions are to be deemed stricti juris, but are, nevertheless, to be reasonably construed in view of the nature of the security, and the interest of the bondholders as a class. It is not the purpose or effect of such a stipulation to divest the bondholders of their rights to judicial remedies, or to oust the courts of their jurisdiction, but it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right.[36] After suit is brought by individual bondholders to fore-

[35] Tillinghast v. Troy &c. R. Co., 48 Hun 420, 1 N. Y. S. 243.

[36] Seibert v. Minneapolis &c. R. Co., 52 Minn. 148, 53 N. W. 1134, 20 L. R. A. 335, 38 Am. St. 530. In this case the court said: "We are unable to see why the bondholders, subject to reasonable limitations, may not be bound by stipulations in the mortgage of this character, waiving a default, and providing, subject to the conditions named, for the foreclosure by the trustee exclusively. The interests of the bondholders as a class and the nature of the security are to be considered. They are agreements which the bondholders are at liberty to make, and there is nothing illegal or contrary to public policy in them. Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47, 7 Am. & Eng. R. Cas. 427, 450. Each bondholder enters into contract relations with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified not only by the express provisions of the mortgage, but by the peculiar nature of the security. Gates v. Boston &c. R. Co., 53 Conn. 333; Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757; Canada &c. R. Co. v. Gebhard, 109 U. S. 527, 537, 3 Sup. Ct. 363, 27 L. ed. 1020; Guilford v. Minneapolis, &c. Railroad Co., 48 Minn. 560, 51 N. W. 658, 31 Am. St. 694. The legislature would have had an undoubted right to have incorporated in the enabling statute authorizing the execution of the mortgage and the issuance of the bonds secured thereby, a provision requiring the mortgage

close a mortgage, the trustees may ask leave to become complainants instead of defendants; and, unless they have been negligent and unfaithful, or have interests adverse to those of the bondholders, they will generally be allowed to do so. It has also been held that as soon as they are admitted as complainants, they have control of the suit, and may, upon leave of court, dismiss it, and pursue some other remedy.[37] A bondholder may bring an action at law for unpaid bonds or interest, but any judgment recovered in such an action will be subject to the prior

to contain similar stipulations. Howell v. Western Railroad Co., 94 U. S. 463, 24 L. ed. 254. It is clear, then, that it would be competent for the bondholders themselves to agree to them. They are to be treated as stricti juris, but nevertheless are to be reasonably construed in view of the nature of the mortgage, which is the common security for all the bondholders, and the purposes to be subserved in making them. * * * The trustee, as mortgagee, representing the interests of all the bondholders as beneficiaries, is the proper party to institute foreclosure proceedings, but if he unreasonably neglects or refuses to discharge his duty in the premises, doubtless any bondholder may bring an action to enforce the security for the common benefit." Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47. The court said: "Why may not the mortgage in the common interest stipulate the conditions under which this right may be exercised by the bondholders, and in order to avoid the risk of rash or arbitrary proceedings which might result in great injury to the security, provide that no such proceedings should be instituted by an individual bondholder except upon the refusal of the trustee to obey the requisition of a reasonable number of the bondholders. It is not the intention or effect of such conditions or stipulations to divest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction; it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right. And this distinction is well recognized by the courts. Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252, and cases; Guilford v. Minneapolis &c. R. Co., 48 Minn. 560, 51 N. W. 658, 31 Am. St. 694. The provisions of this mortgage are not, we think, unreasonable or invalid." But see Guaranty Trust &c. Co. v. Green Cove &c. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116, for a provision held invalid as attempting to oust the jurisdiction of the court.

[37] Richards v. Chesapeake &c. R. Co., 1 Hughes (U. S.) 28, Fed. Cas. No. 11771.

lien of the mortgage.[38] Property of the company not covered by the mortgage may, however, be sold on execution for such a claim.[39] When a railroad company mortgages its property to the bondholders by name, all must join in or be made parties to a suit to foreclose the mortgage, and no one can bring a suit on behalf of himself and all others who will come in and share the expenses of the suit.[40] In such a case, all parties should be before the court, because, if the mortgage should not prove an adequate security, it is the interest of each mortgagee to diminish the claim of every other mortgagee, and thereby add to his own security.[41]

§ 580 (510). **Pledges, assignees and others as plaintiffs.**—One who holds bonds as collateral may sue for a foreclosure in a proper case by making his assignor a party.[42] Where the as-

[38] Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225; Philadelphia &c. R. Co. v. Woelpper, 64 Pa. St. 366, 3 Am. Rep. 596. Waiver of the right to foreclose a mortgage, on default in the payment of interest coupons on the bonds secured by it, does not affect the right to an action at law to recover on the coupons. Lyon v. New York &c. R. Co., 14 Daly (N. Y.) 489.

[39] Carr v. LeFevre, 27 Pa. St. 413; Philadelphia &c. R. Co. v. Johnson, 54 Pa. St. 127. See also Scott v. Farmers' &c. Co., 69 Fed. 17.

[40] Railroad Co. v. Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810.

[41] In Railroad Co. v. Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810, the court says: "In so far as he succeeds in doing that [diminishing the claims of his fellows], he adds to his own security. Each holder, therefore, should be present, both that he may defend his own claims and that he may attack the other claims should there be occasion for it. If, upon a fair adjustment of the amount of the debts, there should be a deficiency in the security, real or apprehended, every one interested should have notice in advance of the time, place, and mode of sale, that he may make timely arrangements to secure a sale of the property at its full value."

[42] Morton v. New Orleans &c. R. Co., 79 Ala. 590; Ackerson v. Lodi Branch R. Co., 28 N. J. Eq. 542. Where bonds were transferred as collateral to secure a loan with the condition that the pledgee, upon default in payment of the principal or interest of the note thus secured by the bonds, might sell the bonds without notice, and might become the purchaser thereof at any sale

signment is in writing it is unnecessary, in some jurisdictions, to make the assignor a party, but in others it is held that the assignment of the bonds or debt passes merely the equitable and not the legal title to the security, and if there is any question as to the assignor having any interest it is advisable to make him a party.[43] But, in case the bonds have been pledged to secure a debt of the corporation, it has been held that the holder will be entitled to a decree for only the amount of the debt.[44] The bonds are the principal and the mortgage the incident. It follows, therefore, that the assignee of the bonds or debt may foreclose even though he may have obtained no assignment of the mortgage,[45] while the mere assignment of a mortgage, which contains

thus made, it was held that the pledgee, after having purchased the bonds at a sale held in accordance with the terms of the pledge, was entitled to a decree for the full amount of the face value of the bonds, with interest, and not merely the price paid therefor. Wade v. Chicago &c R. Co., 149 U. S. 327, 13 Sup. Ct. 892, 35 L. ed. 755.

[43] In Markel v. Evans, 47 Ind. 326, it is held that the assignor of a note secured by mortgage is neither a necessary nor a proper party to a suit to foreclose the mortgage. But see Nichol v. Henry, 89 Ind. 54.

[44] Carpenter v. O'Dougherty, 67 Barb. (N. Y.) 397; Jesup v. City Bank, 14 Wis. 331. Where bonds are pledged by the corporation to secure its own debt under an agreement that the pledgee may purchase them at his own sale made upon default in payment of the notes secured, a purchase by the pledgee in accordance with the terms of the pledge is valid as against everybody, unless fraud or breach of trust is established. Third parties and strangers have no right to question the purchaser's title, but he may foreclose for the full amount of the bonds. Farmers' &c. Co. v. Toledo &c. R. Co., 54 Fed. 759. As a railroad is generally regarded as a unit and cannot be sold in parcels so as to destroy its value and usefulness to the public, it may be that the decisions holding that the pledgee is entitled to a decree merely for the amount of his debt would not apply. The entire road may have to be sold and such a decree rendered as will fix the rights of all parties or hold the proceeds for future adjustment.

[45] Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. ed. 313; Ober v. Gallegher, 93 U. S. 199, 206, 23 L. ed. 829; Converse v. Michigan &c. Co., 45 Fed. 18; Parkhurst v. Watertown &c. Co., 107 Ind. 594, 8 N. E. 635; Horn v. Bennett, 135 Ind. 158, 34 N. E. 321, 956, 24 L. R. A. 800n; Jackson v. Blodgett, 5 Cow. (N. Y.) 202.

no promise to pay, without the debt, or bonds evidencing it, will not entitle the assignee to maintain a suit to foreclose.[46] It may be difficult, however, to apply these rules to trust deeds or railroad mortgages made to a trustee. We suppose that in such cases the assignee stands substantially in the position of his assignor and is represented in the same manner, and to the same extent, by the trustee. At all events the holder of bonds payable to bearer is to all intents and purposes an original payee, to whom the promise runs directly.[47] It has been held that a mortgagee who has guaranteed payment of bonds and has taken up some of the overdue coupons attached thereto, may foreclose his mortgage subject to the rights of the holder of the bonds guaranteed;[48] and that an assignee in bankruptcy[49] or a receiver[50] of a corporation may maintain a suit to foreclose in a proper case.

§ 581 (511). Defendants in foreclosure suit—Generally.—The indorsers of railroad bonds secured by mortgage are not necessary parties to a suit to foreclose the mortgage. Their interest in the proper application of the property to the extinguishment of the debt, however, it is said, gives them such an interest in the suit as makes them proper parties, and they should, if possible, be admitted as such. But where the indorser is a state

[46] Nagle v. Macy, 9 Cal. 426; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Hubbard v. Harrison, 38 Ind. 323; Lunt v. Lunt, 71 Maine 377; Merritt v. Bartholick, 36 N. Y. 44. That an assignee of a mortgage giving an option to declare whole debt due on default in payment of one instalment or taxes may exercise such option, see Bartlett Estate Co. v. Fairhaven Land Co., 49 Wash. 58, 94 Pac. 900, 15 L. R. A. (N. S.) 590, 126 Am. St. 856, and other cases there cited in note.

[47] White v. Vermont &c. R. Co., 21 How. (U. S.) 575, 16 L. ed. 221; Rutten v. Union Pac. R. Co., 17 Fed. 480. The first case just cited distinguishes Hayward v. Andrews, 106 U. S. 672, 1 Sup. Ct. 544, 27 L. ed. 271; and New York York Guaranty &c. Co. v. Memphis &c. Co., 107 U. S. 205, 2 Sup. Ct. 279, 27 L. ed. 484.

[48] Burnett v. Hoffman, 40 Nebr. 569, 58 N. W. 1134.

[49] Upton v. National Bank, 120 Mass. 153.

[50] Iglehart v. Bierce, 36 Ill. 133; Robinson v. Williams, 22 N. Y. 380.

which has made no provision for the institution of a suit against itself, it will not be permitted to intervene in the suit, and thereby oust the jurisdiction of the court.[51] It has also been held that a guarantor of the mortgage bonds of a railroad company, who afterwards joins the company in borrowing money with which to pay the interest coupons, is not thereby subrogated to the rights of the mortgagee so as to be a necessary or even a proper party to a subsequent suit to foreclose the mortgage, for there is no subrogation until the entire debt is paid.[52] It is doubtful whether the United States can be brought in as a party to a bill to foreclose against a railroad in which it is interested,[53] but it has been held that it may be bound by notice so that an effectual decree may be rendered foreclosing its interests in property not held for government purposes.[54] If the mortgagor has conveyed the property his grantee should be made a party,[55] and it may be said, in general, that no owner of an equity of redemption can be deprived of his right to redeem unless he is made a party to the foreclosure suit.[56] It is a general rule, subject, however, to exception, that strangers to the cause cannot be heard in it either by motion or petition. Thus unsecured general creditors[57] and

[51] Young v. Montgomery &c. R. Co., 2 Woods (U. S.) 606, Fed. Cas. No. 18166; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447. See also State v. Farmers Loan &c. Co., 81 Tex. 530, 17 S. W. 60. In deciding the first case Judge Woods said: "If the state has paid any interest on these bonds, and is thereby entitled to any part of the proceeds from the mortgaged property, she can propound her claim before the master, and it will be allowed."

[52] Columbia &c. Co. v. Kentucky Un. R. Co., 60 Fed. 794. But see cases cited in note 51, supra, and Searles v. Jacksonville &c. R. Co., 2 Woods (U. S.) 621, Fed. Cas. No. 12586.

[53] See Meier v. Kansas Pac. R. Co., 4 Dill. (U. S.) 378, Fed. Cas. No. 9394.

[54] Elliot v. Van Voorst, 3 Wall. Jr. (U. S.) 299, Fed. Cas. No. 4390; Jones Corp. Bonds and Mort. § 400.

[55] Berlack v. Halle,, 22 Fla. 236, 1 Am. St. 185, and numerous authorities cited in note; Terrell v. Allison, 21 Wall. (U. S.) 289, 22 L. ed. 634. See also Little Rock Trust Co. v. Southern R. Co., 195 Mo. 669, 93 S. W. 944.

[56] Gaskell v. Viquesney, 122 Ind. 244, 23 N. E. 791, 17 Am. St. 364, and note; Beekman v. Hudson, &c. R. Co., 35 Fed. 3, 3 Thomp. Corp. (2nd. ed.), §§ 2645-2647.

[57] Bronson v. Railroad Co., 2

individual stockholders[58] are not generally allowed to become parties to a foreclosure suit against the corporation. So, it has been held that the state has no right to intervene in a suit to foreclose a mortgage for the benefit of innocent bondholders for the purpose of having the mortgage declared invalid as in violation of the state law.[59] And prior mortgagees are not necessary parties unless the bill seeks the appointment of a receiver, or a sale of the entire property free from all liens or some other relief by which their interests will be affected.[60] Stockholders, however,

Black (U. S.) 524, 17 L. ed. 259; Stout v. Lye, 103 U. S. 66, 26 L. ed. 428; Farmers &c. Co. v. Chicago &c. R. Co., 68 Fed. 412; Herring v. New York &c. R. Co., 105 N. Y. 340, 12 N. E. 763; Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741. But general creditors have often been allowed to intervene in a proper case. See Hoffe v. Hoffe, 104 Cal. 94, 36 Pac. 389, 37 Pac. 894; Hollins v. Brierfield &c. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; Louisville Trust Co. v. Louisville &c. R. Co., 174 U. S. 674, 19 Sup. Ct. 674, 43 L. ed. 1130; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. 302. The general creditors of a railroad company cannot complain that a trustee in a mortgage executed to secure its bonds improperly released errors in a decree adjudicating that the rights of such company had passed to another corporation, under foreclosure proceedings, as the trustee represented the mortgage bondholders, and violated no duty to the company by giving the release. Loeb v. Chur, 53 Hun 637, 6 N. Y. S. 296.

[58] Chicago &c. R. Co. v. Howard, 7 Wall (U. S.) 392, 19 L. ed. 117; Foster v. Mansfield &c. R. Co., 36 Fed. 627; Central Trust Co. v. Peoria &c. R. Co., 104 Fed. 418; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337, 36 Am. & Eng. R. Cas. 239.

[59] Farmers &c. Co. v. Chicago &c. R. Co., 68 Fed. 412. See also State v. Farmers' Loan &c. Co., 81 Tex. 530, 17 S. W. 60. The trustee represents the bondholders and they are bound by a decree against him, so that it is generally held that the bondholders are not necessary parties defendant. Alton Water Co. v. Brown, 166 Fed. 840; Baltimore v. United R. &c. Co., 108 Md. 64, 69 Atl. 436. But in New Jersey a bondholder has been held entitled to be made a party defendant. Ring v. New Auditorium Pier Co., 77 N. J. Eq. 422, 77 Atl. 1054.

[60] Woodworth v. Blair, 112 U. S. 8, 5 Sup. Ct. 6, 28 L. ed. 615; Hagan v. Walker, 14 How. (U. S.) 29, 37, 14 L. ed. 312; Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138; McHenry, Ex parte, 9 Abb. (N. Y.) N. Cas. 256; Miltenberger v. Logansport R. Co., 106 U. S. 286, 1 Sup.

may be admitted as parties, where the directors refuse[61] to defend the corporation against unfounded and illegal claims, upon the same principle that bondholders are permitted to act when the trustees fail to do so.[62] And an assignee in bankruptcy[63] or a receiver of the mortgagor is generally a necessary party.[64]

§ 582 (512). When other lien-holders should be made defendants.—Where a sale of the road is sought upon foreclosure of a junior mortgage, and it is desirable to quiet all outstanding titles, or to ascertain the validity or amount of prior liens about which there is substantial doubt, that the purchaser may know the value of the equity which he buys, the prior mortgagees should be joined as parties.[65] A failure to join the prior mort-

Ct. 140, 27 L. ed. 117. In the first case above cited the prior lienholder was denied the right to intervene, and in the second, prior mortgagees who had been made parties were allowed their costs and the bill dismissed, as against them, upon the ground that they should not be put to the expense of litigation. There is sharp conflict among the authorities as to whether the prior incumbrancers are even proper parties so as to be bound by the decree. It seems desirable that all interests should be determined and adjusted in one suit, if possible, but the weight of authority is probably to the effect that in ordinary cases they are not proper parties. The conflicting decisions are collected in notes to Woods v. Pittsburgh &c. R. Co., 99 Pa. St. 101, 3 Am. & Eng. R. Cas. 525, 531, and Strobe v. Downer, 13 Wis. 10, 80 Am. Dec. 709, 714. See also post, § 582. The mortgagor can not complain, however, when the court adjudges that the junior mortgage is prior as to part of the property and the prior mortgagees, who were made parties, do not appeal. Seibert v. Minneapolis &c. R. Co., 58 Minn. 39, 59 N. W. 822.

[61] A demand upon the directors to protect the interests of the corporation and a neglect or refusal by them to do so must usually be shown before the stockholders will be admitted to defend a foreclosure suit. Dimpfell v. Ohio &c. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121; Alexander v. Searcy, 81 Ga. 536, 8 S. E. 630, 12 Am. St. 337.

[62] Bronson v. La. Crosse &c. R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725; Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4926; Guarantee Trust &c. Co. v. Duluth, &c. R. Co., 70 Fed. 803.

[63] Griffin v. Hodshire, 119 Ind. 235, 21 N. E. 741; Lenihan v. Hamann, 55 N. Y. 652; Bard v. Poole, 12 N. Y. 495.

[64] Raynor v. Selmes, 52 N. Y. 579. But see Herring v. New York &c. R. Co., 105 N. Y. 340, 12 N. E. 763.

[65] Richards v. Chesapeake &c. R. Co., 1 Hughes (U. S.) 28, Fed. Cas. No. 11771; Hagan v. Walker, 14 How. (U. S.) 29, 14 L. ed. 312; Jer-

gagees as parties leaves them, generally speaking, with the same rights in the property that they had before the foreclosure.[66] Where the extent of the prior lien-holder's claim is definitely ascertained, and a foreclosure is sought subject to prior liens, he is not a necessary, nor as a rule, a proper party to the bill.[67] It is said that "the remedy of a junior incumbrancer, both before and after foreclosure, is to redeem the senior mortgage. Without the consent of the prior mortgagee, a junior lienor could not enforce a sale of more than the mortgagor's equity of redemption. If he wished a sale free from the prior lien, and the prior lienor will not consent, the decree should be that he redeem, and then foreclose for the enforcement of his own lien, and that he had redeemed.[68] A judicial foreclosure sale is not void because

ome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Dawson v. Danbury Bank, 15 Mich. 489. It is said, however, to be "well settled that in a foreclosure proceeding the complaint can not make a person who claims adversely to both the mortgagor and mortgagee a party, and litigate and settle his rights in that case." Dial v. Reynolds, 96 U. S. 340, 24 L. ed. 644. See also "Trial of Adverse Title in Suit to Foreclose a Mortgage," 21 Cent. L. J. 223, and note to Strobe v. Downer, 13 Wis. 10, 80 Am. Dec. 709, 714. But compare the well considered cases of Hefner v. Northwestern &c. Co., 123 U. S. 747, 8 Sup. Ct. 337, 31 L. ed. 309; Mendenhall v. Hall, 134 U. S. 559, 10 Sup. Ct. 616, 33 L. ed. 1012; Cohen v. Solomon, 66 Fed. 411; and in support of the well-settled rule in Indiana that an adverse claimant may be made a party and a conclusive adjudication rendered against him, see O'Brien v. Moffitt, 133 Ind. 660, 33 N. E. 616, 36 Am. St. 566; Craighead v. Dalton, 105 Ind. 72, 4 N. E. 425. See generally; Corcoran v. Chesapeake &c. Co., 94 U. S. 741, 24 L. ed. 190; Farmers' Loan &c. Co. v. Green Bay &c. Co., 6 Fed. 100; Farmers' Loan &c. Co. v. San Diego &c. Co., 40 Fed. 105; Converse v. Michigan &c. Co., 45 Fed. 18.

[66] Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138; Pittsburgh &c. R. Co. v. Marshall, 85 Pa. St. 187. A junior lienholder can not compel the forclosure of a mortgage constituting a prior lien upon the road. American &c. Co. v. East &c. R. Co., 37 Fed. 242; Seibert v. Minneapolis &c. R. Co., 52 Minn. 246, 53 N. W. 1151. Where prior lienholder have unnecessarily been made parties, the court may, of its own motion, dismiss the suit as to them, for they ought not to be put to the expense of making a defense where the amount and priority of their liens are undisputed. Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138.

[67] Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138; McMurtry v. Montgomery &c. Co., 86 Ky. 206, 5 S. W. 570.

[68] Woodworth v. Blair, 112 U. S. 8,

one interested in the equity of redemption, as a junior mortgagee, was not a party."[69] Where it is sought to cut off the right of a subsequent mortgagee, judgment creditor, or other lien-holder, to redeem, he must be made a party to the bill to foreclose.[70] And, in general, a junior lien-holder is entitled, on application to be admitted as a party to contest the amount and validity of the claims preferred against the corporation.[71] But he is not a necessary party to a foreclosure against the mortgagor,[72] although, as we have said, he may be a proper party in any case and his equity of redemption cannot be cut off unless he is made a party. The original complainant in a foreclosure suit need not be made a party to an intervening petition, where it appears that he no longer has any interest in the fund in controversy, and no relief is asked against him.[73] The question whether or not a lien is

28 L. ed. 615; McKernan v. Neff, 43 Ind. 503; Spurgin v. Adamson, 62 Iowa 661, 18 N. W. 293; Jones Mort. §§ 1394, 1396.

[69] Compton v. Jesup, 68 Fed. 263, 311, citing Jones Mort. § 1395; Martin v. Noble, 29 Ind. 216; Trayser v. Trustees, 39 Ind. 556; Emigrant &c. Bank v. Goldman, 75 N. Y. 127; Frische v. Kramer, 16 Ohio 125; Fulghum v. Cotton, 3 Tenn. Ch. 296; Rose v. Page, 2 Sim. 471.

[70] Searles v. Jacksonville &c. R. Co., 2 Woods (U. S.) 621, Fed. Cas. No. 12586; Beekman v. Hudson &c. R. Co., 35 Fed. 3; Memphis &c. R. Co. v. State, 37 Ark. 632; Youngman v. Elmira &c. R. Co., 65 Pa. St. 278; Hosford v. Johnson, 74 Ind. 479. See also 3 Thomp. Corp. (2d ed.), §§ 2646, 2647. But, otherwise, he is not, of course, a necessary party, Brooks v. Vermont Cent. R. Co., 14 Blatch. (U. S.) 463, Fed. Cas. No. 1964. See generally Jones v. Williams, 155 N. Car. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426, and elaborate note citing authorities by states as to junior incumbrancers as parties and also as to their assignees.

[71] Farmers' Loan &c. Co. v. Texas &c. R. Co., 32 Fed. 359. Where a railroad extends into two states, in each of which the company is a domestic corporation, and the trustee in a mortgage on the whole road first brings a suit in one state to foreclose, and afterwards an ancillary suit in the other state for the same purpose, it has been held that he can not prevent a lien creditor of the company, who has not filed his claim in the first suit from intervening in the second to establish his lien. Fidelity Ins. &c. Co. v. Shenandoah Val. R. Co., 32 W. Va. 244, 9 S. E. 180.

[72] Stockwell v. State, 101 Ind. 1; Pattison v. Shaw, 6 Ind. 377; Williams v. Kerr, 113 N. Car. 306, 18 S. E. 501.

[73] Central Trust Co. v. Sheffield &c. R. Co., 44 Fed. 526.

prior to the mortgage sought to be foreclosed may properly be tried in a foreclosure suit if the bill contains proper averments that the defendant's title is subordinate to the title of the mortgagee.[74] A mortgagee should always be made a party where any doubt is entertained as to the priority of his lien; for a decree declaring a mortgage to be a first lien upon the property and franchises of a railroad company gives it no precedence over the prior lien of a party who had no notice of the proceedings, and was not a party or privy to the decree.[75] The title usually stands in the order in which conveyances were made, and cannot be changed by any proceedings to which the holders of the title were not parties.[76]

§ 583 (513). Defenses to foreclosure suit.—As a general rule no defenses are allowed to a suit to foreclose in favor of bona fide purchasers of railroad mortgage bonds that would not be allowed in an action at law upon negotiable promissory notes.[77]

[74] Corcoran v. Chesapeake &c. Co., 94 U. S. 741, 24 L. ed. 190; Harland v. Bankers' &c. Tel. Co., 33 Fed. 199; Converse v. Michigan &c. Co., 45 Fed. 18; Lewis v. Smith, 9 N. Y. 502, 514, 515; Jones Corp. Bonds and Mort. § 407.

[75] Pittsburgh &c. R. Co. v. Marshall, 85 Pa. St. 187; Jones Corp. Bonds and Mort. § 404. A decree rendered without proper notice to parties to be affected thereby is void. Central Trust Co. v. Florida R. &c. Co., 43 Fed. 751.

[76] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136. See Howard v. Milwaukee &c. R. Co., 7 Biss. (U. S.) 73, Fed. Cas. No. 6761. But if one claiming to hold a prior lien is properly made a party to the bill, and appears, but fails to procure a dismissal as to himself, he will be bound by a decree and sale thereunder, and can not afterward assert any rights not saved to him by the decree. Woods v. Pittsburgh &c. R. Co., 99 Pa. St. 101. Compare, however, Washington Trust Co. v. Norwich &c. Trac. Co., 89 Conn. 59, 92 Atl. 880.

[77] Kenicott v. Supervisors, 16 Wall. (U. S.) 452, 21 L. ed. 319; Carpenter v. Longan, 16 Wall. (U. S.) 271, 21 L. ed. 314; Swett v. Stark, 31 Fed. 858. See also Guaranty Trust Co. v. Green Cove Springs &c. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116. But see where they are not bona fide purchasers, Chicago &c. R. Co. v. Loewenthal, 93 Ill. 433; Farmers' Loan &c. Co. v. San Diego &c. Co., 45 Fed. 518; Ryan v. Anglesea R. Co. (N. J.), 12 Atl. 539; Atwood v. Shenandoah &c. R. Co., 85 Va. 966, 9 S. E. 748. But see when the bonds are in the hands of the original holders. Guarantee Title &c. Co. v. Dilworth Coal Co., 235 Pa. St. 594, 84 Atl. 516.

The acts of the company subsequent to the execution of the mortgage cannot be set up as a defense to a suit by the mortgagee to foreclose his lien,[78] and neither the company nor a purchaser who claims title by conveyance from it can deny the validity of its incorporation in a suit to foreclose a mortgage which it has executed.[79] The same principle applies where the mortgage is given by a consolidated company.[80] It is no defense that a construction company had agreed to pay the interest in default,[81] nor that the road has been leased,[82] and although it may be a good defense to show that the mortgagee, who holds all the bonds is the lessee and has been paid by way of rental all the interest alleged to be in default.[83] It has also been held that neither a misapplication of its earnings by the mortgagor company in order to cause a default, nor the fact that the largest bondholder was also a stockholder and had bought the bonds, after default in payment of interest, for the purpose of causing a foreclosure and purchasing at the sale, constituted a good defense either in favor of the mortgagor or another stockholder.[84] Where, however a railroad company, executing a mortgage upon its road as contemplated, has no legal title to the right of way, but merely holds contracts for a small portion thereof, to be conveyed on conditions which it never performs or has agreed to perform, and a new company is organized, which builds the road

[78] Bronson v. La Crosse &c. R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725; Hale v. Nashua &c. R. Co., 60 N. H. 333.

[79] Beekman v. Hudson River &c. R. Co., 35 Fed. 3. See also Williamson v. Kokomo &c. Assn., 89 Ind. 389; Farmers Loan &c. Co. v. Toledo &c. R. Co., 67 Fed. 49; Thomas v. Citizens' R. Co., 104 Ill. 462; Gunderson v. Illinois Trust &c., 199 Ill. 422, 65 N. E. 326. A junior mortgagee can not deny the validity of a prior mortgage to which his mortgage is expressly made subject. Bronson v. La Crosse &c. R. Co., 2 Wall. (U. S.) 283, 17 L. ed. 725; Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Jones Corp. Bonds and Mort. § 415.

[80] Coe v. New Jersey &c. R. Co., 31 N. J. Eq. 105.

[81] Foster v. Mansfield &c. R. Co., 36 Fed. 627.

[82] Hale v. Nashua &c. R. Co., 60 N. H. 333.

[83] Chamberlain v. Connecticut &c. R. Co., 54 Conn. 472.

[84] Farmers' Loan &c. Co. v. New York &c. R. Co., 78 Hun 213, 28 N. Y. S. 933. See also Coe v. East &c. R. Co., 52 Fed. 531. And see further for who have been held to be insufficient defenses. 3 Thomp. Corp. (2d ed.), § 2662.

and acquires the legal title to most of the right of way and is equitably entitled to the remainder, it seems that no decree of foreclosure can be sustained under the mortgage, as against the new company, for the sale of its property. The mortgage creditors of the original company could have no rights superior to the company itself, and it had no such interest or title in the road as can be subjected to sale under the mortgage.[85]

§ 584 (514). Effect of provisions giving trustees the right to take possession and sell.—It is usual, in mortgages of railroad property, to confer upon the mortgage trustee a right of possession and sale in case of a continuing default in the payment of the mortgage debt. In some instances this power can only be exercised by the trustees at the request of a majority of the bondholders, and it is generally provided that it shall only be exercised after the default in payment has continued for a specified time. Provisions of this character in restraint of the exercise of a power of summary foreclosure, to be effective, must be strictly complied with. Thus, where it is provided that a power of sale may be exercised by the mortgage trustees in case of a continued default for sixty days after notice to the mortgagor of an intention to sell, but not until the sale has been previously advertised for sixty days, the sale must be advertised for sixty days from the close of the sixty days' notice to the corporation of an intention to sell.[86] It was also held in a comparatively recent case that a power of sale given to the mortgagee can be executed only by him, unless the debt has been assigned so as to pass the legal title, and that the assignee of the mortgage, without the debt, cannot execute the power of sale.[87] Where the trustees

[85] Chicago &c. R. Co. v. Loewenthal, 93 Ill. 433. See generally for examples of defense held sufficient, 3 Thomp. Corp. (2d ed.), §§ 2660, 2661.

[86] Macon &c. R. Co. v. Georgia R. Co., 63 Ga. 103; Gibbons v. McDougall, 26 Grant's Ch. (Ont.) 214. To same effect, see generally, Jones Corp. Bonds and Mort. § 384; Shillaber v. Robinson, 97 U. S. 68, 24 L. ed. 967; Equitable Trust Co. v. Fisher, 106 Ill. 189; Foster v. Boston, 133 Mass. 143; Schanewerk v. Hoberecht, 117 Mo. 22, 22 S. W. 949, 38 Am. St. 631. So a demand may be necessary under the provisions of the mortgage or trust deed. Las Vegas R. &c. Co. v. Trust Co., 15 N. Mex. 634, 110 Pac. 856.

[87] Sanford v. Kane, 133 Ill. 199, 24 N. E. 414, 8 L. R. A. 724, 23 Am. St. 602. See also Dameron v. Esk-

under a mortgage stipulating for possession of the mortgaged property are denied possession upon the happening of a default, it has been held that they may maintain ejectment to recover the mortgaged real estate.[88] But since the corporate property usually includes personal property and choses in action for which ejectment will not lie, and since a judgment against an insolvent mortgagor for damages for the non-delivery of the property would be valueless, the remedy for the recovery of possession by an action at law is usually inadequate.[89] Equity will, in such a case, order the specific performance of a stipulation in a railroad mortgage authorizing the trustees to take possession.[90] The trustees, it has been held, may enforce their right to possession upon default even against a contractor engaged in constructing the road under a contract by which he is entitled to the possession of the road until his contract is completed.[91]

§ 585 (514). Rights and duties of trustees as to possession and sale.—A power to take possession, if exercised at all, must

ridge, 104 N. Car. 621, 10 S. E. 700. But where the trustee was a corporation it was held that it could take possession on default by an attorney appointed by it. Pilcher v. Sioux City &c. Co., 12 S. Dak. 52, 80 N. W. 151; Jones v. Williams, 155 N. Car. 179, 71 S. E. 222, 36 L. R. A. (N. S.) 426. It has also been held that a sale and conveyance under a power, although defectively executed, passes the legal title to the purchaser, subject, however, to the right of redemption. Lanier v. McIntosh, 117 Mo. 508, 23 S. W. 787, 38 Am. St. 676. See notes in 31 Am. St. 328, 335, and 19 Am. St. 263, 266, 297.

[88] Rice v. St. Paul &c. R. Co., 24 Minn. 464; Seibert v. Minneapolis &c. R. Co., 52 Minn. 246, 53 N. W. 1151.

[89] Dow v. Memphis &c. R. Co., 20 Fed. 260; North Carolina &c. R. Co. v. Drew, 3 Woods (U. S.) 691, 713; First Nat. Ins. Co. v. Salisbury, 130 Mass. 303; Jones Corp. Bonds and Mort. § 343.

[90] Dow v. Memphis &c. R. Co., 20 Fed. 260; McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748; Sacramento &c. R. Co. v. Superior Ct., 55 Cal. 453 (ordered over the objection of a majority of the bondholders); Shepley v. Atlantic &c. R. Co., 55 Maine 395; Shaw v. Norfolk County R. Co., 5 Gray (Mass.) 162. The jurisdiction of the court is based upon its general equity jurisdiction to compel persons to keep and perform their lawful contracts, and not upon any rule of law authorizing a foreclosure of mortgage liens. Shepley v. Atlantic &c. R. Co., 55 Maine 395, per Walton, J.

[91] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221.

generally be exercised by the trustees as to the entire property. They cannot take possession of a part of the property which has been seized on execution to satisfy the claim of a judgment creditor, while leaving the other mortgaged property in the hands of the corporation.[92] The statutes of several of the states prescribe the duties of mortgage trustees as to taking possession of the mortgaged property of a railroad upon default in payment of its bonds or coupons, and operating it for the benefit of the parties interested. Where the statute provides for the rights and duties of trustees, it is unnecessary to provide therefor in each mortgage executed under the laws of the state, since those laws enter into and become a part of the mortgage.[93] But in the absence of such a statute the trustees have, in general, only those rights and powers conferred upon them by agreement of the parties.[94]

§ 586 (514). Right to foreclose still exists.—The remedies by action at law to recover the debt, or by suit in equity to foreclose the mortgage lien, are not taken away by a grant to the trustees of a power of entry and sale.[95] A suit at law by bondholders

[92] Coe v. Peacock, 14 Ohio St. 187.

[93] Mercantile Trust Co. v. Portland &c. R. Co., 10 Fed. 604.

[94] McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748; Macon &c. R. Co. v. Georgia R. Co., 63 Ga. 103; Shepley v. Atlantic &c. R. Co., 55 Maine 395. But see as to their right to sue to protect the trust, Mercantile T. Co. v. Texas &c. R. Co., 51 Fed. 529; Clapp v. Spokane, 53 Fed. 515. As to the duties and liabilities of trustees in possession, see Jones v. Seligman, 81 N. Y. 190 (duty to fence); Daniels v. Hart, 118 Mass. 543; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424, and Rogers v. Wheeler, 43 N. Y. 598 (liable in damages for injuries); Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434 (liable for loss of freight). They are said to represent both the bondholders and the corporation, Ashuelot R. Co. v. Elliott, 57 N. H. 397, and owe an active duty to the former and to each and all of them to preserve the property and take care of their interests. Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 320, 1 L. R. A. 225; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782; Merrill v. Farmers' Loan &c. Co., 24 Hun (N. Y.) 297; Sturges v. Knapp, 31 Vt. 1.

[95] Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221; Williamson v. New Albany &c. R. Co., 1 Biss. (U. S.) 198, Fed. Cas. No. 17753; Martin v. Ward, 60 Ark. 510, 30 S.

may be maintained for non-payment of the principal or interest bonds secured by mortgage,[96] if the mortgage contains no agreement on the part of the mortgagee not to sue.[97] Indeed, it is held that a provision in a deed of trust to secure bonds of a railroad company, which prohibits foreclosure and judicial sale, by providing that the mode of sale by the trustee set forth in the deed shall be exclusive of all others, is of no effect.[98] Stipulations as to the time which must elapse between the happening of a default and an entry or a sale by the trustees under a power do not limit the right to bring an action to foreclose the mortgage, but such an action may be brought immediately upon default.[99] So, it has been held that they may sue to foreclose the mortgage to recover interest due to a single bondholder, although the mortgage prohibits them from taking any steps to collect the principal of the bonds without the consent of a majority of the bondholders.[1] And, although the trustee is authorized at the request of a certain proportion of the bondholders to take possession of the mortgaged property and to operate or sell the same after

W. 1041; Utermehle v. McGreal, 1 App. D. C. 359; Eaton &c. R. Co. v. Hunt, 20 Ind. 457; Stewart v. Bardin, 113 N. Car. 277, 18 S. E. 320; Credit Foncier &c. v. Andrew, 9 Manitoba 65.

[96] Marlor v. Texas &c. R. Co., 19 Fed. 867; Welsh v. First Division of St. Paul &c. R. Co., 25 Minn. 314; Philadelphia &c. R. Co. v. Johnson, 54 Pa. St. 127; Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 1 L. R. A. 225.

[97] Manning v. Norfolk &c. R. Co., 29 Fed. 838. The provision of a mortgage that holders of bonds secured by it shall not proceed at law or in equity to foreclose it, or procure a sale of the property independently of the trustee, does not defeat an action at law to recover on overdue interest coupons, although the mortgage provides for foreclosure on default in payment of the coupons. Lyon v. New York &c. R. Co., 14 Daly (N. Y.) 489.

[98] Guaranty &c. Co. v. Green Cove Springs &c. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116.

[99] Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Central Trust Co. v. Texas &c. R. Co., 23 Fed. 846; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 1 L. R. A. 397; Farmers &c. Co. v. Winona &c. R. Co., 59 Fed. 957; Mercantile T. Co. v. Chicago &c. R. Co., 61 Fed. 372; Farmers' &c. Co. v. Chicago &c. R. Co., 61 Fed. 543; Central Trust Co. v. New York City &c. R. Co., 33 Hun (N. Y.) 513; Farmers' &c. Co. v. Nova Scotia &c. R. Co., 24 N. S. 542.

[1] Farmers' &c. Co. v. Chicago &c. R. Co., 27 Fed. 146.

default in payment of the mortgage debt, he may bring a suit to foreclose the mortgage without such request by the specified number of bondholders.[2]

§ 587 (515). The decree.—A course of procedure prescribed by the mortgage to be pursued in case of a sale by the trustee without foreclosure is not binding upon the court in proceedings to foreclose such mortgage, but such a decree may be entered as to the terms of payment and the manner of sale as the equities of the case demand.[3] The decree may provide that the sale shall be made subject to such claims as shall be finally adjudicated, where the amount of certain claims in dispute can only be known after a long course of litigation.[4] A decree in an action by a railroad bondholder to foreclose a mortgage securing bonds, which directs a sale of the mortgaged property, free of all liens

[2] Guaranty Trust &c. Co. v. Green Cove &c. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. ed. 116; Morgan's Louisiana &c. R. Co. v. Texas Central R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625; distinguishing Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47. Such a limitation is to be strictly construed and applies to proceedings by the trustee ex mero motu without the intervention of the court. Authorities first above cited; also, Alexander v. Central R. Co., 3 Dill (U. S.) 487, Fed. Cas. No. 166; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 46. See generally, note in 16 L. R. A. (N. S.) 1006, et seq.

[3] Farmers' Loan &c. Co. v. Green Bay &c. R. Co., 6 Fed. 100, 10 Biss. (U. S.) 203, 1 Am. & Eng. R. Cas. 622. See also Provident Life &c. Co. v. Camden &c. R. Co., 177 Fed. 854.

[4] Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14259; Sage v. Central R. Co., 99 U. S. 334, 25 L. ed. 394; Bound v. South Carolina R. Co., 58 Fed. 473. See also as to providing for sale subject to prior liens, Compton v. Jesup, 167 U. S. 1, 17 Sup. Ct. 795, 42 L. ed. 55; Randolph v. Middleton, 26 N. J. Eq. 543. But see where liens are subsequent as to provision for sale free from them, St. Louis &c. R. Co. v. Jackson, 95 Fed. 560; Hardin v. Iowa R. Co., 78 Iowa 726, 43 N. W. 543. A consent decree in railroad foreclosure proceedings, provided that defendant, as purchaser, should "pay, satisfy, and full discharge all debts and liabilities of such receivership of every kind now remaining unpaid." The defendant was held liable for an injury caused by the negligence of the receiver. Wabash R. Co. v. Stewart, 41 Ill. App. 640.

and incumbrances, to satisfy plaintiff's claims, without making provision for other bondholders, subsequent mortgagees, or other creditors of the road, is fatally defective.[5] As a general rule the decree should declare the extent of the default, find the amount due and order the mortgaged property sold if payment is not made within a reasonable time, which should be specified therein.[6] It is customary, also, or at least within the power of the court, to fix an "upset" price[7] and direct that the fund be brought into court for distribution.[8] It may likewise provide that bonds may be received from the purchasers in payment of their bid.[9] The sale of a railroad extending into two states which have united in chartering the corporation by which it is owned, may, it has been held, be decreed by a court sitting in one of such states.[10] So, of course, if this be true, such a decree may be

[5] New Orleans Pac. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66, 6 Lewis' Am. R. & Corp. 43. See also Trimble v. Acme Mills &c. Co., 151 Ky. 570, 152 S. W. 561.

[6] Blossom v. Milwaukee &c. R. Co., 1 Wall. (U. S.) 655, 17 L. ed. 673; Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47. But it is often impracticable to determine and insert the exact amount of costs at the time the decree is drawn and the omission to do so is not fatal. Grape Creek Coal Co. v. Farmers' &c. Co., 63 Fed. 891. In Knevals v. Florida Central &c. R. Co., 66 Fed. 224, it was held that a decree ordering the sale of a railroad, without describing the property included all the property of the company covered by the mortgage and connected with the use and purpose of the road. Trustees may not purchase at the sale except, perhaps, in instances where it is for the benefit of the bondholders. See 3 Thomp. Corp. (2d ed.), §§ 2677, 2678.

[7] Blair v. St. Louis &c. R. Co., 25 Fed. 232. A form of decree is given in full in this case. Provident Life &c. Co. v. Camden &c. R. Co., 177 Fed. 854. See also McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705. A deposit by bidders may also be required. Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14259; Eastern v. Houston &c. R. Co., 44 Fed. 718; Provident Life &c. Co. v. Camden &c. R. Co., 177 Fed. 854.

[8] Chicago &c. Land Co. v. Peck, 112 Ill. 408.

[9] Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; Kropholler v. St. Paul &c. R. Co., 2 Fed. 302; Duncan v. Mobile &c. R. Co., 3 Woods (U. S.) 597, Fed. Cas. No. 4139.

[10] McTighe v. Macon &c. Co., 94 Ga. 306, 21 S. E. 701, 32 L. R.

rendered by a Federal court sitting in one of the states.[11] Although the court cannot send its process into another state nor deliver possession of property in another jurisdiction, it can command and enforce a transfer of the title to the purchaser.[12] A decree determining the rights of the parties to the suit is final and conclusive between them as to all matters which were or might have been litigated therein under the issues, and can only be questioned by appeal or in a direct proceeding for that purpose.[13] But it does not affect the rights and priorities of persons who had no notice of the proceedings and were neither parties nor privies thereto.[14]

§ 588 (516). Consent decree.—A decree entered by consent of the parties has legal effect so long as it remains unreversed, and, after it has been executed, is binding, at least so far as it is embraced by the issues.[15] But it has been held that so long as they

A. 208, 47 Am. St. 153; McElrath v. Pittsburg &c. R. Co., 55 Pa. St. 189. See also Union Trust Co. v. Olmstead, 102 N. Y. 729, 7 N. E. 822; Craft v. Indiana &c. R. Co., 166 Ill. 580, 46 N. E. 1132. Subject, however, to existing liens in the other state. Hand v. Savannah &c. R. Co., 12 S. Car. 314. Some of the courts refuse to recognize such a decree so far as it affects the road in their state which is subject to an underlying mortgage. See Eaton &c. R. Co. v. Hunt, 20 Ind. 457; Farmers' Loan &c. Co. v. Bankers' &c. Co., 44 Hun (N. Y.) 400; Pittsburgh &c. R. Co.'s Appeal (Pa.), 4 Atl. 385.

[11] Wilmer v. Atlanta &c. Co., 2 Woods (U. S.) 409, 447, 454, Fed. Cas. No. 17775; Blackburn v. Selma &c. R. Co., 2 Flip. 525, Fed. Cas. No. 1467; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Randolph v. Wilmington &c. R. Co., 11 Phila. 502.

[12] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Jones Corp. Bonds and Mort. § 417. See also as to the decree operating in personam, Craft v. Indiana &c. R. Co., 166 Ill. 580, 46 N. E. 1132; Lynde v. Columbus &c. R. Co., 57 Fed. 993.

[13] Brooks v. O'Hara, 2 McCrary (U. S.) 644, 8 Fed. 529; Woolery v. Grayson, 110 Ind. 149, 10 N. E. 935; Indiana &c. R. Co. v. Bird, 116 Ind. 217, 18 N. E. 837, 9 Am. St. 842; Herring v. New York &c. R. Co., 105 N. Y. 341, 12 N. E. 763; Woods v. Pittsburgh &c. R. Co., 99 Pa. St. 101.

[14] Pittsburgh &c. R. Co. v. Marshall, 85 Pa. St. 187.

[15] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Farmers Loan &c. Co. v. Central R., 4 Dill. (U. S.) 533, Fed. Cas. No. 4663; Wadhams v. Gay, 73 Ill. 415; Indiana &c. R. Co. v. Bird, 116 Ind. 217, 9 Am. St. 842, 18 N. E. 837. In

remain unexecuted, decrees entered by consent, like ex parte decrees, are subject to the control of the court.[16] A consent decree as to matters beyond the scope of the bill will bind the court in its future actions only so far as it is embraced by the bill. But it will, after it is executed by one of the parties, constitute a binding agreement upon the part of the other.[17]

§ 589 (517). Deficiency decree.—It was formerly held by the Federal courts that, after a decree of foreclosure and sale, duly confirmed, it was erroneous to direct an execution for any deficiency, that is, for the balance of the debt in case the property did not sell for enough to pay it in full.[18] But, under the present equity rule,[19] "a decree may be rendered for any balance that may be found due to the complaint over and above the proceeds of the sale or sales, and execution may issue for the collection of the same." This rule, however, does not authorize such a decree unless the bill shows that the amount is actually due.[20] Thus, it is held in the case just cited that where there is

Hutts v. Martin, 134 Ind. 587, 593, 33 N. E. 676, it is said that the decree is based upon the agreement and not upon the pleadings and may, therefore, be binding upon the parties although not within the issues. See also Nashville &c. R. Co. v. United States, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. ed. 971; Knobloch v. Mueller, 123 Ill. 554, 17 N. E. 696; Indianapolis &c. R. Co. v. Sands, 133 Ind. 433, 32 N. E. 722; Schmidt v. Oregon &c. Co., 28 Ore. 9, 40 Pac. 406, 1014, 52 Am. St. 759.

[16] Vermont &c. R. Co. v. Vermont Central R. Co., 50 Vt. 500. "Consent decrees decide nothing. They merely authenticate private agreements, and render them executory between the parties." Union Bank v. Marin, 3 La. Ann. 34, 35, per Rost, J.

[17] Vermont &c. R. Co. v. Vermont Central R. Co., 50 Vt. 500.

[18] Noonan v. Lee, 2 Black (U. S.) 499, 17 L. ed. 278; Orchard v. Hughes, 1 Wall. (U. S.) 73, 17 L. ed. 560. See also Libby v. Rennie, 31 N. J. Eq. 42. It is also held in some jurisdictions that there is no lien for the deficiency until after a sale has been made, the deficiency ascertained and a judgment entered therefor. Hibberd v. Smith, 50 Cal. 511; Linn v. Patton, 10 W. Va. 187. See also Myers v. Hewitt, 16 Ohio 449, 454. Contra, Fletcher v. Holmes, 25 Ind. 458.

[19] United States Equity Rule 92. See also Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. ed. 706; Dodge v. Freedman's &c. Trust Co., 106 U. S. 445, 1 Sup. Ct. 335, 27 L. ed. 206.

[20] Ohio Cent. R. Co. v. Central Trust Co., 133 U. S. 83, 10 Sup. Ct.

no provision in the bonds or mortgage that the bonds shall become due, or may be declared due, upon any contingency before their maturity, it is error to find the unpaid balance due when it in fact has not matured and to enter a deficiency decree ordering execution therefor. So, in another recent case, it was held that on foreclosure of a mortgage for non-payment of interest, if the principal is not due and there is no provision in the bonds or mortgage that the principal shall become due on default in the payment of interest, no judgment can be rendered for any deficiency in the proceeds of the sale to pay the principal.[21] We suppose, also, that no deficiency decree, amounting to a personal judgment, can be rendered in any case against a party unless the court has jurisdiction of the person.[22]

§ 590 (518). Final and appealable decrees.—A decree may be final although the case be referred to a master to execute the decree by a sale of the mortgaged property.[23] If, however, it leaves the amount due upon the debt to be determined, and the property to be sold is not ascertained and defined it is not final.[24] If it determines the whole controversy between the parties, leav-

235, 33 L. ed. 561. Where proper facts are alleged, however, a personal decree for deficiency may be awarded under the prayer for general relief. Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. ed. 706. And trustee under authority of trust deed may bind bondholders by deficiency judgment. Grant v. Winona &c. R. Co., 85 Minn. 422, 89 N. W. 60.

[21] Farmers &c. Co. v. Grape Creek &c. Co., 65 Fed. 717. See also Danforth v. Coleman, 23 Wis. 528.

[22] See 1 Elliott's Gen. Pr. §§ 243, 244, 362. See also the extreme case of Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. 547.

[23] Bronson v. Railroad Co., 2 Black (U. S.) 524, 17 L. ed. 347, 359; Ray v. Law, 3 Cranch (U. S.) 179, 2 L. ed. 404; Whiting v. United States Bank, 13 Peters (U. S.) 6, 10 L. ed 33; Elliott's App. Proc. § 92.

[24] McGourkey v. Toledo &c. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 172, 36 L. ed. 1079; Railroad Co. v. Swasey, 23 Wall. (U. S.) 405, 23 L. ed. 136; Grant v. Phoenix &c. Co., 106 U. S. 429, 1 Sup. Ct. 414, 27 L. ed. 237; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153, 30 L. ed. 1122; Burlington &c. R. Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. 58, 31 L. ed. 73.

ing nothing to be done except to carry it into execution, it is appealable as a final decree notwithstanding the fact that the court retains the fund in controversy for the purpose of distributing it as decreed.[25] So, a decree of foreclosure, ascertaining the amount due, directing payment within a specified time and providing for an order of sale in case of default in such payment, is a final decree from which an appeal may be taken.[26] It is also "manifest that a substantial error, to the prejudice of one of the parties, may originate in a decree distributing the proceeds of a sale under a decree of foreclosure, and no question can be successfully raised against the right to appeal from such a decree."[27] There are also cases in which there are independent issues not affecting all parties, and in such cases an appeal may lie as to those whose interests are finally determined although the decree is not final as to all the issues between the other parties.[28] Thus, it has been held that a decree in a foreclosure suit awarding priority to a creditor who claims an interest in locomotives in the possession of the receiver and in use on the road is a final decree upon a distinct and independent issue.[29] And it may, perhaps,

[25] Bank of Lewisburg v. Sheffey, 140 U. S. 445, 11 Sup. Ct. 755, 35 L. ed. 493; Hoffman v. Knox, 50 Fed. 484. See also Stovall v. Banks, 10 Wall. (U. S.) 583, 19 L. ed. 1036.

[26] Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 440, 17 L. ed. 860.

[27] Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 82, 1 Sup. Ct. 10, 12, 27 L. ed. 47. See also Blossom v. Milwaukee &c. R. Co., 1 Wall. (U. S.) 657, 17 L. ed. 673; Louisville &c. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. ed. 1023; Kneeland v. American Loan &c. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. ed. 379.

[28] Trustees v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Hinckley v. Gilman &c. R. Co., 94 U. S. 467, 24 L. ed 166; Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. ed. 559; Brush &c. Co. v. Electric Imp. Co., 51 Fed. 557.

[29] Central Trust Co. v. Grant &c. Works, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. ed. 97. See also Farmers' Loan &c. Co., Ex parte, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. ed. 656; Jordan, Ex parte, 94 U. S. 248, 24 L. ed 123; Central Trust Co. v. Marietta &c. R. Co., 48 Fed. 850 (holding decision in favor of an intervenor a final decision under the Circuit Court of Appeals Act). That the term "final decision" in such act means final judgment or decree, see Duff v. Carrier, 55 Fed. 433.

be stated as a general rule that where the parties are entirely dismissed from a case by the decree, it is so far final as to them that an immediate appeal may be taken, although other matters are retained in which they have no interest.[30] But where an intervener in a foreclosure suit claimed certain rolling stock in the possession of the receiver, as having been leased to the mortgagor, and, after sale of the property on foreclosure, a decree was made directing the delivery of such property to the intervener, but referring the matter to a master to determine its rental value while used by the receiver, together with all questions between the receiver and the intervener growing out of its use and restoration, it was held that the decree directing the delivery of the property to the intervener was not such a final decree as to prevent the court from determining at a subsequent term that the title to such property had passed to the purchaser at the foreclosure sale.[31] Other decisions upon various phases of this subject are cited below.[32]

[30] Hill v. Chicago &c. R. Co., 140 U. S. 52, 11 Sup. Ct. 690, 35 L. ed. 331; Grant v. East &c. R. Co., 50 Fed. 795. But see Keystone &c. Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. ed. 275.

[31] McGourkey v. Toledo &c. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. ed. 1079.

[32] Doyle v. London Guaranty Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. ed. 641; Investment Registry v. Chicago &c. R. Co., 212 Fed. 594.

CHAPTER XXI.

SALE AND REORGANIZATION.

Sec.
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§ 595 (519). Railroad company cannot sell franchise and necessary property without statutory authority.—In the absence of legislative authority, a railroad company cannot sell its road and franchises to another corporation, so as to prevent it from performing its duties to the public,[1] even though the latter cor-

[1] Pennsylvania R. Co. v. St. Louis &c. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. ed. 83; Snell v. Chicago, 152 U. S. 191, 14 Sup.

poration should undertake to keep the road open at all times for the use of the public; for a corporation has no implied authority to delegate the performance of its public duties to another company.[2] An unauthorized attempt on the part of a railroad com-

Ct. 489, 492, 38 L. ed. 408; Oregon &c. Nav. Co. v. Oregonian R. Co., 130 U. S. 1, 9 Sup. Ct. 409, 32 L. ed. 837; Cumberland Tel. &c. Co. v. Evansville, 127 Fed. 187; East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690; Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156; Fisher v. West Virginia &c. R. Co., 39 W. Va. 366, 19 S. E. 578, 23 L. R. A. 758. 3 Thomp. Corp. (2nd ed.), §§ 2900, 2906. See also Attorney-General v. Haverhill Gaslight &c. Co., 215 Mass. 394, 101 N. E. 1061, Ann. Cas. 1914 C, 1266 and note; elaborate note to Brunswick &c. Co. v. United States Gas Co., 35 Am. St. 385, 390; and note in 103 Am. St. 555. In Central Transp. Co. v. Pullman &c. Co., 139 U. S. 24, 11 Sup. Ct. 478, 484, 35 L. ed. 55; Gray, J., states the reason for the rule as follows: "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws." But see as to "secondary franchises," Owensboro v. Cumberland Tel. &c. Co., 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829; Cooper v. Utah Light &c. Co., 35 Utah 570, 102 Pac. 202.

[2] York &c. R. Co. v. Winans, 17 How. (U. S.) 30, 39, 15 L. ed. 350, 353; Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. ed. 950;

pany to dispose of its franchise may be ground for the forfeiture of its charter.[3] Nor can one railroad corporation purchase the property and franchises of another without such authority.[4] A grant to a railroad corporation of power to sell its line will not be implied unless necessary to give effect to the language of the

Clark v. Washington, 12 Wheat (U. S.) 40, 54, 6 L. ed. 544; Great Northern R. Co. v. Eastern Counties R. Co., 21 L. J. Ch. 837; cf. Rogers Locomotive &c. Works v. Erie R. Co., 20 N. J. Eq. 379; Roper v. McWhorter, 77 Va. 214; Beman v. Rufford, 1 Sim. N. S. 550. It has been held that by conveying its road and franchises, to trustees selected by itself, a railroad company can not evade its legal liability for injuries afterwards done to persons and property by the negligent operation of its road. Acker v. Alexandria &c. R. Co., 84 Va. 648, 5 S. E. 688; Naglee v. Alexandria &c. R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. 308. So, it has been held that a railroad company cannot, without statutory authority, transfer the right to operate its road so as to absolve itself from its duties to the public, or its liability for the torts of the company which operates the road. East Line &c. R. Co. v. Rushing, 69 Tex. 306, 6 S. W. 834; International &c. Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484; International &c. R. Co. v. Eckford, 71 Tex. 274, 8 S W. 679; Anderson v. Cincinnati S. R. Co., 86 Ky. 44, 5 S. W. 49, 9 Am. St. 263; Chollette v. Omaha &c. R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135. In one of these cases it is said that legislative consent to the transfer is not sufficient of itself to relieve the company from such liabilities; there must be an exemption granted or a release from the obligations of the company to the public. Chollette v. Omaha &c. R. Co., 26 Nebr. 159, 41 N. W. 1106, 4 L. R. A. 135.

[3] Where a railroad company, having a land grant from the state, disposed of the entire interest in and control of the road to another company, reserving the granted land and certain corporate rights, but ceasing to do a railroad business, it was held that, as such separation of the franchises was not authorized by the legislative acts incorporating the companies, judgment of forfeiture and dissolution of both was authorized in quo warranto proceedings by the state. State v. Minnesota Cent. R. Co., 36 Minn. 246, 29 Am. & Eng. R. Cas. 440, 30 N. W. 816.

[4] Gulf &c. R. Co. v. Morris, 67 Tex. 692, 4 S. W. 156. But it would seem that authority given to one corporation to purchase the franchise of another specified corporation gives the latter authority to sell. New York &c. R. Co. v. New York &c. R. Co., 52 Conn. 274.

statute.[5] A provision in the charter of a railroad corporation prohibiting it from purchasing, selling, leasing, or consolidating with any other corporation owning a parallel or competing line does not carry implied power to sell to a company which does not own such a line. And it has been held that such a sale cannot be legally made, although the two roads are expressly empowered by law to consolidate.[6] Neither, it has been held, does the grant of power to purchase other roads imply authority on the part of a corporation to sell its own.[7] A general power to sell, except upon foreclosure, is not included in a power granted to a railroad company to mortgage,[8] or lease.[9] But railroads are empowered by general statute in many of the states to purchase the roads of

[5] See Clarke v. Omaha &c. R. Co., 4 Nebr. 458; Southern Pac. R. Co. v. Esquibel, 4 N. Mex. 337, 20 Pac. 109, 36 Am. & Eng. R. Cas. 410; East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690; State v. Consolidation Coal Co., 46 Md. 1, 3 Thomp. Corp. (2d ed.) § 2903

[6] East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690.

[7] Southern Pac. R. Co. v. Esquibel, 4 N. M. 337, 20 Pac. 109, 36 Am. & Eng. R. Cas. 410.

[8] Southern Pac. R. Co. v. Esquibel, 4 N. M. 337, 20 Pac. 109. In announcing the opinion of the court in this case, Reeves, J., said: "It was argued for the appellant that, if the land could be mortgaged for the means to construct, equip and operate the road, it could be assigned, in the first place, for the same object. The doctrine that a power to mortgage includes a power to sell is not supported by authority of law. A corporation must execise its powers in the mode prescribed in its charter. The power to procure means to construct the road in question was not a general power, it was a particular power to be exercised for a specific object. The Texas & Pacific R. Co. was authorised to issue construction and land bonds, and to execute mortgages to secure the bonds on its land grant and other lands the company might acquire; the proceeds of the sale of the bonds to be applied to the construction, operation, and equipment of the road, and for the purchase, construction, completion, equipment, and operating of the other roads [which it was authorized to acquire] as contemplated and specified in the acts of congress. The acts require that the bonds and mortgages should contain an extract from the law authorizing them to be issued, and that the mortgages should be filed and recorded in the department of the interior. The appellant was not a mortgagee, nor a purchaser under a mortgage. No mortgage bond was given in aid of the construction of the road."

[9] Pittsburgh &c. R. Co. v. Bedford &c. R. Co., 81½ Pa. St. 104.

connecting lines.[10] And this power is frequently granted by special charter. When the charter of one company authorizes it to purchase the property and franchise of another, this must be construed to be an implied authority to that other company to sell,[11] and where "any railroad company" is authorized to purchase the property and franchises of a certain corporation they may, it seems, be lawfully purchased by a railroad corporation of another state.[12]

§ 596 (520). **Execution sales.**—The franchise of a railroad company, and corporate property essential to the enjoyment of the franchise, are not subject to sale on execution, unless the legislature authorizes or assents to the transfer.[13] But locomotives, cars and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution,[14] and there seems

[10] In Michigan the sale of an uncompleted road, begun in good faith, but which the company undertaking it has become unable to finish, is alone authorized. Young v. Toledo &c. R. Co., 76 Mich. 485, 43 N. W. 632.

[11] New York &c. R. Co. v. New York &c. R. Co., 52 Conn. 274. See also Brinkerhoff v. Newark &c. Trac. Co., 66 N. J. L. 478, 49 Atl. 812; Rogers v. Oxford &c. R. Co., 2 DeG. & J. 662.

[12] Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529. But see Merz Capsule Co. v. United Capsule Co., 67 Fed. 414; McCutcheon v. Merz Capsule Co., 71 Fed. 787, 31 L. R. A. 415; People v. Ballard, 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737.

[13] Gue v. Tide Water Canal Co., 24 How. (U. S.) 257, 16 L. ed. 635; East Alabama R. Co. v. Doe, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. ed. 136; Connor v. Tennessee Cent. R. Co., 109 Fed. 931, 939, 940 (citing text); Wood v. Truckee Turnpike Co., 24 Cal. 474; Hatcher v. Toledo &c. R. Co., 62 Ill. 477; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Indianapolis &c. G. R. Co. v. State, 105 Ind. 37, 4 N. E. 316; Brady v. Johnson, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737, and note; Tippets v. Walker, 4 Mass. 595, 597, per Parsons, C. J.; Stewart v. Jones, 40 Mo. 140; Overton Bridge Co. v. Means, 33 Nebr. 857, 51 N. W. 240, 29 Am. St. 514; Ludlow v. Hurd, 1 Disney (Ohio) 552; Oakland R. Co. v. Keenan, 56 Pa. St. 198; Ammant v. New Alexandria Turnpike Co., 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593, and note; Leedom v. Plymouth R. Co., 5 W. & S. (Pa.) 265; Baxter v. Nashville &c. Tpk. Co., 10 Lea (Tenn.) 488; 3 Thomp. Corp. (2nd ed.), § 2908.

[14] Lathrop v. Middleton, 23 Cal. 257, 83 Am. Dec. 112; Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432; Pierce v. Emery, 32 N. H. 484;

to be no reason why property of a railroad corporation not essential to the enjoyment of its franchise should not be subjected to the payment of its debts.[15] The general statutes of many of the states authorize a sale of the property and franchises of a railway corporation upon execution,[16] and it is said, perhaps too broadly, that "a general power to alienate franchises necessarily implies a liability to have them levied upon."[17] The statutory method of sale must be strictly pursued,[18] and, unless otherwise provided, a railroad cannot be levied upon and sold in fragmentary parts although it may run into different counties.[19] So,

Boston &c. R. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336. See also Williamson v. New Jersey &c. R. Co., 29 N. J. Eq. 311; Stevens v. Buffalo &c. R. Co., 31 Barb. (N. Y.) 590. In Wall v. Norfolk &c. R. Co., 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. 948, 951 (citing text), it is said that the better view seems to be that rolling stock which may be useful in the operation of the road is not subject at common law to execution or attachment, but that under the provision of the West Virginia constitution, making rolling stock subject to execution and sale, it is also subject to attachment. So, a portion of a railroad which the company has abandoned the use of and is proceeding to take up is subject to levy under execution. Gardner v. Mobile &c. R. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. 84; Benedict v. Heineberg, 43 Vt. 231.

[15] Louisville &c R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[16] Atlanta v. Grant &c. Co., 57 Ga. 340; Williams v. East Wareham &c. R. Co., 171 Mass. 61, 50 N. E. 646; Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225; Winchester &c. R. Co. v. Colfelt, 27 Grat. (Va.) 777; State v. Rives, 5 Ired. Law (N. Car.) 297.

[17] Note to Brunswick &c. Co. v. United Gas &c. Co., 35 Am. St. 385, 401, citing National Foundry Works v. Oconto &c. Co., 52 Fed. 43, which however, only inferentially sustains the proposition. So, in State v. Hare, 121 Ind. 308, 310, 23 N. E. 145, it is said that "the rule is that whatever the corporation might voluntarily alienate, its creditors may subject to sale by adverse process," citing Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

[18] James v. Pontiac &c. Co., 8 Mich. 91; Taylor v. Jenkins, 6 Jones L. (N. Car.) 316; Seymour v. Milford &c. Co., 10 Ohio 476. See also Gregory v. Blanchard, 98 Cal. 311, 33 Pac. 199.

[19] Macon & Western R. Co. v. Parker, 9 Ga. 377; Noble v. State, 43 Ga. 466; Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. 506; Dayton, Xenia &c. R. Co. v. Lewton, 20 Ohio St. 401. See also Brooks v. Railway

it is held in a recent case that the property of a railroad company, cannot be sold under process separately and apart from its franchise, where such property is so indissolubly linked to the franchise and to the public functions of the corporation that without it the franchise will be rendered inoperative, and, that a decree directing the sale of a portion of the right of way and roadbed to satisfy a debt, is inoperative, where the road has not been abandoned; nor the franchise under which it was built surrendered; and the court may properly refuse to award process for the enforcement of such decree, as the effect of a sale would be merely to cloud the title of the owner of the road and its franchise.[20]

§ 597 (521). Foreclosure sales—Authority—Purchasers—Authority to mortgage, of course, includes the power to enforce a sale of the mortgaged property upon foreclosure for default in payment of the mortgaged debt.[21] And in many cases the charter authorizes the execution of a mortgage containing a power of sale.[22] A corporation may become the purchaser at a foreclosure sale, or obtain the property from the purchaser, if authorized by its charter to purchase and operate other lines of road.[23] So,

Co., 101 U. S. 443, 451, 25 L. ed. 1057; National &c. Works v. Oconto Water Co., 52 Fed. 43, 45; Bound v. South Carolina R. Co., 46 Fed. 315, 316; Wheeling Bridge &c. R. Co. v. Reymann &c. Co., 90 Fed. 189; Yellow River Improvement Co. v. Wood County, 81 Wis. 554, 51 N. W. 1004, 17 L. R. A. 92. So, where it is all mortgaged it should be sold as an entirety although it runs into different states. Muller v. Dows, 94 U. S. 444, 24 L. ed. 207.

[20] Connor v. Tennessee Cent. R. Co., 109 Fed. 931.

[21] New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; Detroit v. Mutual Gas Light Co., 43 Mich. 594, 5 N. W. 1039. Compare Savannah &c. R. Co. v. Lancaster, 62 Ala. 555.

[22] McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748. An order that a railroad be sold as an entirety, together with all its franchises, on the foreclosure of a lien given by statute, which makes no express provision as to the mode of its enforcement, is in excess of the power of the court. In such a case payment must be enforced out of other property or funds, and the lien affords the basis for the exercise, by the court of chancery, of its flexible jurisdiction to coerce payment. Louisville &c. R. Co. v. Boney, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

[23] People v. Brooklyn &c. R. Co., 89 N. W. 75. It has been held in New Hampshire that a foreign corporation could lawfully become the purchaser of a railroad at foreclo-

mortgage bondholders and other creditors may lawfully combine to purchase a railroad at a foreclosure sale, if there is no intention of defrauding any party in interest by the use of an unfair advantage, or by preventing competition at the sale.[24] The bondholders for whom the road is purchased may also be permitted to apply their bonds in payment of the purchase-money, after satisfying the costs and charges of the litigation and trust[25]

sure sale. Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529. See also Rogers v. Nashville &c. R. Co., 91 Fed. 299; Central Trust Co. v. Western N. Car. R. Co., 89 Fed. 24. There is nothing in the Michigan general railroad law of 1873 authorizing one railroad company to acquire the stock and franchises of another competing company, for the purpose of itself exercising such franchises, and such an acquisition is unlawful. Mackintosh v. Flint &c. R. Co., 34 Fed. 582. But see under Act of 1901, Lisman v. Knickerbocker Trust Co., 211 Fed. 413.

[24] Robinson v. Philadelphia &c. R. Co., 28 Fed. 340; Kitchen v. St. Louis &c. R. Co., 69 Mo. 224; Thornton v. Wabash R. Co., 81 N. Y. 462; Marie v. Garrison, 83 N. Y. 14, 13 Abb. N. Cas. 210; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576; Jones Corp. Bonds and Mort. § 687. See also Owen v. Potter, 115 Mich. 556, 73 N. W. 977; Starksweather v. Jenner, 216 U. S. 524, 54 L. ed. 602. In Texas a married woman can not purchase, but a trustee may take for her. Texas So. R. Co. v. Harle, 101 Texas 170, 105 S. W. 1107. A decree of foreclosure and sale of a railroad, entered by consent of creditors and the company, without fraud, and in pursuance of a plan of reorganization, will not be set aside at the suit of some of the stockholders merely because the principal of one mortgage was not yet due, when the sums due for interest thereon, for floating indebtedness, and on other mortgages then due, were so great as to render foreclosure inevitable, and when complainants do not offer to do equity by paying the floating debt, and have not been diligent in opposing the plan or reorganization, or in attacking the decree complained of. Carey v. Houston &c. R. Co., 52 Fed. 671. But see Northern Pac. R. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. ed. 931; Ballentyne v. Smith, 205 U. S. 285, 51 L. ed. 803. Trustee has implied authority to buy in property for benefit of bondholders at a figure sufficient to cover debt, interest and costs so long as it does not exceed value of the property. Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, 87 Atl. 843.

[25] Duncan v. Mobile &c. R. Co., 3 Woods (U. S.) 567, Fed. Cas. No. 4139; Farmers' Loan &c. Co. v. Green &c. R., 6 Fed. 100; American Water &c. Co. v. Farmers' Loan &c. Co., 73 Fed. 956; Rumsey v. People &c. R., 154 Mo. 215, 55 S. W. 615. And the mortgage may so provide. Child v. New York &c. R., 129 Mass. 170. See also Easton v. German-American Bank, 127 U. S. 532, 8 Sup. Ct. 1297, 32 L. ed. 210. A sale to bond-

if there are no prior lienholders whose claims are unsatisfied.[26]

§ 598 (522). Sale on default in payment of interest—Sale of road as an entirety.—Where a trust deed provides that the road and property shall be sold upon a default in the payment of principal or interest, but one sale is contemplated, and sufficient property should be sold to realize the debt, although default has been made in the payment of interest only. And if the property cannot be sold in parts without injury to the whole, it may be sold as an entirety.[27] And even though the mortgage contains no provision making the whole debt due upon a default in the payment of interest, a sale of the whole property may be decreed

holders' committee, however, ordinarily makes the members individually liable for the purchase price. Middendorf v. Baltimore &c. Co., 117 Md. 443, 84 Atl. 150.

[26] Sanxey v. Iowa City Glass Co., 68 Iowa 542, 27 N. W. 747. Debts contracted in conserving the property and maintaining its value as a going concern are usually considered preferred claims and paid before the mortgage debt is satisfied. Farmers' &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182; Seibert v. Minneapolis &c. R. Co., 58 Minn. 53, 59 N. W. 879. See Finance Company v. Charleston &c. R. Co., 61 Fed. 369; Bound v. South Carolina R. Co., 58 Fed. 473. Post, § 606. It has, however been held erroneous to direct payment of claims for supplies furnished prior to the receivership first out of the proceeds of the sale, where no provision was made for such payment when the receiver was appointed, and it does not appear that current earnings, before or after his appointment, were diverted to paying the interest on the bonded debt. Cutting v. Tavares &c. R. Co., 61 Fed. 150. A claim for cutting and clearing away timber from the road for its original construction has also been refused preference on foreclosure of a prior mortgage on the road. Barstow v. Pine Bluff &c. R. Co., 57 Ark. 334, 21 S. W. 652; Farmers &c. Co. v. Candler, 81 Ga. 691, 18 S. E. 540.

[27] Wilmer v. Atlanta &c. R Co., 2 Woods (U. S.) 447, Fed. Cas. No. 17776; Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47; Peoria &c. R. Co. v. Thompson, 103 Ill. 187. This is the general rule as to the sale of mortgaged property, which cannot readily be divided. Bound v. South Carolina R. Co., 50 Fed. 853; Farmers' Loan &c. Co. v. Oregon &c. R. Co., 24 Fed. 407; Kneeland v. American Loan &c. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. ed. 319; 2 Jones Mort., §§ 1181, 1459, 1478, 1616, 1619. See also Clearwater &c. Bank v. Bagley &c. Tel. Co., 116 Minn. 4, 133 N. W. 91, Ann. Cas. 1913A, 622, 624, 36 L. R. A. (N. S.) 1132, and note citing many other cases to this effect.

by a court of equity, if it cannot be divided without injury.[28] Or, it seems that the court may, in a proper case, direct that the property be leased for such a period as will secure the payment of the sum due and the interest accruing.[29] Where suit is brought to foreclose a railroad mortgage for default in payment of interest, the court may properly enter a decree nisi, ascertaining the amount of interest due, and giving the debtor a reasonable time to pay it; and directing that in case of non-payment, the property be sold, and the proceeds applied to the payment of both interest and principal. But under such a decree the debtor may redeem at any time before the sale is confirmed by payment of the unpaid interest and costs.[30] The rule stated at the beginning of this section requiring or permitting the sale of the road as an entirety for default in payment of interest does not apply in all cases. If the property is divisible, and interest only is due, there being no provision making the whole debt due, it has been held that no more should be sold than will pay the accrued in-

[28] See McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748. In Peoria &c. R. Co. v. Thompson, 103 Ill. 187, Mr. Justice Mulkey, in delivering the opinion of the court, said: "When a railway, its appurtenances, privileges and franchises are mortgaged as a whole, there is in our opinion, no power or authority to sell them separately. From the very nature of the property, one would be useless without the other. The franchise could not be used at all without the road, and the road could not lawfully be used, as against the state, without the franchise. Under such circumstances, to avoid the possibility of conflicting ownerships, the law has wisely determined that both must be sold as an entirety. Chicago, Danville and Vincennes R. Co. v. Loewenthal, 93 Ill. 433." As supporting the text, see Jones on Corporate Bonds and Mort., § 634. Some of the states have statutes providing for the sale of a mortgaged railroad upon foreclosure as an entirety. See Jones on Corp. Bonds and Mort., § 634, and note, citing laws of Indiana, New Jersey, Kansas, Kentucky and New York.

[29] Bardstown &c. R. Co. v. Metcalfe, 4 Met. (Ky.) 199. But compare Duncan v. Atlantic &c. R. Co., 4 Hughes (U. S.) 125.

[30] Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47. See also Howell v. Western R. Co., 94 U. S. 463, 24 L. ed. 254. But sale should usually be made without right of redemption, even though statute may give right or redemption from foreclosure sales of real estate. Clearwater &c. Bank v. Bagley &c. Tel. Co., 116 Minn. 4, 133 N. W. 91, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913A, 622, 626, and other cases there cited.

terest, and then, upon a second default, a further order of sale may be made.[31] So, in case of divisional mortgages, the courts have refused, in several instances, to order the entire system sold.[32]

§ 599 (523). **Sale of consolidated road—Sale by receiver pending foreclosure.**—A road formed by the consolidation of several roads, each of which was subject to a mortgage before consolidation, may properly be sold as an entirety upon foreclosure, where it will sell to better advantage as a whole than if sold in divisions, and the interest of the several mortgagees in the fund arising from the sale may be settled by a decree of the court.[33] But where the holders of a general mortgage elect to have the road sold in this manner, the holder of a prior lien upon one division of the road, is entitled to have his claim paid out of the aggregate proceeds of the sale of the entire property before any payment is made to the holders of the general mortgage.[34] In a proper case, where the property is of such a nature as to deteriorate rapidly in value, when not in use, and is plainly insufficient in value to meet the company's indebtedness, and where the income

[31] Jones Corporate Bonds and Mort., § 634, citing Fleming v. Soutter, 6 Wall. (U. S.) 747, 18 L. ed. 847; Tillinghast v. Troy &c. R. Co., 48 Hun 420, 425, 1 N. Y. S. 243, per Learned P. J. See also Union Trust Co. v. St. Louis &c. R. Co., 5 Dill. (U. S.) 1, 24 Fed. Cas. No. 14, 403; Farmers' Loan &c. Co. v. Chicago &c. R. Co., 27 Fed. 146; McFadden v. Mays Landing &c. Co., 49 N. J. Eq. 176, 22 Atl. 932.

[32] Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Campbell v. Texas &c. R. Co., 2 Woods (U. S.) 263, 4 Fed. Cas. No. 2369. But such a sale may be ordered where it is for the advantage of the divisional bondholders as well as all interested. Farmers' Loan &c. Co. v. Cape Fear &c. R. Co., 82 Fed. 344; Cleveland First Nat. Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807, 30 L. ed. 871; Gibert v. Washington City &c. R. Co., 33 Grat. (Va.) 586. See next following section.

[33] Gibert v. Washington &c. R Co., 33 Grat. (Va.) 586; Campbell v. Texas &c. R. Co., 2 Woods (U. S.) 263, Fed. Cas. No. 2369. See also last note to last preceding section.

[34] Farmers' Loan &c. Co. v. Newman, 127 U. S. 649, 8 Sup. Ct. 1364, 32 L. ed. 303. Where advantageous, the road may be sold in separate systems or divisions, especially where there are separate divisional mortgages. Metropolitan Trust Co. v. Chicago &c. R. Co., 253 Fed. 868.

from the property will not meet the expense of necessary repairs, it has been held that the court may order the road and its franchise sold by the receiver pending a foreclosure suit.[35]

§ 600 (524). Discretion of trustees and officers as to time and manner of sale.—After a decree of foreclosure has been obtained, the mortgage trustees are generally invested with discretion as to when they will sell the property under the decree, or whether they will sell it at all pending an appeal, subject, however, to the control which the court has over the execution of its own decrees, and when the trustees think it best for all the bondholders that the decree should not be executed pending the appeal the court will not order them to have it executed on the application of a portion of the bondholders.[36] When a sale is ordered made by the proper officer of the court it has been held that he must exercise a sound legal discretion as to the manner of conducting the sale, and as to whether he will strike off the property for such bids as are received, or will adjourn the sale until the attendance of bidders who will pay a reasonable value for it can be obtained.[37] And the court will decline to interfere

[35] Middleton v. New Jersey &c. R. Co., 26 N. J. Eq. 269. And, on the other hand, a sale of a portion of the mortgaged property may be postponed until a sale of all where such portion can not be operated except in connection with the rest. Morton Trust Co. v. Metropolitan St. R. Co., 179 Fed. 1010.

[36] Farmers' Loan &c. Co. v. Central R. Co., 4 Dill. (U. S.) 533, Fed. Cas. No. 4663. See also Thomas v. San Diego &c. Co., 111 Cal. 358, 43 Pac. 965. The supreme court will not interfere by mandamus to compel the execution of the decree of the lower court by a sale of the road. Jones on Corp. Bonds and Mort., § 640. But the court may, of course, fix the time and usually does fix the limit of time within which it is to be made. See Columbia Finance &c. Co. v. Kentucky Union R. Co., 60 Fed. 794; Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47.

[37] Blossom v. Railroad Co., 3 Wall. (U. S.) 196, 18 L. ed. 43. In this case four separate adjournments were had extending over a period of seven months, although bids had been received in the meantime, and it was held that such adjournments were within the discretion of the officer. It was also held that, while it was customary for the officer to act under the advice of the complainant's solicitor, unreasonable di-

with this discretion and order an immediate sale at the request of a part of the bondholders, where it does not clearly appear that their rights are prejudiced by the delay.[38] The rules above stated, of course, fully apply only in the absence of a governing statute, expressly, or impliedly, depriving the trustee or officer of any discretion as to the time and manner of the sale.

§ 601 (525). **Effect of sale—Purchaser's title.**—The franchise of being a corporation, not being a part of the mortgaged security, does not pass upon a foreclosure sale.[39] The corporate existence of a company is not destroyed by the transfer of all its property to another corporation,[40] unless the statute so pro-

rections of the solicitor were not obligatory and should not be followed. So, it has been held that the court may confirm a sale made on a day different from that fixed by the court. Farmers Loan &c. Co. v. Oregon Pac. R. Co., 28 Ore. 44, 40 Pac. 1089. It is not meant, of course, in stating that the officer has certain discretion that his action is final or not subject to review. See generally as to discretion and manner of conducting sale, 3 Thomp. Corp. (2nd. ed.), §§ 2672, 2674, 2675.

[38] Farmers Loan &c. Co. v. Central R. Co., 4 Dill. (U. S.) 533, Fed. Cas. No. 4663.

[39] Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Norfolk &c. R. Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. ed. 574; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; People v. Cook, 110 N. Y. 443, 448, 18 N. E. 113, 36 Am. & Eng. R. Cas. 256, 258; Atkinson v. Marietta &c. R. Co., 15 Ohio St. 21; Western Penn. R. Co. v. Johnston, 59 Pa. St. 290; Bank of Middlebury v. Edgerton, 30 Vt. 182, 190; Miller v. Rutland &c. R. Co., 36 Vt. 452, 498. In Meyer v. Johnson, 53 Ala. 237, 325. Mr. Justice Manning, speaking for the court, said: "Strictly, 'the franchise to exist as a corporation' is not a corporate franchise, or 'franchise of the corporation' at all. It is a franchise of the individual corporators, of the natural persons who are shareholders of the capital stock, and pertains to them as such corporators, whereby they are endowed with the privilege and capacity of being constituted into and cooperating together, as a body politic, with power of succession, and without individual liability. And the corporation as such, in its collective capacity or by its board of directors, has no more power to sell this franchise thus pertaining to the corporators individually than it has to sell their paid-up shares of the capital stock."

[40] Bruffett v. Great Western R. Co., 25 Ill. 353; Arthur v. Commercial & R. Bank, 9 S. & M.

vides.[41] It continues in existence, until formally dissolved, for the purpose of collecting and paying debts, and performing such functions as it may without the ownership of its property.[42] In the absence of any statute or agreement to the contrary, the foreclosure and sale, duly confirmed, cuts off all the interest of the corporation and stockholders or general creditors claiming under it in the mortgaged property.[43] The purchaser at a foreclosure sale takes only the property which the decree ordered to be sold,[44] together with the accompanying rights and franchises necessary to its profitable use and lawfully included in the mortgage and sale.[45] In a very recent case it was held by the Su-

(Miss.) 394; Wright v. Milwaukee &c. R. Co., 25 Wis. 46. See also State v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897.

41 Even where the statute so provides, an illegal and fraudulent sale does not work a dissolution. White Mountains R. Co. v. White Mountains R. Co., 50 N. H. 50.

42 Smith v. Gower, 3 Met. (Ky.) 171, 2 Duv. (Ky.) 17; Wright v. Milwaukee &c. R. Co., 25 Wis. 46.

43 Vatable v. New York &c. R. Co., 96 N. Y. 49; Thornton v. Wabash R. Co., 81 N. Y. 462; Carpenter v. Catlin, 44 Barb. (N. Y.) 75. See also Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. ed. 1020.

44 Osterberg v. Union Trust Co., 93 U. S. 424, 23 L. ed. 964; Frank v. New York &c. R. Co., 122 N. Y. 197, 25 N. E. 332; Jones Corp. Bonds and Mort., § 694. Only property covered by the mortgage. Wilmington &c. R. Co. v. Downard, 8 Houst. 227 (Del.), 14 Atl. 720, 32 Atl. 133, 40 Am. St. 141; St. Louis Bridge Co. v. Curtis, 103 Ill. 410; Aldridge v. Pardee, 24 Tex. Civ. App. 254, 60 S. W. 789; Milwaukee &c. R. Co. v. Milwaukee &c. R. Co., 20 Wis. 174, 88 Am. Dec. 740. As to what passes under sale of "railroad," see Knevals v. Florida Cent. R. Co., 66 Fed. 224.

45 New Orleans &c. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; North Carolina &c. R. Co. v. Carolina &c. R. Co., 83 N. Car. 489; Wright v. Milwaukee &c. R. Co., 25 Wis. 46. In a proper case the franchise to operate the road may pass. Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Gunnison v. Chicago &c. R. Co., 117 Fed. 629; State v. Central Iowa R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806; Parker v Elmira &c. R. Co., 165 N. Y. 274, 59 N. E. 81. So, it has been held that the purchaser at foreclosure sale of a street railway mortgage will take contracts held by the mortgagor for rights of way over railroad tracks. Louisville &c. R. Co. v. Central

preme Court of the United States that an exemption from taxation, which was enjoyed by one of several companies afterwards consolidated, did not pass to the consolidated company because

Ky. Trac. Co., 147 Ky. 513, 144 S. W. 739. But compare Evansville &c. Trac. Co. v. Evansville Belt R. Co., 44 Ind. App. 155, 87 N. E. 21. As to right of eminent domain, see Lawrence v. Morgan's &c. R. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265 (holding that it passed to the purchaser); North Carolina &c. R. Co. v. Carolina Cent. R. Co., 83 N. Car. 489. The question whether a right of exemption from taxation enjoyed by the old corporation passed to the purchaser or not has been much litigated. The answer to this question must depend upon the intent of the charter or statute by which such right was conferred. The Supreme Court of the United States has held in a number of cases that an exemption from taxation is not a franchise which will pass by a conveyance of the property and franchises. And that a statute authorizing the mortgage of the property and franchise of a corporation does not include the mere personal privilege like exemption from taxation. Trask v. Maguire, 18 Wall. (U. S.) 391, 21 L. ed. 938; Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Louisville &c. R. Co. v. Palmes, 109 U. S. 244, 3 Sup. Ct. 193, 27 L. ed. 922; Memphis &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 831; Chesapeake &c. R. Co. v. Miller, 114 U. S. 176, 5 Sup. Ct. 813, 29 L. ed. 121. But where a sale is made by authority of the state, of all rights, privileges and immunities of the company, as well as its property and franchise, the state cannot assert any rights against the purchaser which it did not have as against the old corporation. Knoxville &c. R. Co. v. Hicks, 9 Baxt. (Tenn.) 442, commented on in Wilson v. Gaines, 103 U. S. 417, 26 L. ed. 401; Wilmington &c. R. Co. v. Alsbrook, 146 U. S. 279, 297, 13 Sup. Ct. 72, 36 L. ed. 972; Nichols v. New Haven &c. R. Co., 42 Conn. 103; Atlantic &c. R. Co. v. Allen, 15 Fla. 637; Gonzales v. Sullivan, 16 Fla. 791; First Division of St. Paul &c. R. Co. v. Parcher, 14 Minn. 297; Chicago &c. R. Co. v. Pfaender, 23 Minn. 217; Hand v. Savannah &c. R. Co., 17 S. Car. 219; Jones Corp. Bonds and Mort., § 693. The privilege of regulating its charges conferred upon a railroad company does not pass to the purchasers under a mortgage foreclosure sale, and the reorganization by such purchasers is the formation of a new corporation, subject to the laws in force at the time of the reorganization. Dow v. Beidelman, 49 Ark. 325, 455, 5 S. W. 297, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841. But see Parker v. Elmira &c. R. Co., 165 N. Y. 274, 59 N. E. 81.

of the adoption of a new constitution, in the meantime, prohibiting such exemption, and that the purchaser at foreclosure sale obtains no exemption from taxation and could not successfully set up as a defense to an action for taxes a judgment rendered in favor of the company in a prior action by the county against it for taxes, nor a decree against the county in favor of certain stockholders enjoining the collection of taxes for other years. Neither the mortgage trustee nor the bondholders were parties to these proceedings, and the court held that the purchaser could not avail himself of the judgment or decree because of the lack of privity between the parties.[46]

§ 602 (525a). What passes to purchaser at foreclosure sale.— As stated in the last preceding section, the franchise to be a corporation does not pass at foreclosure sale. So, it has been held that charter grants, such as the franchise to charge certain rates, do not constitute a contract protected by the federal constitution, but are matters of law and subject to the law in force at the time of the purchase, reorganization and grant of the right to become a new corporation.[47] And, in a recent case, it was held that the successor of the Union Pacific Railroad Company by purchase under a first mortgage foreclosure sale did not take the property free from the obligation under an act, passed after the execution of the mortgage in the exercise by congress of its reserved right to alter, amend or repeal, to permit the joint use, by the trains of all roads terminating at Omaha, of the bridge authorized by the statute to be constructed at that point by the Union Pacific Railroad Company.[48] But, while the right of a corporation to

[46] Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450. See also Covington &c. Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; Kentucky Cent. R. Co. v. Commonwealth, 87 Ky. 661, 10 S. W. 269; and see ante, §§ 380, 381.

[47] Grand Rapids &c. R. Co. v. Osborn, 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598; People's Gas Light &c. Co. v. Chicago, 194 U. S. 1, 24 Sup. Ct. 520, 48 L. ed. 851; Hooker v. Burr, 194 U. S. 415, 24 Sup. Ct. 706, 48 L. ed. 1046; Union Pac. R. Co. v. Mason City &c. R. Co., 199 U. S. 160, 170, 26 Sup. Ct. 19, 50 L. ed. 134.

[48] Union Pac. R. Co. v. Mason City &c. R. Co., 199 U. S. 160, 26 Sup. Ct. 19, 50 L. ed. 134.

exist may not be mortgaged or sold, all its contract rights, as a general rule, with other corporations or individuals may be, including a contract with a city as to rates, and, upon foreclosure of a mortgage covering them, they usually pass to the purchaser at the foreclosure sale.[49]

§ 603 (526). **When purchaser takes title free from liabilities and liens.**—The purchaser generally takes the property freed from the debts[50] and contracts of the vendor,[51] except so far as

[49] Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. ed. 1102; Julian v. Central Trust Co., 193 U. S. 93, 106, 24 Sup. Ct. 399, 48 L. ed. 629; Omaha Water Co. v. Omaha, 147 Fed 1. As to the difference between charter rights and contract rights, see also Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 387-389, 22 Sup. Ct. 410, 417-419, 46 L. ed. 559.

[50] Hopkins v. St. Paul &c. R. Co., 2 Dill. (U. S.) 396, Fed. Cas. No. 6690; Sullivan v. Portland &c. R. Co., 94 U. S. 806, 24 L. ed. 324; Cooper v. Corbin, 105 Ill. 224; Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487; Moyer v. Ft. Wayne &c. R. Co., 132 Ind. 88, 31 N. E. 567; Cook v. Detroit &c. R. Co., 43 Mich. 349, 5 N. W. 390, 9 Am. & Eng. R. Cas. 443; Lincoln Twp. v. Kansas City &c. R. Co., 77 Nebr. 79, 108 N. W. 140; North Hudson County R. Co. v. Booraem, 28 N. J. Eq. 450; Vatable v. New York &c. R. Co., 96 N. Y. 49; Vilas v. Page, 106 N. Y. 439, 13 N. E. 743; Wellsborough &c. Co. v. Griffin, 57 Pa. St. 417; Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576 (not liable on judgment against old company); Ryan v. Hays, 62 Tex. 42; Gilman v. Sheboygan &c. R. Co., 37 Wis. 317. The purchaser of a railroad at foreclosure sale is not liable for damages occasioned by the acts of the old company, which had already accrued at the time of the purchase. Hammond v. Port Royal &c. R. Co., 15 S. Car. 10. (Injuries done to adjoining land.) Where one railroad company is sold to another, a person having a claim against the former for damages on account of personal injuries cannot maintain an action against the latter; and the old company having been dissolved by the sale, his only right of action remaining is against the stockholders of the old company, who received the purchase money. Chesapeake &c. Co. v. Griest, 85 Ky. 619, 30 Am. & Eng. R. Cas. 149; Louisville &c. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Powell v. North Missouri R. Co., 42 Mo. 63.

[51] Hoard v. Chesapeake &c. R. Co., 123 U. S. 222, 8 Sup. Ct. 74, 31 L. ed. 130; Menasha v. Milwaukee &c. R. Co., 52 Wis. 414, 9 N. W. 396; People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E.

his title is made subject thereto by statute[52] or by the terms of

657, and see original opinion in same case in 5 N. E. 379, and 25 Am. & Eng. R. Cas. 235. See Keeler v. Atchison &c. R. Co., 92 Fed. 545; Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487; Evansville &c. Trac. Co. v. Evansville Belt R. Co., 44 Ind. App. 155, 87 N. E. 21; Branson v. Oregonian R. Co., 11 Ore. 161, 2 Pac. 86; Houston &c. R. Co. v. Shirley, 54 Tex. 125. But compare Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. ed. 843. The purchaser at the foreclosure sale is not bound by a parol agreement made by the president of the railroad company to make a farm crossing and to maintain a fence of a certain description. Hunter v. Burlington &c. R. Co., 76 Iowa 490, 41 N. W. 305. Nor is he bound by a contract of the corporation to maintain a depot at a certain place. Gulf &c. R. Co. v. Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. 788; People v. Rome &c. R. Co., 103 N. Y. 95, 8 N. E. 369. Even though the consideration of the contract was a large sum of money voted by the people of the county upon condition that the depot should be forever maintained, and the railroad was empower by its charter to receive the aid and to make the contract. People v. Louisville &c. R. Co., 120 Ill. 48, 10 N. E. 657. But it was held by the supreme court of Iowa that a railroad company that has purchased a line of road at a foreclosure sale of an insolvent company, part of which line was constructed and equipped with money raised by taxes voted to it by a town, assumes the obligations of the company whose line it purchased, and cannot lease such line to another company, so as to surrender the exclusive use thereof, and, by ceasing to operate it, deprive the town of the benefits intended to be derived therefrom. State v. Central Iowa R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806. But compare Sherwood v. Atlantic &c. R. Co., 94 Va. 291, 26 S. E. 943. A contract between two railroad companies in relation to the carriage of freights and division of earnings, providing that this "contract, and any damages for the breach of the same, shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosoever hands they may come," does not constitute a lien or obligation running with the land, so as to make it liable in the hands of a purchaser of one of them for earnings that would have accrued during the term of the contract. Des Moines &c. R. Co. v. Wabash &c. R. Co., 135 U. S. 576, 10 Sup. Ct. 753, 34 L. ed. 244.

[52] Statutory liens upon the property existing at the time of the sale continue to operate as liens upon it after the transfer. Hervey v. Illinois Midland R. Co., 28 Fed. 169. Where the statute declares judgments for personal

the order of sale.[53] The act providing for the reorganization of the purchasers into a new corporation may, however, require that it shall assume certain debts and liabilities of its predecessor, in which the acceptance of the act amounts to an assumption of the payment of all claims.[54] Or the decree of the court may order the sale to be made subject to certain liabilities, in which case the purchaser's title is based upon the decree, and he cannot question its validity, nor dispute the liability which it imposes upon him.[55] The purchaser also takes his title subject, of course, to all prior valid liens, of which he had or ought to have had notice, not cut off by the foreclosure proceedings.[56] But he

injuries to be a prior lien upon the property of railroad companies, the purchasers of the property of such a company upon foreclosure of mortgage takes it subject to all unpaid judgments of this class. And it has been held that the purchasers were bound to perform a contract entered into by the old company for the payment of money in liquidation of a claim for personal injuries. Frazier v. East Tennessee &c. R. Co., 88 Tenn. 138, 12 S. W. 537.

[53] Hukle v. Atchison &c. R. Co., 71 Kans. 251, 80 Pac. 603 (quoting text). See Central Ind. R. Co. v. Grantham, 143 Fed. 43, 52. If the sale is authorized by law, the purchaser ordinarily takes the property free from any liability for existing debts not secured by prior liens and from all obligations of the mortgagor of a strictly personal character. See also Texas Cent. R. Co. v. Lyons (Tex. Civ. App.), 34 S. W. 362; Dallas Consol. Trac. Co. v. Maddox (Tex. Civ. App.), 31 S. W. 702.

[54] St. Louis &c. R. Co. v. Miller, 43 Ill. 199. See also Welsh v. First Div. St. Paul &c. R. Co., 25 Minn. 314; New Bedford R. Co. v. Old Colony R. Co., 120 Mass. 397.

[55] Swann v. Wright, 110 U. S. 590, 4 Sup. Ct. 235, 28 L. ed. 252; Farmers Loan &c. Co. v. Central R. Co., 17 Fed. 758; Brown v. Wabash R. Co., 96 Ill. 297; Wabash R. Co. v. Stewart, 41 Ill. App. 640. See also Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. ed. 559; Olcott v. Headrick, 141 U. S. 543, 12 Sup. Ct. 81, 35 L. ed. 851; Riffe v. Wabash R. Co., 200 Mo. App. 397, 207 S. W. 78; Vilas v. Page, 106 N. Y. 439, 13 N. E. 743.

[56] Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; Brooks v. Railway Co., 101 U. S. 443, 25 L. ed. 1057; Western Union Tel. Co. v. Burlington &c. R. Co., 11 Fed. 1; Morgan Co. v. Thomas, 76 Ill. 120. A vendor's lien for purchase-money may be enforced against the property in the hands of a corporation composed of the bondholders, by whom it was purchased. Western Division of Western North Carolina R. Co. v. Drew, 3 Woods (U. S.) 691, Fed. Cas. No.

may dispute the validity of any such liens except those which are adjudged in the order of sale to be superior to the title which he purchased.[57] And in a recent case it is held that the purchaser succeeds to all the rights of the former owner, and of the holders of liens and claims foreclosed, as against an unforeclosed lien, and may intervene in a suit to enforce such lien and assert the equities and rights to which it has succeeded.[58] The new company is also liable in equity upon the contracts of its predecessor in so far as it adopts them, and claims the benefit for itself.[59] Thus the purchasers at a foreclosure sale of the property of a railroad company have been held liable for unpaid damages for lands appropriated as the right of way by the railroad company and occupied and used as such by the purchasers.[60] The purchasers may also, in a case where it is deemed advisable, assume the payment of the debts of the old corporation, and such an assumption will bind not only them but also their assignees with notice.[61]

17434. But see Columbus &c. R. Co.'s Appeal, 109 Fed. 177. An equitable lien for damages connected with the operation of the road by trustees can be enforced against the property in the hands of the new corporation when it is shown that funds from which the claim for damages should have been paid passed into the hands of the new corporation upon reorganization. Stratton v. European &c. R. Co., 76 Maine 269. See Houston &c. R. Co. v. Keller, 8 Tex. Civ. App. 537, 28 S. W. 724.

[57] Jones Corp. Bonds and Mort., §§ 683, 685, citing Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548, 555; Swann v. Wright, 110 U. S. 590, 4 Sup. Ct. 235, 28 L. ed. 252; Central Nat. Bank v. Hazard, 30 Fed. 484.

[58] Connor v. Tennessee Cent. R. Co., 109 Fed. 931, 54 L. R. A. 687.

[59] Jacksonville &c. R. Co. v. Louisville &c. R. Co., 150 Ill. 480, 37 N. E. 924; Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487. See also Wiggins Ferry Co. v. Ohio &c. R. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. ed. 1055; Walker v. Wilmington &c. R. Co., 26 S. Car. 80, 1 S. E. 366; Kansas City &c. R. Co. v. Frohwerk, 68 Kans. 292, 74 Pac. 1124. But compare Sloss Iron &c. Co. v. South Carolina R. Co., 85 Fed. 133.

[60] Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487; Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290; Gillison v. Savannah &c. R. Co., 7 S. Car. 173; White v. Nashville &c. R. Co., 7 Heisk. (Tenn.) 518; Rio Grande &c. R. Co. v. Ortiz, 75 Tex. 602, 12 S. W. 1129; Gilman v. Sheboygan &c. R. Co., 37 Wis. 317, 40 Wis. 653. Compare Moyer v. Ft. Wayne &c. R. Co., 132 Ind. 88.

[61] Blair v. St. Louis &c. R. Co., 24 Fed. 148, 25 Fed. 684. See also Island City Bank v. Sachtleben, 67 Tex. 420.

§ 604 (527). Disposition of proceeds of sale.—The proceeds of the sale, after the payment of costs and any other claims properly given preference, are applied first in satisfaction of bonds secured by the mortgage foreclosed, giving to each bond its pro rata share in case the proceeds are insufficient to satisfy the whole debt.[62] But overdue coupons may be given a preference over bonds which have not yet matured, especially when a part of the series to which they belong had been redeemed before the default occurred.[63] Where a bondholder received the bonds in pledge as collateral security for a loan, he is entitled to be repaid only the amount of his loan with interest.[64] Any surplus remaining after paying the expenses and satisfying the mortgage indebtedness goes to the corporation as a trust fund for the payment of other liens or creditors, and not first to the stockholders. And an agreement between the bondholders and the stockholders by which, in consideration of withdrawing opposition to the foreclosure suit, the stockholders are to be paid a portion of the pur-

But see Hervey v. Illinois Midland R. Co., 28 Fed. 169, holding that the assumption by the purchaser of debts of the old corporation creates a personal obligation only and not a lien upon the property. And the same effect as the last holding is also Columbus &c. R. Co.'s Appeal, 109 Fed. 177.

[62] Barry v. Missouri &c. R. Co., 34 Fed. 829; Pinkard v. Allen, 75 Ala. 73; Hodge's Appeal, 84 Pa. St. 359. See also Claflin v. South Carolina R. Co., 8 Fed. 118; Watkins v. Hill, 8 Pick. (Mass.) 522. All the bonds secured by the same mortgage are deemed to have been issued at the same time, and there is no priority in favor of any of them because they bear lower numbers than others. Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 523, Fed. Cas. No. 13297. See also Mason v. York &c. R. Co., 52 Maine 82; Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448; Appeal of Reed, 122 Pa. St. 565, 16 Atl. 100, 3 Thomp. Corp. (2nd ed.), §§ 2314, 2700. Nor does it ordinarily make any difference what the purchaser paid for the bonds. Duncombe v. New York &c. R. Co., 84 N. Y. 190.

[63] Stevens v. New York &c. R. Co., 13 Blatchf. (U. S.) 412, Fed. Cas. No. 13406; Cutting v. Tavares &c. R. Co., 61 Fed. 150; Commonwealth of Virginia v. Chesapeake &c. Canal Co., 32 Md. 501. But see Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868.

[64] Morton v. New Orleans &c. R. Co., 79 Ala. 590; Peck v. New York &c. R. Co., 59 How. (N. Y.) Prac. 419; Rice's Appeal, 79 Pa. St. 168; Jesup v. City Bank, 14 Wis. 331. See also Duncombe v. New York &c. R. Co., 84 N. Y. 190.

chase money, is fraudulent as against the general creditors.[65] On a sale for default in interest, the proceeds will usually be applied, "first, to the arrears of interest; then to the mortgage debt, then to the junior incumbrances, according to their respective priority of lien, and the surplus to the mortgagor."[66]

§ 605 (527a). Disposition of proceeds—Purchaser not bound to see that they are properly applied.—It is frequently provided in the mortgage or trust deed that the purchaser shall not be bound to see that the proceeds of a proper sale thereunder are properly applied,[67] but, as a general rule at least, no such provision is necessary. The purchaser who is not a party thereto is not responsible for the misapplication or misappropriation of the proceeds.[68] So, as he is not responsible and has no interest in the fund after it is properly paid in, it has been held that he cannot maintain an action to recover it where it has been misapplied.[69]

§ 606 (528). Preferred claims—Six months' rule.—When a court of chancery is requested by the mortgagees to appoint a receiver of the railroad, pending proceedings for foreclosure, it may, and usually will, in the exercise of a sound discretion, impose such terms in reference to the payment from the income dur-

[65] Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117.

[66] Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 27 L. ed. 47. See Gair v. Tuttle, 49 Fed. 198; Chicago &c. R. Co. v. Peck, 112 Ill. 408. Citizens' Bank v. Whinery, 110 Iowa 390, 81 N. W. 694; Perkins v. Stewart, 75 Minn. 21, 77 N. W. 434; Real Estate Trust Co. v. Pennsylvania &c. Co., 237 Pa. 311, 85 Atl. 365. And see generally as to priority of liens and adjustment of claims, 3 Thomp. Corp. (2nd. ed.), §§ 2695-2718. As to reimbursement for payment of prior liens and the like, see Nickerson v. Atchison &c. R. Co., 17 Fed. 408; Skilton v. Roberts, 129 Mass. 306.

[67] See Coler v. Barth, 24 Colo. 31, 48 Pac. 656; Mosca Milling Co. v. Murto, 18 Colo. App. 437, 72 Pac. 287.

[68] Damon v. Reeves, 62 Mich. 465, 29 N. W. 42; Sinclair v. Learned, 51 Mich. 335, 16 N. W. 672; Wood v. Augustine, 61 Mo. 46; Woodwine v. Woodrum, 19 W. Va. 67. The first two cases hold that this rule applies even where the mortgagee it the purchaser, but Hunter v. Wooldert, 55 Tex. 433, seems to hold the contrary.

[69] Day v. New Lots, 107 N. Y. 148, 13 N. E. 915.

ing the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable.[70] It is within the power of the court to use the income of the receivership to discharge such obligations, even where no such order is made at the time the receiver is appointed.[71] "He who seeks equity must do equity." Such claims are usually paid out of the earnings of the road in the hands of the receiver, but in exceptional cases where equity requires it, they may be paid out of the proceeds of the sale, or corpus of the property.[72] Ordinarily, however, they can only be paid out of

[70] Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Huidekoper v. Locomotive Works, 99 U. S. 258, 25 L. ed. 344; Miltenberger v. Logansport R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Union Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295, 27 L. ed. 488; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596; United States Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. ed. 1085; Douglass v. Cline, 12 Bush (Ky.) 608; McIlhenny &c. Co. v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705; Williamson v. Washington &c. R. Co., 33 Grat. (Va.) 624; Fidelity &c. Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. 858; Litzenberger v. Jarvis &c. Trust Co., 8 Utah 15, 28 Pac. 871, and authorities cited in following notes, infra. See also Virginia Passenger &c. Co. v. Lane Bros. Co., 174 Fed. 513. Contra Coe v. New Jersey &c. R. Co., 27 N. J. Eq. 37; Metropolitan Trust Co. v. Tonawanda &c. R. Co., 103 N. Y. 245. As to apportionment among the several lines of one system, see Central Trust Co. v. Wabash &c. R. Co., 30 Fed. 332.

[71] Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Central Trust Co. v. St. Louis &c. R. Co., 41 Fed. 551; Farmers' Loan &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182. The mortgagor is not accountable to the mortgagee for earnings, while the property remains in his possession, until a demand is made, even though the mortgage covers income. Dow v. Memphis &c. R. Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. ed. 565; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[72] Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Blair v. St. Louis &c. R. Co., 22 Fed. 471; Thomas v. Peoria R. Co., 36 Fed. 808; Finance Co. v. Charleston &c. R. Co., 48 Fed. 188; Farmers' &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182. But not ordinarily, where the suit is by stockholders or there is no diversion of income. St. Louis &c. R. Co. v. Cleveland &c. R. Co., 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. ed. 832; Denniston v. Chicago &c. R. Co., 4 Biss. (U. S.) 414, Fed. Cas. No. 3800; Street v. Maryland Cent. R.

the earnings, and it is said in a recent case that such preferences are allowed because of an implied agreement on the part of the mortgagees that current debts contracted in the ordinary course of the business shall be paid from current earnings before such mortgagees shall have a claim to the income and that there is no such implied agreement as to payment out of the corpus or body of the mortgaged property.[73] They may be preferred, not only where they have arisen during the receivership, but also where they arose a limited time before the appointment of the receiver, and it is the practice of the federal courts in most jurisdictions, upon the appointment of a receiver, to impose the condition that debts for materials, supplies, and labor furnished to the mortgagor within six months previous to the appointment shall be paid out of the net income or proceeds of the sale before the debt secured by the mortgage is paid.[74] This limitation is arbitrary, however, and in some cases it has been fixed at three months,[75] while in others such claims have been given a preference, although they arose more than six months prior to the appointment of the receiver.[76] Much depends upon the circumstances

Co., 59 Fed. 25; Cutting v. Tavares &c. R. Co., 61 Fed. 150; Farmers' &c. Co. v. Northern Pac. R. Co., 68 Fed. 36.

[73] Mersick v. Hartford &c. R. Co., 76 Conn. 11, 55 Atl. 664, 100 Am. St. 977. See also Fordyce v. Kansas City &c. R. Co., 145 Fed. 566.

[74] Clark v. Central R. &c. Co., 66 Fed. 803; Kelly, In re, v. Receiver of Green Bay &c. R. Co., 5 Fed. 846; Thomas v. Peoria &c. R. Co., 36 Fed. 808; Putnam v. Jacksonville &c. R. Co., 61 Fed. 440; Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 315, Fed. Cas. No. 14258; Dow v. Memphis &c. R. Co., 20 Fed. 260. The general rule is that such preferential claims must have accrued within six months preceding the impounding of the income and the seizure of the property by the mortgage bondholders. Westinghouse &c. Co. v. Kansas City &c. R. Co., 137 Fed. 26.

[75] Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Finance Co. v. Charleston &c. R. Co., 62 Fed. 205.

[76] Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596; Hale v. Frost, 99 U. S. 389, 25 L. ed. 419; note to Blair v. R. Co., 22 Fed. 471; Central Trust Co. v. Wabash &c. R. Co., 30 Fed. 332; Farmers' &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182; Atkins v. Petersburg R. Co., 3 Hughes (U. S.) 307, Fed. Cas. No. 604; McII-

and equities of the particular case. But it is the exception and not the rule that priority of liens can be displaced in this way,[77] and such preference is usually confined to claims for current or operating expenses incurred in keeping up the railroad as a "going concern." Claims for work done in the original construction of the road are not included and are not entitled to a preference.[78] And it was held in a comparatively recent case, where a railroad went into the hands of a receiver without any funds, and the earnings under the receivership were barely sufficient to pay current operating expenses, that arrears of salary due the president should not be paid out of the proceeds of the sale in preference to the mortgage debt.[79] In a still later case it is held that sureties on an appeal bond executed solely for the accommodation of

henny &c. Co. v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705.

[77] Kneeland v. American Loan Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, 34 L. ed. 379; Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 60 Am. & Eng. R. Cas. 443, 37 L. ed. 663; Bound v. South Car. R. Co., 58 Fed. 473. As to what are not "operating expenses," see Central Trust Co. v. Charlotte &c. R. Co., 65 Fed. 264; Reyburn v. Consumers' &c. Co., 29 Fed. 561; Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 46 N. W. 301, 9 L. R. A. 140. Claims for damages to persons or property arising from the operation of the road are classed as operating expenses. Brown, Ex parte, 15 S. Car. 518; Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Mobile &c. R. Co. v. Davis, 62 Miss. 271; Klein v. Jewett, 26 N. J. Eq. 474.

[78] Toledo &c. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. ed. 905; Wood v. Guarantee &c. Deposit Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. ed. 472; Lackawanna &c. Co. v. Farmers' &c. Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. ed. 475; Farmers' Loan &c. Co. v. Pine Bluff &c. R. Co., 57 Ark. 334, 21 S. W. 652; Farmers' Loan &c. Co. v. Candler, 92 Ga. 249, 18 S. E. 540; Addison v. Lewis, 75 Va. 701. But compare McIlhenny &c. Co. v. Binz, 80 Tex. 1, 13 S. W. 665, 26 Am. St. 705. Ante, § 566.

[79] National Bank v. Carolina &c. R. Co., 63 Fed. 25. See also Wells v. Southern &c. R. Co., 1 Fed. 270; Addison v. Lewis, 75 Va. 701, and compare Blair v. St. Louis &c. R. Co., 23 Fed. 521; Olyphant v. St. Louis &c. Co., 22 Fed. 179 (salary of secretary preferred). For other claims held not entitled to preference, see Fordyce v. Omaha &c. R., 145 Fed. 544; Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. ed. 717.

the company, and without pecuniary advantage to themselves, are not entitled to a preference over the mortgagors, although the judgment appealed from was obtained prior to the foreclosure and appointment of the receiver, and notwithstanding the fact that the assets of the company in the hands of the receiver had been preserved and increased, by virtue of such bond, to the extent of the judgment.[80] "It must, however," says Chief Justice Fuller, "be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within ninety days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and the public, that the property may be preserved and disposed of as a going concern, and the company's public duty discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims."[81]

[80] Farmers' Loan &c. Co. v. Northern Pac. R. Co., 68 Fed. 36. The court, in this case, insists that there must be a diversion of funds to the benefit of the bondholders and to the injury of the party seeking the preference before the priority of the mortgage lien will be displaced, and disapproves Farmers' Loan &c. Co. v. Kansas City &c. R. Co., 53 Fed. 182. These two cases seem to mark, in the dicta at least, the opposite extremes to which the federal courts have gone. Sureties have been reimbursed in other cases. Union T. Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. ed. 825; Dow v. Memphis &c. Co., 124 U. S. 652, 8 Sup. Ct. 673, 31 L. ed. 565; Rome &c. R. Co. v. Sibert, 97 Ala. 393, 12 So. 69. But compare Pennsylvania v. Calhoun, 121 U. S. 251, 7 Sup. Ct. 906, 30 L. ed. 915.

[81] Finance Co. v. Charleston &c. R. Co., 62 Fed. 205, citing Miltenberger v. Logansport R. Co., 106 U. S. 286, 311, 4 Sup. Ct. 140, 27 L.

§ 607 (529). **Setting sale aside—Grounds—Who may sue.**—Mortgagors may obtain relief from a fraudulent sale upon foreclosure if they apply for it within a reasonable time after discovering the fraud.[82] And it has been held that a bill for this

ed. 117; Union Trust Co. v. Souther, 107 U. S. 591, 594, 2 Sup. Ct. 295, 27 L. ed. 488; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Morgan's &c. Co. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625; Kneeland v. Bass Foundry &c. Works, 140 U. S. 592, 11 Sup. Ct. 857, 35 L. ed. 543. See also Rome &c. R. Co. v. Sibert, 97 Ala. 393, 12 So. 69; Seibert v. Minn. &c. Co., 58 Minn. 69, 59 N. W. 829; Virginia &c. Co. v. Central &c. Co., 170 U. S. 355, 365, 368, 18 Sup. Ct. 657, 42 L. ed. 1068; Southern R. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. ed. 458. This case last cited holds a debt for rails, bought shortly before the appointment of a receiver and needed to properly operate the road, as much a current debt in the ordinary course of business as if it were incurred by a receiver under order of court. So, in Fordyce v. Kansas City &c. R. Co., 145 Fed. 566, it is held that a diversion of the income for the benefit of the bondholders must usually be shown, but that claims for damages in constructing the road are entitled to preference over the mortgage. As to taxes and street assessments, see Clyde v. Richmond &c. R. Co., 63 Fed. 21; Union L. & T. Co. v. Southern &c. R. Co., 49 Fed. 267; Cutting v. Tavares &c. R. Co., 61 Fed. 150; Ellis v. Boston &c. R. Co., 107 Mass. 1; Central Trust Co. v. New York &c. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260. As to judgments, see Clyde v. Richmond &c. R. Co., 56 Fed. 539; Texas &c. R. Co. v. Bloom, 60 Fed. 979; Finance Co. v. Charleston &c. R. Co., 61 Fed. 369; Chicago &c. R. Co. v. McCammon, 61 Fed. 772; Phinizy v. Augusta &c. R. Co., 63 Fed. 922; Central Trust Co. v. Charlotte &c. R. Co., 65 Fed. 257; Penn Mutual Insurance Co. v. Heiss, 141 Ill. 35, 31 N. E. 138, 3 Am. St. 273; Texas &c. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60, and 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81.

[82] Harwood v. Railroad Co., 17 Wall. (U. S.) 78, 21 L. ed. 558; Jones Corp. Bonds and Mort. § 651. Suit on behalf of bondholders to set aside a foreclosure sale should usually be brought by their mortgage trustees. Meyer v. Utah &c. R. Co., 3 Utah 280, 3 Pac. 393. See also Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757; New Orleans &c. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66. In Kent v. Lake Superior &c. Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. ed. 352, it is held that bondholders must seek their remedy in the court which rendered the decree and confirmed the sale. See generally Wetmore

purpose may be maintained on behalf of the corporation by a single stockholder upon refusal of the corporation to ask that the sale be set aside.[83] But where dissenting stockholders and bondholders institute a suit to set aside a foreclosure sale on the ground of fraud and collusion upon the part of the majority, it is not sufficient to make the purchasing and selling companies parties defendant.[84] This right may be barred by laches,[85] and any considerable delay in bringing a bill for this purpose must be

v. St. Paul &c. R. Co., 3 Fed. 177; Massachusetts &c. Co. v. Chicago &c. R. Co., 13 Fed. 857; Campbell v. Railroad Co., 1 Woods (U. S.) 368, Fed Cas. No. 2366.

[83] Foster v. Mansfield &c. R. Co., 36 Fed. 627. But where an insolvent railroad company had issued different series of mortgage bonds, some of the mortgages covering all of its property, and others only part, the principal of some of the mortgages being due, and the company having defaulted on the interest on all of them, and, in addition, it had a large floating debt, running into millions, with no fair prospect of its being able to pay the accrued interest on the bonds and the floating debt without a sale of all its property, it was held that a decree foreclosing all the mortgages, entered by consent of the creditors, should not be set aside at the suit of some of the stockholders on the ground that the principal of some of the mortgages was not yet due, "as it was to the interest of the railroad company that the rights of all the mortgage bondholders should be cut off to enable the company to effect a reorganization which would secure and extend its bonded debt, and reduce the rate of interest thereon, and provide the necessary means to satisfy the floating debt." Carey v. Houston &c. R. Co., 45 Fed. 438.

[84] Ribon v. Railroad Companies, 16 Wall. (U. S.) 446, 21 L. ed. 367. Trustees through whom the scheme was consummated should have been made parties, and so should the majority stockholders and bondholders, or a sufficient number of them, at least, if they had participated in the distribution of the proceeds and were required to refund.

[85] Sullivan v. Portland &c. R. Co., 4 Cliff. (U. S.) 212, 94 U. S. 806, 24 L. ed. 324, Fed. Cas. No. 13596; Coddington v. Railroad Co., 103 U. S. 409, 26 L. ed. 400; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Foster v. Mansfield &c. R. Co., 36 Fed. 627. See also Farmers' Loan &c. Co. v. Rockaway &c. R. Co., 69 Fed. 9; Brunson v. Morgan, 84 Ala. 598, 4 So. 589; McHenry v. Schenk, 88 Ill. 357; Rabe v. Dunlap, 51 N. J. Eq. 40, 25 Atl. 959.

satisfactorily explained or a court of equity will deny relief.[86] The stockholders or other parties in interest cannot wait until new equities arise or until they see that the purchasers, by improving the property, are likely to make it valuable, and then procure a return of the property with its added value, and discharged from the equities which have attached.[87] If the fraud is concealed from the mortgagor and its stockholders for a time, suit may usually be brought within a reasonable time after it is discovered.[88] A sale of the property to pay the arrears due a single bondholder, at a grossly inadequate price and without notice to the other bondholders whose interests are affected, will be set aside at the suit of such bondholders, especially where it is shown that the bondholder who instituted the proceedings and the persons who became purchasers at the sale, several of whom were directors and officers of the road, had entered into a conspiracy to obtain the property at a sacrifice, and had prevented a reasonable competition at the sale.[89] Where a sale is made

[86] Harwood v. Railroad Co., 17 Wall. (U. S.) 78, 21 L. ed. 558; Credit Co. v. Arkansas Cent. R. Co., 15 Fed. 46, 5 McCrary 23; Farmers' Loan &c. Co. v. Green Bay &c. R. Co., 6 Fed. 100. The following periods of unexplained delay have been held fatal: Seven years, Sullivan v. Portland &c. R. Co., 94 U. S. 806, 24 L. ed. 324, 4 Cliff. (U. S.) 212, Fed. Cas. No. 13596; ten years, Foster v. Mansfield &c. R. Co., 36 Fed. 627; eight years, Coddington v. Pensacola &c. R. Co., 103 U. S. 409, 26 L. ed. 409; five years, Harwood v. Railroad Co., 17 Wall. (U. S.) 78, 21 L. ed. 558; eighteen months, Graham v. Birkenhead &c. R. Co., 2 Mac. & G. (Eng. Ch.) 146; and even less than a year, Northwestern Mortg. Co. v. Bradley, 9 S. Dak. 495, 70 N. W. 648; Wilson v. Wall, 99 Va. 353, 38 S. E. 181.

[87] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; Kitchen v. St. Louis &c. R. Co., 69 Mo. 224.

[88] Where the mortgagors remained ignorant for eight years of the fraud which had been practiced, they were permitted to bring suit to set aside the sale two years after the fraud was discovered. White Mountains R. Co. v. White Mountains R. Co., 50 N. H. 50.

[89] Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492. A decree by which no provision is made for the interests of other bondholders beside the complainant, will be set aside on appeal. New Orleans &c. R. Co. v. Parker, 143 U. S. 42, 12 Sup. Ct. 364, 36 L. ed. 66.

under a notice setting forth that the amount of bonds secured by the mortgage foreclosed is ten times as great as it really is, and all competition in bidding is thereby destroyed and the property is purchased by the bondholders, such sale will be set aside at the suit of judgment creditors whose liens are thereby defeated.[90] But the creditors who were defrauded by the sale can alone claim the benefit of a decree setting aside the sale, and neither the mortgage trustee by whom the property was sold on foreclosure, nor the bondholders at whose request the foreclosure and sale were had, can assert any rights under the mortgage; but they hold title to the property under the sale, subject to the equities of such creditors.[91] The parties in interest cannot question the validity of a foreclosure sale, to which they have assented, on the ground that it was a fraud upon the rights of others.[92] And creditors cannot ordinarily impeach a completed sale where the trustee representing them has acted in good faith.[93] A mortgage trustee in possession cannot without express authority become a purchaser at his own sale.[94] And a director, or other person occupying a fiduciary relation toward the company, must act with perfect fairness, in purchasing its property at a sale under a trust deed to secure debts due to himself, or the sale will be set aside; but the stockholders must act promptly in disaffirming a sale because of the fiduciary relations of the purchaser.[95] Where it is shown that the purchasers at a

[90] James v. Railroad Co., 6 Wall. (U. S.) 752, 18 L. ed. 885.

[91] Railroad Co. v. Soutter, 13 Wall. (U. S.) 517, 20 L. ed. 543; Barnes v. Chicago &c. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. ed. 1128.

[92] Barnes v. Chicago &c. R. Co., 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. ed. 1128; Symmes v. Union Trust Co., 60 Fed. 830. See also United States v. Union Pac. R. Co, 98 U. S. 569, 25 L. ed. 143; Matthews v. Murchison, 15 Fed. 691; Berry v. Broach, 65 Miss. 450, 4 So. 117.

[93] Richter v. Jerome, 123 U. S. 233, 8 Sup. Ct. 106, 31 L. ed. 132; Fletcher v. Ann Arbor R. Co., 116 Fed. 479.

[94] Racine &c. R. Co. v. Farmers' Loan &c. R. Co., 49 Ill. 331, 95 Am. Dec. 595; Kitchen v. St. Louis &c. Co., 69 Mo. 224; Ashhurst's Appeal, 60 Pa. St. 290.

[95] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328. A director of a railroad corporation may honestly own its bonds secured by mortgage. Duncomb v. New York &c. R. Co., 84 N. Y.

foreclosure sale have conspired with the directors of the corporation in effecting a fraudulent sale, they will be held as trustees for the benefit of the parties in interest to the full value of the property purchased.[96] It has been held that a fraudulent sale cannot be validated by an act of the legislature, since the legislature has no power to transfer the property of one corporation to another without due process of law.[97] A decree can only be avoided upon proceedings for that purpose, brought by a party in interest[98] and upon sufficient cause shown.[98a]

§ 608. Setting sale aside—What is not sufficient ground.—Inadequacy of price alone is not sufficient ground for setting aside a sale, where the sale was honestly and fairly made;[99] nor is

190, 88 N. Y. 1. And he can enforce them in the usual and ordinary way, and may purchase the mortgaged property at a sale which is fairly made in an effort to enforce the payment of his debt. Harpending v. Munson, 91 N. Y. 650. As to when director can not purchase, see post, § 615.

[96] Drury v. Cross, 7 Wall. (U. S.) 299, 19 L. ed. 40; Merrill v. Farmers' Loan &c. Co., 24 Hun (N. Y.) 297; Jones Corp. Bonds and Mort. § 633; Post, § 615.

[97] White Mountains R. Co. v. White Mountains R. Co., 50 N. H. 50. See also Roche v. Waters, 72 Md. 264, 19 Atl. 535, 7 L. R. A. 533. This, we think, would undoubtedly be true if the sale were absolutely void for want of jurisdiction, but a merely fraudulent sale would seem to be voidable only, and not necessarily void or beyond the power of the legislature to cure.

[98] One whose interest in the property expired before the final decree was entered can not maintain a suit to have the decree reopened. Ward v. Montclair R. Co., 26 N. J. Eq. 260; Graham v. Boston &c. R. Co., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196. See also Fleming, Ex parte, 2 Wall. (U. S.) 759, 17 L. ed. 924; Symmes v. Union Trust Co., 60 Fed. 830; Wade v. Thompson, 52 Miss. 367; Day v. Lyon, 11 N. J. Eq. 331; Hollins v. St. Paul &c. R. Co., 29 N. Y. St. 208, 9 N. Y. S. 909.

[98a] See generally as to confirming or setting aside sale, Investment Registry Co. v. Chicago &c. R. Co., 212 Fed. 594; Painter v. Union Trust Co., 246 Fed. 240; Simon v. New Orleans &c. R. Co., 242 Fed. 62.

[99] Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14259; Fidelity &c. Co. v. Mobile &c. R. Co., 54 Fed. 26; Jones Corp. Bonds and Mort. § 662. See also Bethlehem Iron Co. v. Philadelphia &c. R. Co., 49 N. J. Eq. 356, 23 Atl. 1077; Cross

mere increase in the value of the property sufficient cause for vacating the decree.[1] A purchase of the mortgaged property by a combination of the bondholders and other creditors is valid unless some unfair advantage is used to prevent competition and keep down the price, and such creditors have in general all the rights of bona fide purchasers.[2] The fact that the railroad company's solicitor acts for the creditors in making the purchase and that the title is taken in his name, does not invalidate the sale, if it was honestly conducted and no unfair advantage was taken.[3] The validity of the sale, it has been held, cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering a default, and that this was known to the trustee, when there is no claim against him of collusion or fraud, and it appears that the default justifying foreclosure actually occurred, and the property was sold for an adequate price.[4] In a suit to set aside a sale on foreclosure the validity and sufficiency of the proceedings in the foreclosure suit prior to the sale cannot be questioned, since they were matters proper for adjudication in the foreclosure suit.[5]

v. Allen, 141 U. S. 528, 12 Sup. Ct. 67, 35 L. ed. 843; Lathrop v. Tracy, 24 Colo. 382, 51 Pac. 486, 65 Am. St. 229. Unless, perhaps, it is so great as to shock the conscience. Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. ed. 839; Fletcher v. McGill, 110 Ind. 395.

[1] County of Leavenworth v. Chicago &c. R. Co., 25 Fed. 219.

[2] Wetmore v. St. Paul &c. R. Co., 1 McCrary (U. S.) 466, 3 Fed. 177; Thornton v. Wabash R. Co., 81 N. Y. 462; Vose v. Cowdrey, 49 N. Y. 336; Pennsylvania Trans. Co.'s Appeal, 101 Pa. St. 576; Ante, § 597. Holders of junior mortgage bonds can not have a sale to the first mortgage bondholders set aside where no fraud is shown. Their remedy is to redeem. Robinson v. Iron R. Co., 135 U. S. 522, 10 Sup. Ct. 907, 34 L. ed. 276.

[3] Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932. But compare as to purchase by the mortgagee or his solicitor, Bennett, Ex parte, 10 Ves. Jr. 381; Callan v. Wilson, 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223; Lockett v. Hill, 1 Woods (U. S.) 552, Fed. Cas. No. 8443; Adams v. Sayre, 76 Ala. 509; Gibson v. Barbour, 100 N. Car. 192, 6 S. E. 766; Houston v. National &c. Assn., 80 Miss. 31, 31 So. 540, 92 Am. St. 565, and note. These cases relate, however, to sales under powers rather than foreclosure sales.

[4] Harpending v. Munson, 91 N. Y. 650. Compare Symmes v. Union Trust Co., 60 Fed. 830.

[5] Robinson v. Iron R. Co., 135

§ 609 (530). **Redemption.**—A valid foreclosure and sale, duly confirmed, usually cuts off the equity of redemption,[6] and the only remedy, if any, in such a case, is by a suit to vacate the decree,[7] unless a statutory right to redeem is given,[8] and even where a statute gives a right of redemption from foreclosure sales of real estate, it is generally held that a foreclosure sale of a railroad under a mortgage including its franchises and other property should be made as an entirety without any right of redemption after final confirmation.[9] Where, however, the mortgage trustee enters into possession, upon default, and manages the property for the bondholders, the corporation or stockholders may institute a suit to redeem and hold him to an accounting as trustee for the corporation as well as for the bondholders.[10] So,

U. S. 522, 10 Sup. Ct. 907, 34 L. ed. 276.

[6] Parker v. Dacres, 130 U. S. 43, 9 Sup. Ct. 433, 32 L. ed. 848; Turner v. Indianapolis &c. R. Co., 8 Biss. (U. S.) 380, Fed. Cas. No. 14259; Woodruff v. Adair, 131 Ala. 530, 32 So. 515; Eiceman v. Finch, 79 Ind. 511; Grandin v. Emmons, 10 N. Dak. 223, 86 N. W. 723, 54 L. R. A. 610, 88 Am. St. 684. As to who may redeem, see note to Horn v. Indianapolis &c. Bank, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. 231, 245 et seq.

[7] Delaware &c. R. Co. v. Scranton, 34 N. J. Eq. 429.

[8] Brine v. Ins. Co., 96 U. S. 627, 24 L. ed. 858; Parker v. Dacres, 130 U. S. 43, 9 Sup. Ct. 433, 32 L. ed. 848; Jackson &c. Co. v. Burlington &c. R. Co., 29 Fed. 474; Singer Mfg. Co. v. McCollock, 24 Fed. 667. In these cases the state statute was followed by the federal courts. See also Benedict v. St. Joseph &c. R. Co., 19 Fed. 173. But a general statute applying in ordinary cases may not authorize or apply to a redemption in the case of a railroad. Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Hammock v. Farmers' Loan &c. Co., 105 U. S. 77, 26 L. ed. 1111; Columbia Finance &c. Co. v. Kentucky Union R. Co., 60 Fed. 794; and other cases cited in next following note.

[9] Sioux City Terminal R. &c. Co. v. Trust Co., 82 Fed. 124; Pacific N. W. Packing Co. v. Allen, 116 Fed. 312; Peoria &c. R. Co. v. Thompson, 103 Ill. 187; Clearwater &c. Bank v. Bagley &c. Co., 116 Minn. 14, 133 N. W. 91, 36 L. R. A. (N. S.) 1132, Ann. Cas. 1913A, 622; McFadden v. May's Landing &c. R. Co., 49 N. J. Eq. 176, 22 Atl. 932; McKenzie v. Bismarck Water Co., 6 N. Dak. 361, 71 N. W. 608.

[10] Ashuelot R. Co. v. Elliott, 57 N. H. 397. See also Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354.

as we shall hereafter see,[11] where a transaction is voidable because a director or trustee has improperly purchased at the sale, the courts will usually allow a redemption. The right to redeem is a favorite equity and an opportunity to exercise it should be given before the sale is confirmed, that is, at least where the foreclosure is for failure to pay interest, a decree nisi should be entered declaring "the fact, nature and extent of the default * * * and the amount due on account thereof, which, with any further sums subsequently accruing, and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which, if not paid, a sale of the mortgaged premises is directed."[12] Thus, in a recent foreclosure proceeding for default in payment of interest, it was held that, although the mortgage, as construed by the court, did not authorize a decree that the whole debt was due, it was proper to direct payment of the whole debt from the proceeds of the sale of the property as an entirety, but that the decree should also provide that the mortgagor might redeem before sale upon payment of the overdue interest and costs.[13] In another comparatively recent case[14] involving the right to redeem separate divisional mortgages on railroads afterwards consolidated the judges of the circuit court of appeals for the sixth circuit differed in opinion and each sup-

[11] Post, § 615.

[12] Chicago &c. R. Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, 27 L. ed. 47. See also to same effect, Clark v. Reyburn, 8 Wall. (U. S.) 318, 19 L. ed. 354; Howell v. Western R. Co., 94 U. S. 463, 24 L. ed. 254; Foster Fed. Prac. § 322. For form of decree, see Blair v. St. Louis &c. R. Co., 25 Fed. 132, 237. Four months has been held to be a reasonable time. Columbia Finance &c. Co. v. Kentucky Union R. Co., 60 Fed. 794. No contract right of an independent purchaser at a foreclosure sale, who has no connection with the mortgage contract other than that arising from his purchase for a sum sufficient to pay the mortgage debt, is impaired by a change in the law, subsequent to the execution of the mortgage but prior to the sale, regarding the time of redemption and rate of interest payable in order to redeem. Hooker v. Burr, 194 U. S. 415, 24 Sup. Ct. 706, 48 L. ed. 1046.

[13] Grape Creek &c. Co. v. Farmers' &c. Co., 63 Fed. 891. See also Olcott v. Bynum, 17 Wall. (U. S.) 44, 21 L. ed. 570; Holden v. Gilbert, 7 Paige (N. Y.) 208.

[14] Compton v. Jesup, 68 Fed. 263.

ported the position which he had taken by a very able argument. The mortgages on the separate divisions were made to the same trustee, and Judge Lurton held that the mortgagees were, therefore, to be regarded as the same, and that for this reason, as well as for the further reason that it is the settled policy of the courts to treat a railroad as an entirety and prevent its severance, if possible, there could be no separate redemption of the division covered by one of them, while Judge Taft held that they were separate mortgages and that, under the circumstances of the case, there could be a separate redemption. The case was complicated by a question of suretyship and a question as to the effect of prior decrees in the different states, in regard to both of which the judges disagreed. They also disagreed as to whether, in fixing the amount to be paid by the redemptioner he was entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser. The case is one of great importance and merits careful study.[15] It was afterwards taken to the Supreme Court of the United States on certificate, but that court decided it on such grounds that it was found unnecessary to consider the difficult points relating to the question of redemption.[16]

§ 610 (531). Reorganization by purchasers at sale—Power of legislature to provide for.—The purchaser of a railroad under a sale upon foreclosure, or otherwise, by legislative authority, does not, by reason of his purchase, take the place of the old corporation and become clothed with corporate powers,[17] unless the

[15] It is impossible to give an intelligent statement of all the facts of the case, with the reasoning and numerous authorities cited, without taking more space than we feel justified in giving to a review of any one case. The principal questions involved were certified to the supreme court, but it did not fully settle the law upon the subject. In addition to the authorities cited in the case referred to, see Horn v. Indianapolis Nat. Bank, 125 Ind. 381, 25 N. E. 558, 9 L. R. A. 676, 21 Am. St. 231, and note.

[16] Compton v. Jesup, 167 U. S. 1, 17 Sup. Ct. 795, 807, 808, 42 L. ed. 55.

[17] Dow v. Beidelman, 49 Ark. 325, 455, 5 S. W. 297, 718, 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; Memphis &c. R. Co. v. Railroad Commissioners, 112 U. S. 609, 5

statute expressly so provides. But the purchaser at a foreclosure sale takes with the property all franchises which are included and authorized to be included in the mortgage, and are necessary to the successful operation of the road, including, it seems, the franchise of eminent domain.[18] The same reasons which cause nearly all railroads to be built by corporations apply with equal force to urge the incorporation of the purchasers of a railroad at foreclosure sale.[19] The legislature has power to provide for the reorganization of the bondholders into a new corporation with the rights and duties of the old corporation, upon strict foreclosure of a railroad mortgage; and it has been held that when the majority effect an organization under legislative authority, a dissenting minority have no private rights that can be

Sup. Ct. 299, 28 L. ed. 837; Norfolk &c. R. Co. v. Pendleton, 156 U. S. 667, 15 Sup. Ct. 413, 39 L. ed. 574; Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. ed. 629; Watson v. Albany &c. R. Co., 111 Ga. 10, 36 S. E. 324; Atkinson v. Marietta &c. R. Co., 15 Ohio St. 21; Wellsborough &c. Co. v. Griffin, 57 Pa. St. 417; Ante, § 595.

[18] New Orleans &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 245; Lawrence v. Morgan La. R. &c. Co., 39 La. Ann. 427, 2 So. 69, 4 Am. St. 265; Marshall v. Western &c. R. Co., 92 N. Car. 322. See also North Carolina &c. R. Co. v. Carolina Central R. Co., 83 N. Car. 489. In the case of Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860, the Supreme Court of the United States, in defining what were the franchises which the purchaser of a railroad had acquired at marshal's sale, said: "The franchises of a railroad corporation are rights and privileges which are essential to the operations of a corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights and privileges, without the possession of which the road of the company could not be successfully worked. A conveyance by a railroad company of "all and singular the chartered rights, privileges, and franchises of every kind" belonging to it, or which should thereafter belong to it, does not include land grants which are not directly connected with the operation of the road. Shirley v. Waco Tap. R. Co., 78 Tex. 131, 10 S. W. 543. See also Little Rock &c. R. Co. v. McGehee, 41 Ark. 202.

[19] See Jones Corp. Bonds and Mort. § 695; 3 Thomp. Corp. (2d ed.), § 2912.

successfully asserted against such action.[20] It has also been held that the bondholders, under a trust deed of railroad property, acquire their rights subject to an obligation to execute the public trust cast upon the mortgaged property by devoting it to the public use for which it was created, and that no rights of any bondholder are violated by the action of the state in creating a new instrumentality to carry into effect the original design and to devote the property to the only use which the law of its creation permits, so long as he retains his original pro rata share of the trust property.[21] So, it is held that the legislature may constitute the purchasers at foreclosure sale a corporation under the charter of the old corporation.[22] Persons acquiring rights

[20] Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 534, 3 Sup. Ct. 363, 27 L. ed. 1020; Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695, 24 Am. & Eng. R. Cas. 143. So it has been held that such a statute may be amended so as to be made conditional, as authority to incorporate is a privilege and not a property right. Railroad Comrs. v. Grand Rapids &c. R. Co., 130 Mich. 248, 89 N. W. 967.

[21] Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695. In this case Stoddard, J., said: "There is no reason why, subject to legislative and judicial control and direction, the majority in interest in common property, of an indivisible nature, consecrated to public use, should not so use that property as to advance the private interests in that property and secure the public welfare." In a case where the plaintiff, owing but one per cent. of the bonds, refused to accept a reorganization agreement, but sued to collect his bonds; and it appeared that all the other bondholders had accepted the plan of reorganization and had surrendered their bonds; that their interests demanded that the reorganization be confirmed, and that it had been substantially confirmed by a judgment of the United States Circuit Court in Oregon, the court held that plaintiff's bill must be dismissed and that he must surrender his old bonds and accept new ones, as provided in the agreement. Pollitz v. Farmers' Loan &c. Co., 53 Fed. 210. But see Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653 n, 115 Am. St. 1023. And see as to what is necessary as against creditors on reorganization of insolvent company, and when such reorganization is fraudulent. Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696, and cases cited; Northern Pac. R. Co. v. Boyd, 177 Fed. 804.

[22] Witherspoon v. Texas Pacific R. Co., 48 Tex. 309; Acres v. Moyne, 59 Tex. 623; Gulf &c. R.

under a mortgage upon the property of a railroad corporation must be held to have acquired them subject to the power of the legislature to provide for a continuous performance of all public duties imposed by law upon the corporation.[23] Statutes providing for the reorganization of the bondholders to form a new corporation may be altered at the pleasure of the legislature. A change in the law after the issue of the mortgage bonds does not impair the obligation of a contract, although the expense of reorganization is thereby increased.[24] So, as the franchise to be a corporation is deemed to be granted anew, the company formed upon reorganization may be made amenable to statutory or constitutional provisions enacted after the charter to the original company was granted and before the reorganization.[25]

§ 611 (531a). **Reorganization through purchasing committee.** —The bondholders or persons interested, such as the bondholders, stockholders and creditors frequently get together for the purpose of purchasing and reorganizing and appoint a purchasing or reorganization committee for carrying out their plans, which usually contemplate the foreclosure and purchase, or purchase at the foreclosure sale, by the committee and the transfer of the property by the committee so purchasing to a new corporation formed for the purpose of taking such property and carrying on the business. "It rarely happens in the United States," it is said, "that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect, and a reorganiza

Co. v. Morris, 67 Tex. 692, 700, 4 S. W. 156. See also Holland v. Lee, 71 Md. 338, 18 Atl. 661; Boylan v. Kelly, 36 N. J. Eq. 331; State v. Sherman, 22 Ohio St. 428.

[23] Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695.

[24] People v. Cook, 148 U. S. 397, 13 Sup. Ct. 645, 37 L. ed. 498; Railroad Comrs. v. Grand Rapids &c. R. Co., 130 Mich. 248, 89 N. W. 967

[25] Trask v. Maguire, 18 Wall. (U. S.) 391, 21 L. ed. 938; Railroad Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Keokuk &c. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; Grand Rapids &c. R. Co. v. Osborn, 193 U. S. 17, 26 Sup. Ct. 310, 48 L. ed. 598; State v. Sherman, 22 Ohio St. 411. But see First Division of St. Paul &c. R. Co. v. Parcher, 14 Minn. 297.

tion of the affairs of the corporation under a new name brought about."[26] The whole matter is usually arranged by agreement, and the powers and duties of the committee depend upon the agreement,[27] under which they occupy a position or relation of trust.[28] As elsewhere shown, the courts have looked with favor upon such combinations and arrangements when properly planned and carried out, but they must not be unfair and fraudulent, and the trustee or committee must not unduly favor some of the bondholders at the expense of the others who are parties to the agreement.[29]

§ 612 (532). Statutory reorganization—Liability of new corporation.—Most of the states provide by general statutes for the

[26] Canada So. R. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. ed. 1020.

[27] Indiana &c. R. Co. v. Swannell, 157 Ill. 616, 41 N. E. 989, 30 L. R. A. 290; Cox v. Stokes, 156 N. Y. 491, 51 N. E. 320. See also Peoria &c. R. Co. v. Coster, 97 Fed. 519.

[28] Fuller v. Venable, 118 Fed. 543; United Water Works Co. v. Omaha Water Co., 164 N. Y. 41, 58 N. E. 58; Cox v. Stokes, 156 N. Y. 491, 51 N. E. 320; Thayer v. Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906. But considerable discretion is usually invested in the committee. Central Trust Co. v. Carter, 78 Fed. 225; McHenry v. New York &c. R. Co., 25 Fed. 65; Mercantile Trust &c. Co. v. Low, 87 Fed. 241. And the courts are inclined to construe the agreement with some liberality to protect the committee except where there is malfeasance or misfeasance or gross negligence. Venner v. Fitzgerald, 91 Fed. 335; Van Sicklen v. Bartol, 95 Fed. 793. See generally as to their duties and liabilities, Lehigh Coal Co. v. Central R. Co., 34 N. J. Eq. 88; Lyman v. Kansas City &c. R. Co., 101 Fed. 636; United Water Works Co. v. Stone, 127 Fed. 587; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937; Industrial &c. Trust v. Tod, 93 App. Div. 263, 87 N. Y. S. 687, 170 N. Y. 233, 63 N. E. 285; Grace v. Noel Mill Co. (Tenn. Ch.), 63 S. W. 246; Reed v. Schmidt, 115 Ky. 67, 72 S. W. 367, 61 L. R. A. 270; 5 Thomp. Corp. (2nd ed.) §§ 6003, 6004. See also note in 40 L. R. A. 216, on the relations and rights of members of a syndicate.

[29] The reorganization scheme and agreement must not defraud creditors nor otherwise be for an unlawful purpose. Northern Pac. R. Co. v. Boyd, 177 Fed. 804; Central Imp. Co. v. Cambria Steel Co., 201 Fed. 811; Investment Registry Co. v. Chicago &c. Elec. R. Co., 206 Fed. 488; State v. Citizens' Light &c. Co., 172 Ala. 7 55 So. 193.

incorporation of the purchasers of railroad property at foreclosure sale.[30] When they have complied with the statute they become a new and entirely different corporation from that whose property and franchises they obtained by purchase at the foreclosure sale, even though the statute expressly invests them with all the rights, franchises, powers and privileges possessed by the old corporation.[31] Under these and similar special acts it is customary to reorganize the persons having an interest in the road to form a new corporation for whom the porperty is purchased by a trustee chosen for that purpose. A proper agreement of this kind is legal and binding, and the trustee will be compelled to transfer the property to the corporation when organized.[32] But none of the creditors can claim an interest in a reorganized corporation without sharing in the expense of the sale and reorganization.[33] The statute providing for reorganization sometimes provides that the stockholders of the old corporation may become members of the new corporation upon certain terms. And such provision is sometimes contained in the mortgage or in the reorganization agreement entered into by the purchasers.[35]

[30] Thomas v. Milledgeville R. Co., 99 Ga. 714, 27 S. E. 756; Moore v. State, 71 Ind. 478; State v. Hare, 121 Ind. 308, 23 N. E. 145; Vicksburg &c. R. Co. v. Elmore, 46 La. Ann. 1237, 15 So. 701; Vilas v. Milwaukee &c. R. Co., 17 Wis. 497; 3 Thomp. Corp. (2nd ed.) § 2912. Such a statute, it is held, does not prevent purchasers from selling to any existing corporation if they otherwise have that right. Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. ed. 629.

[31] People v. Cook, 110 N. Y. 443, 449, 18 N. E. 113, 36 Am. & Eng. R. Cas. 256, 258; State v. Sherman, 22 Ohio St. 411; Smith v. Chicago &c. R. Co., 18 Wis. 17.

[32] Marie v. Garrison, 83 N. Y. 14; Munson v. Syracuse &c. R. Co., 103 N. Y. 58, 8 N. E. 355. See also Wenger v. Chicago &c. R. Co., 114 Fed. 34; Kurtz v. Philadelphia &c. R. Co., 187 Pa. St. 59, 40 Atl. 988. But see, where there is fraud, Louisville Trust Co. v. Louisville &c. R. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. ed. 1130; Central of Georgia R. Co. v. Paul, 93 Fed. 878; St. Louis Trust Co. v. Des Moines &c. R. Co., 101 Fed. 632.

[33] Hancock v. Toledo &c. R. Co., 11 Biss. (U. S.) 148, 9 Fed. 738; Jones Corp. Bonds and Mort. § 691, citing Fidelity Insurance &c. Co's Appeal, 106 Pa. St. 144. See also Huston's Appeal, 127 Pa. St. 620, 18 Atl. 419.

[35] Unsecured creditors can not complain of the reorganization

A stockholder who would claim the benefit of an agreement or statutory provision by which the old stockholders are permitted to become members of the new corporation must show a strict compliance on his part with the terms of the agreement or statute.[36] Under a New York statute which provided that any old stockholder of a company whose property and franchises are purchased by trustees upon foreclosure sale for the purpose of reorganization "shall have the right to assent to the plan of readjustment and reorganization of interests pursuant to which such franchises and property shall have been purchased at any time within six months after the organization of said new company, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein according to its terms,"[37] it was held that no notice at all to the stockholders need be provided for in a scheme for reorganization entered into in accordance with the terms of the statute, since all stockholders who are reasonably careful of their interests and vigilant in looking after their rights may be presumed to have

scheme as inequitable because the stockholders of the old company are to become stockholders of the new, while the unsecured bondholders are given second preferred income bonds at par in full for their claims. Hancock v. Toledo &c. R. Co., 11 Biss. (U. S.) 148, 9 Fed. 738. But compare on this general subject Northern Pac. R. Co. v. Boyd, 177 Fed. 804; Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696.

[36] The fact that he had no actual notice of the right accorded to stockholders to take stock until after the time allowed them for exercising the privilege had expired gives a stockholder no right to claim stock after the expiration of that time, where notice was given by publication as required by the agreement for reorganization. Thornton v. Wabash &c. R. Co., 81 N. Y. 462; Vatable v. New York &c. R. Co., 96 N. Y. 49. And where the bondholders purchased a railroad at foreclosure sale and entered into a reorganization scheme by which any stockholder should be entitled to exchange his stock for stock of the new company on payment of fifteen dollars per share within a specified time, it was held that the administrator of a deceased stockholder could not demand new shares in exchange for old ones belonging to his decedent upon tender of that sum after the expiration of the time specified. Dow v. Iowa Central R. Co., 70 Hun 186, 24 N. Y. S. 292.

[37] N. Y. Laws 1874, Ch. 430, § 3.

notice of a protracted litigation to foreclose their interests in the corporaton, and of a judicial sale made in pursuance thereto after due notice.[38] And a stockholder who fails to comply with the terms of the plan of reorganization within the time prescribed by it, that being not less than the statutory period of six months, has no right to come in after the expiration of such time and claim stock upon an offer to perform the conditions prescribed by the plan. And the fact that he had no actual notice of the adoption of the plan does not enlarge his rights.[39] Statutes providing for the reorganization of insolvent corporations do not ordinarily impose any additional liabilities upon the purchasers, but simply confer upon them and such persons as they choose to associate with them the power to exist as a corporation and to own and manage the property which they have acquired as a railroad corporation. The new corporation organized thereunder does not become liable for any debts or liabilities of the old company for which the purchasers would not be liable by the terms of their purchase if incorporated.[40] But it does generally become liable to perform the public duties imposed by law upon the old corporation. Thus, the new company has been held liable for a failure to maintain and repair bridges forming a part of the highway over its road, where that duty was imposed by law upon its predecessor.[41]

[38] Vatable v. New York &c. R. Co., 96 N. Y. 49.

[39] Vatable v. New York &c. R. Co., 96 N. Y. 49.

[40] Columbus &c. R. Co.'s Appeal, 109 Fed. 177; Lake Erie &c. R. Co. v. Griffin, 92 Ind. 487; Vatable v. New York &c. R. Co., 96 N. Y. 49; Houston &c. R. Co. v. Shirley, 54 Tex. 125. See ante, § 603. See also Brockert v. Iowa Cent. R. Co., 93 Iowa 132, 61 N. W. 405. But see where reorganization is fraudulent as against creditors. Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696, and cases cited.

[41] New York &c. R. Co. v. State, 50 N. J. L. 303, 13 Atl. 1, 32 Am. & Eng. R. Cas. 186. In announcing the opinion of the court in this case, Judge Reed said of the defendant company: "It proceeded to exercise all the powers with which the charter of the original company would invest it as a purchaser, so far as the new company wished to exert those powers and privileges. While it occupies this attitude it can not ignore those duties to the public which are coupled with the enjoyment of the corporate privileges." Montclair v. New York &c. R. Co., 45 N. J. Eq. 436, 18

§ 613 (533). **Reorganization by agreement—Rights of minority.**—"In the absence of statutory authority, or some provision in the instrument which creates the trust, nothing can be done by a majority, however large, which will bind a minority without their consent,"[42] and a reorganization cannot, therefore, be effected, without a foreclosure, by a majority of the bondholders in such a manner as to deprive dissenting bondholders of their rights under the mortgage.[43] But provisions may be, and often are, inserted in the mortgage or trust deed which enable a majority of the bondholders to modify the mortgage rights of all[44] and sometimes "go far towards organizing the bondholders into a body corporate to take the place and perform the functions of the original corporation upon the insolvency of the latter."[45] And some of the courts have gone

Atl. 242. See also Gates v. Boston Air Line &c. R. Co., 53 Conn. 333, 5 Atl. 695; State v. Central Iowa R. Co., 71 Iowa 410, 32 N. W. 409, 60 Am. Rep. 806; Gage v. Pontiac &c. R Co., 105 Mich. 335, 63 N. W. 318; Dyer County v. Chesapeake &c. R. Co., 87 Tenn. 712, 11 S. W. 943; Sherwood v. Atlantic &c. R. Co., 94 Va. 291, 26 S. E. 943.

[42] Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 534, 3 Sup. Ct. 363, 27 L. ed. 1020; Gilfillan v. Union Canal Co., 109 U. S. 401, 403, 3 Sup. Ct. 304, 27 L. ed. 977. Minority stockholders have a right to complain where the majority stockholders attempt to reorganize and sell to a new corporation without their consent. See Price v. Holcomb, 89 Iowa 123, 56 N. W. 407; Smith v. Smith, 125 Mich. 234, 84 N. W. 144. See generally as to rights of minority stockholders on reorganization, Sparrow v. Bement, 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725, and cases there reviewed in note.

[43] Bill v. New Albany &c. R., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407; Hollister v. Stewart, 111 N. Y. 644, 19 N. E. 782; Taylor v. Atlantic &c. R., 55 How. Prac. (N. Y.) 275; Poland v. Lamoille Valley R Co., 52 Vt. 144. See also Mason v. Pewabic Min. Co., 25 Fed 882, 133 U. S. 50, 10 Sup. Ct. 224, 33 L. ed. 524; Lake &c. El. R. Co. v. Ziegler, 99 Fed. 114. And it has been held that the consent of a bondholder to a reorganization scheme is not implied from his silence. Philadelphia &c. R. Co. v. Love, 125 Pa. St. 488, 17 Atl. 455.

[44] Follit v. Eddystone Granite Quarries, L. R. (1892) 3 Ch. 75; Sneath v. Valley Gold, L. R. (1893) 1 Ch. 477.

[45] Sage v. Central R. Co., 99 U. S. 334, 25 L. ed. 394; Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757.

very far in upholding reorganization schemes adopted by the majority.[46] As a foreclosure cuts off or bars the rights of the stockholders and creditors against whom the decree is rendered, it is usually the safest way in which to prepare for a reorganization upon the insolvency of the corporation. Unsecured creditors and stockholders often have it in their power, however, to so embarrass and delay the foreclosure proceedings that it is found expedient for the mortgage creditors and other parties interested in the property to agree upon some scheme of reorganization whereby, after the foreclosure sale, all parties interested shall be allowed, upon equitable terms, to come into a new company which shall own the property and carry on the business. This may be necessary in order to preserve intact a system of railways, to obtain funds required in the reorganization, or to prevent the appointment of a receiver and the issuance of receiver's certificates, or the allowance of other preferred claims growing out of the operation of the road, which would lessen the value of the property or imperil the security of the bondholders, and it is, therefore, better for them to "give up something of their own security" in order to avoid the delay and danger of loss. Under such schemes of reorganization the old stockholders are usually allowed to become shareholders in the new corporation upon the payment of a certain sum for each share of stock held by them, or upon some other equitable basis, and the bondholders are generally permitted to exchange the old bonds for new ones issued by the new company. Of course, in the absence of any statutory provision upon the subject, no one who has not signed the agreement can be compelled to come into the new company, and where all the interested parties have agreed to the plan of reorganization their rights are measured by the agreement.[47] Such schemes

[46] Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757; Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. ed. 1020. See Pollitz v. Farmers' Loan &c. Co., 53 Fed. 210; Symmes v. Union Trust Co., 60 Fed. 830; Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695; Cowell v. City &c. Co., 130 Iowa 671, 105 N. W. 1016; Mills v. Potter, 189 Mass. 238, 75 N. E. 627.

[47] See generally 5 Thomp. Corp. (2nd ed.) §§ 5980-6019.

of reorganization, when fair and properly guarded, are legal and are encouraged by the courts in order to prevent loss and insure the operation of the road for the benefit of the public.[48]

§ 614 (534). **Rights and obligations of the parties—Laches and estoppel.**—In the absence of a statute or provision in the mortgage giving the majority power to bind the minority, it has been held that bondholders who refuse to participate in the reorganization are not bound to do so, but may usually insist on being paid in cash.[49] They are entitled to their proportion of the money realized from the sale, but nothing more, unless they come in within the time limited by the agreement.[50] Even in the absence of any specific limitation they should act within a reasonable time and may, by their own laches, lose their rights to come in,[51] or to set aside the sale.[52] So, of course, one who takes part in the reorganization may thereby estop

[48] Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757; Kropholler v. St. Paul &c. R., 1 McCrary (U. S.) 299, 2 Fed. 302; Robinson v. Philadelphia &c. R. Co., 28 Fed. 340; Riker v. Alsop, 27 Fed. 251; Mackintosh v. Flint &c. R. 34 Fed. 582; Gates v. Boston &c. R. Co., 53 Conn. 333, 5 Atl. 695. The bondholders may combine to purchase at the sale. Terbell v. Lee. 40 Fed. 40. The stockholders may also combine with them. Pennsylvania Transportation Co.'s Appeal, 101 Pa. St. 576.

[49] Brooks v. Vermont &c. R., 22 Fed. 211. See also Philadelphia &c. R. Co. v. Love, 125 Pa. St. 488, 17 Atl. 455. Compare Pollitz v Farmers' Loan &c. Co., 53 Fed. 210, 213.

[50] Bound v. South Carolina R. Co., 78 Fed. 49; Vatable v. New York &c. R. Co., 96 N. Y. 49; Vose v. Cowdrey, 49 N. Y. 336; Appeal of Huston, 127 Pa. St. 620, 18 Atl. 419; Landis v. Western Pass. R. Co., 133 Pa. St. 579, 19 Atl. 556; Zuccani v. Nacupai &c. Co., 61 L. T. R. 176. But minority bondholders have been permitted by the court to come in and participate in the purchase where they made their application before the sale. Duncan v. Mobile &c. R., 3 Woods (U. S.) 597, Fed. Cas. No. 4139. See also Walker v. Montclair &c. R. Co., 30 N. J. Eq. 525.

[51] Holland v. Cheshire R., 151 Mass. 231, 24 N. E. 206; Zebley v. Farmers' &c. Co., 63 Hun 541, 18 N. Y. S. 526; Carpenter v. Catlin, 44 Barb. (N. Y.) 75; Dow v. Iowa Central R. Co., 70 Hun 186, 24 N. Y. S. 292; Landis v. Western Penna. R. Co., 133 Pa. St. 579, 19 Atl. 556.

[52] Wetmore v. St. Paul &c. R., 1 McCrary (U. S.) 466, 3 Fed. 177; Carey v. Houston &c. R. Co., 52 Fed. 671; Farmers' &c. Co. v. Bankers' &c Co., 119 N. Y. 15, 23

himself from thereafter repudiating it.[53] The provisions of the reorganization agreement must be duly complied with[54] and a change in the plan can not be made by the reorganization committee, unless the authority is clearly given.[55] But where the reorganization agreement makes the reorganization committee the agents of the signers, notice to the committee is notice to all the signers.[56] One who has signed and complied with the reorganization agreement and is wrongfully excluded may recover damages,[57] or, in other cases, equity will protect him and may even enforce the agreement.[58]

§ 615 (535). **Fraud in the sale or reorganization.**—A secret agreement, whereby one of the parties seeks to obtain an undue advantage, will not be tolerated by the courts,[59] and a sale may be set aside where the mortgage trustee enters into a combination with part of the bondholders to purchase at the

N. E. 173. See also Cole v. Birmingham &c. R. Co., 143 Ala. 427, 39 So. 403; Mills v. Potter, 189 Mass. 238, 75 N. E. 627.

[53] Crawshay v. Soutter, 6 Wall. (U. S.) 739, 18 L. ed. 845; Symmes v. Union Trust Co., 60 Fed. 830; Matthews v. Murchison, 15 Fed. 691. See also United States v. Union Pac. R. Co., 98 U. S. 569, 25 L. ed. 143; St Louis &c. Co. v. Sandoval &c. Co., 116 Ill. 770, 5 N. E. 370; Hollins v. St. Paul &c. R. Co., 9 N. Y. S. 909, 29 N. Y. St. 208; Butterfield v. Cowing, 112 N. Y. 486, 20 N. E. 369.

[54] In order to hold a dissatisfied subscriber. Miller v. Rutland &c. R. Co., 40 Vt. 399, 94 Am. Dec. 413; United Water Works Co. v. Stone, 127 Fed. 587; Martin v. Somerville &c. Co., 27 How. Prac. (N. Y.) 161; United Water Works Co. v. Omaha &c. Co., 164 N. Y. 41, 58 N. E. 58. And by those who desire to come into the new company, in order to entitle them to do so. Thornton v. Wabash &c. R. Co., 81 N. Y. 462; Fuller v. Venable, 118 Fed. 543; Appeal of Fidelity &c. Co., 106 Pa. St. 144; Van Alstyne v. Houston &c. R. Co., 56 Tex. 377.

[55] Dutenhofer v. Adirondack R. Co., 14 N. Y. S. 558.

[56] Cox v. Stokes, 78 Hun 331, 29 N. Y. S. 141.

[57] Harris v. Davis, 44 Fed. 172; Reading &c. Co. v. Reading &c. Works, 137 Pa. St. 282, 21 Atl. 169.

[58] May compel an accounting. Riker v. Alsop, 27 Fed. 251; Cushman v. Bonfield, 139 Ill. 219, 28 N. E. 937. May enforce agreement of purchaser to allow others to participate. Cornell v. Utica &c. R. Co., 61 How. Prac. (N. Y.) 184; Marie v. Garrison, 83 N. Y. 14. See also Motley v. Southern R. Co., 184 Fed. 956.

[59] Bliss v. Matteson, 45 N. Y. 22; White, ex parte, 2 S. Car. 409.

sale for a small price and reorganize in such a manner as to sacrifice the interests of the other bondholders.[60] But, as we have already seen, any number of stockholders or creditors may purchase for themselves so long as they do so in good faith without preventing competition or taking any undue advantage of the others.[61] It has been held that a purchaser by a director,[62] or a trustee[63] at his own sale is constructively or prima facie fraudulent and voidable, but mortgage trustees are sometimes authorized by the courts to make a certain bid or purchase at the sale for the benefit of all the bondholders,[64] and in some cases purchases by directors in good faith have been upheld.[65] But the company, or mortgagor, may usually avoid the sale to a trustee by redeeming,[66] and a director who fraudulently purchases may be compelled to transfer the property or account as a trustee.[67] It has been held that property fraudu-

[60] Sahlgard v. Kennedy, 1 McCrary (U. S.) 291, 2 Fed. 295. See also Lake St. El. R. Co. v. Ziegler, 99 Fed. 114.

[61] Ante, § 607. See also Carter v. Ford Plate Glass Co., 85 Ind. 180; Ketchum v. Duncan, 96 U. S. 659, 24 L. ed. 868; Wetmore v. St. Paul &c. R. Co., 3 Fed. 177; Hayden v. Official &c. Co., 42 Fed. 875; Osborne v. Monks (Ky.), 21 S. W. 101; Kitchen v. St. Louis &c. R. Co., 69 Mo. 224.

[62] Jones v. Arkansas &c. Co., 38 Ark. 17; European &c. R. Co. v. Poor, 59 Maine 277; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Cumberland &c. Co. v. Sherman, 30 Barb. (N. Y.) 553; Iron &c. Co., Re, 19 Ont. R. 113, 33 Am. & Eng. Corp. Cas. 277. The company's attorney may purchase for the bondholders. Pacific R. v. Ketchum, 101 U. S. 289, 25 L. ed. 932.

[63] Washington &c. R. v. Alexandria &c. R., 19 Grat. (Va.) 592, 100 Am. Dec. 710. But he may purchase at a sale brought about by other parties. Allan v. Gillette, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. ed. 271.

[64] Sage v. Central R., 99 U. S. 334, 25 L. ed. 394; Rogers v. Wheeler, 43 N. Y. 598.

[65] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; Hill v. Nisbet, 100 Ind. 341; Hallam v. Indianola Hotel Co., 56 Iowa 178, 9 N. W. 111; Saltmarsh v. Spaulding, 147 Mass. 224, 17 N. E. 316; Harpending v. Munson, 91 N. Y. 650. See also for acts of officers in effecting reorganization held not to be fraudulent. Symmes v. Union Trust Co., 60 Fed. 830.

[66] Racine &c. R. v. Farmers' &c. Co., 49 Ill. 331, 95 Am. Dec. 595; Kitchen v. St. Louis &c. R., 69 Mo. 224; Hoyle v. Plattsburgh &c. R. Co., 54 N. Y. 314, 13 Am. Dec. 595; Wasatch &c. Co. v. Jennings, 5 Utah 243, 15 Pac. 65. See also James v. Cowing, 82 N. Y. 449.

[67] Jackson v. Ludeling, 21 Wall.

lently transferred to a new company formed by the members of an old company, with the intention of cheating, hindering and delaying the creditors of the old corporation, may be reached by them on execution.[68] So, where a company was apparently properly incorporated and executed notes as a corporation, it was held that it could not escape liability upon the notes by attempting to dissolve on the ground that the incorporation was invalid and by reorganizing and reincorporating.[69] As a general rule, it may, perhaps, be said that any sale or device by which all the assets of an insolvent corporation are to be parceled out among the stockholders, leaving creditors unpaid, is a fraud upon such creditor, and, in a proper case, they may follow the assets or the purchase-money in the hands of the stockholders. Thus, it has been held that a foreclosure sale made after the company had become insolvent, and expedited by an arrangement between the bondholders and the stockholders whereby the former received part of their debt and the latter the balance of the proceeds, is fraudulent as to the unsecured creditors, who may be allowed to intervene and obtain satisfaction of their debts out of the proceeds of the sale set apart for the stockholders.[70] In another case[71] an insolvent railroad company sold all its property to another company for

(U. S.) 616, 22 L. ed. 492; Bradbury v. Barnes, 19 Cal. 120; Harts v. Brown, 77 Ill. 226; Allen v. Jackson, 122 Ill. 567, 13 N. E. 840; Covington &c. R. Co. v. Bowler's Ex., 9 Bush (Ky.) 468; Raleigh v. Fitzpatrick, 43 N. J. Eq. 501, 11 Atl. 1; Tobin &c. Co. v. Fraser, 81 Tex. 407, 17 S. W. 25; Hope v. Valley City Salt Co., 25 W. Va. 789.

[68] Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372. See also Blair v. St. Louis &c. R. Co., 22 Fed. 36; White v. Atlanta &c. R. Co., 5 Ga. App. 308, 63 S. E. 234 (held liable for torts where reorganization was simply a scheme to avoid liability therefor). A transfer of all the property of a railroad company to a new company formed by the members of the old with the same officers and a mere exchange of stock was held fraudulent as against creditors in San Francisco &c. R. Co. v. Bee, 48 Cal. 398.

[69] Empire Mfg. Co. v. Stuart, 46 Mich. 482, 9 N. W. 527.

[70] Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 19 L. ed. 117. See also Northern Pac. R. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 559, 560, 57 L. ed. 931.

[71] Chattanooga, Rome &c. R. Co. v. Evans, 66 Fed. 809.

bonds of the latter guaranteed by a banking company, and the contract of sale provided that, in consideration for the guaranty, the banking company should become the owner of the stock and income bonds of the selling company, while the bonds of the buying company, instead of being held as assets by the officers of the selling company, were to be distributed among its shareholders and the owners of its income bonds. The court held that, as against unsecured creditors of the vendor company, its income bonds in the hands of the banking company should be treated as paid and canceled, saying that the device was "doubly fraudulent." It may be stated, as a general rule, under these decisions, that a sale of all the property of an insolvent railroad company, under an arrangement whereby the stockholders of the selling company or such stockholders and the owners of its income bonds receive the entire purchase-price or proceeds of the sale, is fraudulent as against unsecured creditors known to exist by both parties at the time of the sale, and that, even in the absence of express notice of their existence upon the part of the purchaser, the purchasing company, knowing that the purchase-price will be placed beyond their reach, is bound to inquire as to whether there are any unsecured creditors and is chargeable with the knowledge which an inquiry would disclose.[72]

§ 616 (536). **Reorganization by the courts.**—It is, perhaps, not strictly correct to say that the courts will reorganize a corporation, but in many cases they have done what they could to further the reorganization of railroad companies in the interests of the public and of all parties concerned.[73] Thus, in a

[72] Louisville Trust Co. v. Louisville &c. R. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. ed. 1130; McVicker v. American &c. Co., 40 Fed. 861; Central of Georgia R. Co. v. Paul, 93 Fed. 878; Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696; Northern Pac. R. Co. v. Boyd, 177 Fed. 804; Montgomery &c. R. Co. v. Branch, 59 Ala. 139; San Francisco &c. R Co v. Bee, 48 Cal. 398; Luedecke v. Des Moines &c. Co., 140 Iowa 223, 118 N. W. 456, 32 L. R. A. (N. S.) 616, and note; Ewing v. Composite &c. Co., 169 Mass. 72, 47 N. E. 241; Berthold v. Holladay &c. Co., 91 Mo. App. 233. See also Vance v. McNabb &c. Coke Co., 92 Tenn. 47, 20 S. W. 424.

[73] See ante, § 613. Courts do not ordinarily formulate reorganiza-

comparatively recent case,[74] the court approved a master's report wherein he laid down the rule that "a court of equity in foreclosure proceedings upon railroad mortgages, in view of the number and variety of persons and interests to be affected, and their probable sacrifice without combination for their protection, will facilitate combinations and schemes of reorganization to the end that a small minority of interests shall not enforce unreasonable and inequitable concessions from the majority, or the majority crush out or subject to disadvantage the rights of the minority."[75] The court also granted permission to the receiver to pay to a syndicate which had proposed to effect a reorganization by the advancement of funds for the purchase of overdue coupons, a commission of two and one-half per cent. on the money advanced in case the reorganization was perfected, stating that it would "regard with satisfaction any and every legitimate effort to terminate the receivership." It took care to observe, however, that receivers "should not enlist, on either side, in conflicts among those interested in the property," and that it would not pass upon the merits of rival schemes of reorganization nor coerce the judgment or control the action of the parties interested. So, in another case,[76] the court confirmed a plan of reorganization, over the objection of the minority, who were compelled to surrender their old bonds and accept new ones upon being duly secured. And in many cases

tion plans. Paton v. Northern Pac. R. Co., 85 Fed. 838; Lake St. El. R. Co. v. Ziegler, 99 Fed. 114; Wabash &c. R. Co. v. Central Trust Co., 22 Fed. 138. But they often do what they can to encourage them. See Shaw v. Little Rock &c. R. Co., 100 U. S. 605, 25 L. ed. 757; Robinson v. Philadelphia &c. R. Co., 28 Fed. 340; Reed v. Schmidt, 115 Ky. 67, 72 S. W. 367, 61 L. R. A. 270.

[74] Platt v. Philadelphia &c. R. Co., 65 Fed. 872.

[75] Citing Sage v. Central R. Co., 99 U. S. 334, 25 L. ed. 394; Robinson v. Philadelphia &c. R. Co., 28 Fed. 340; Carey v. Houston &c. R. Co., 45 Fed. 438. See also Clark v. Central R. &c. Co., 66 Fed. 16 But compare Chable v. Nicaragua &c. Co., 59 Fed. 846.

[76] Pollitz v. Farmers' &c. Co., 53 Fed. 210.

the courts have approved a fair reorganization by the majority where all interests were properly protected.[77]

[77] See cases cited in last two preceding notes; also Shaw v. Little Rock &c. R. Co., 100 U. S. 605, 25 L. ed. 757; Fidelity Ins. &c. Co. v. Roanoke St. R. Co., 98 Fed. 475. See also 5 Thomp. Corp. (2nd ed.), § 5981, et seq.

CHAPTER XXII.

RECEIVERS.

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§ 620 (537). Receivers generally.—A receiver is a person[1] appointed by the court to take charge of property pending litigation, or in pursuance thereof.[2] The appointment of a receiver is an auxiliary equitable remedy, devised, on account of the inadequacy of any remedy at law, to prevent loss or injury to

[1] In many of the states provision is made for the appointment of corporations commonly called "trust companies."

[2] Baker v. Backus, 32 Ill. 79; Devendorf v. Dickson, 21 How. Prac. (N. Y.) 275; Merritt v. Merritt, 16 Wend. (N. Y.) 405; Farmers' Loan &c. Co. v. Oregon Pac. R. Co., 31 Ore. 237, 48 Pac. 706, 65 Am. St. 822. In some jurisdictions, and generally in the absence of statutory authority, the appointment of a receiver is strictly an ancillary remedy and can not be obtained where it is the sole primary object. Davis v. Alton &c. R. Co., 180 Ill. App. 1; Winona &c. Trac. Co. v. Collins, 162 Ind. 693, 69 N. E. 998; 5 Thomp. Corp. (2nd ed.), § 6334. See also Howell v. Harris-Cortner &c. Co., 168 Ala. 383, 52 So. 935, Ann. Cas. 1912B, 234, and cases cited in note. And in some instances the statute seems to authorize the appointment in the case of a corporation for certain causes and not for an individual, or vice versa. It is held that the pending litigation need not be in the same court. Underground Elec. R. Co. v. Owsley, 176 Fed. 26; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116. But compare Martin v. Harnage, 26 Okla. 790, 110 Pac.

property in litigation and preserve it, pendente lite, for the sake of all interested, to be finally disposed of as the court may decree.[3] In the case of a receiver of a railroad his duties usually involve the operation of the road for a time, and often until the receivership is terminated, under the control of the court.[4] A receiver stands indifferent between the parties, and occupies a fiduciary relation to all the creditors.[5] He is, in a sense, an officer of the court, and the court will protect the property in his hands.[6] In the absence of a statute authorizing it he cannot be sued, ordinarily at least, without permission of the court by whom he was appointed.[7] So, as a rule, he can only bring suit in his own name when authorized by statute or

781, 38 L. R. A. (N. S.) 228. In the note to this case as last reported it is apparently disapproved and the Federal cases above cited and other authorities are referred to as sustaining the appointment in a proper case, even though the litigation is in another court.

[3] Stilwell v. Williams, 6 Madd. 38; Folsom v. Evans, 5 Minn. 418; Myers v. Estell, 48 Miss. 372; Bank of Mississippi v. Duncan, 52 Miss. 740; Lyman v. Cent. Vermont R Co., 59 Vt. 167, 10 Atl. 346. There are, however, cases where a receiver finally disposes of property; as, for instance, under statutes authorizing a receiver to wind up the affairs of a corporation.

[4] See Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. ed. 897; Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Meyer v. Johnston, 53 Ala. 237; Continental Trust Co. v. Toledo &c. R. Co., 59 Fed. 514; Dayton &c. Co. v. Felsenthal, 116 Fed. 961; Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188; Vermont &c. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792.

[5] Davis v. Gray, 16 Wall. (U. S.) 203, 217, 21 L. ed. 447; Porter v. Williams, 9 N. Y. 142, 59 Am. Dec. 519; Vermont &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1.

[6] Davis v. Gray, 16 Wall. (U. S.) 203, 218, 21 L. ed. 447; Toledo &c. R. Co. v. Continental Trust Co., 95 Fed. 497; Walling v. Miller, 108 N. Y. 173, 2 Am. St. 400; Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. 776; 5 Thomp. Corp. (2nd ed.), §§ 6372, 6375.

[7] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; De Graffenried v. Brunswick &c. Co., 57 Ga. 22; Keen v. Breckenridge, 96 Ind. 69; Wayne Pike Co. v. State, Whittaker, 134 Ind. 672, 34 N. E. 440; Davis v. Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494; Christian Jensen Co., Matter of, 128 N. Y. 550, 28 N. E. 665. Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. 278; Allen v. Central R. Co., 42 Iowa 683; Fullerton v. Fordyce,

by the court.[8] As a general rule he derives his title through the debtor, and can only maintain suit where the debtor could have done so.[9] But there are exceptions to this general rule, for a receiver may sometimes bring suits which the debtor could not maintain. The paramount duty of a receiver is to secure assets for the payment of the debtor's liabilities, and he may for that purpose bring and sustain suits, such as a suit to set aside a fraudulent conveyance made by the debtor, that the latter could not successfully prosecute.[10]

§ 621 (538). Jurisdiction of courts of equity—Statutory provisions.—The power to appoint a receiver is, we think, inherent in courts of equity in a proper case, and in those code states in which the court of equity has lost its separate identity the

121 Mo. 1, 25 S. W. 587, 45 Am. St. 505; Lyman v. Central &c. R. Co., 59 Vt. 167; Kinney v. Crocker, 18 Wis 74.

[8] Garver v. Kent, 70 Ind. 428; Wilson v. Welch, 157 Mass. 77, 31 N. E. 712; Green v. Winter, 1 Johns. Ch. (N. Y.) 60. See also Pendleton v. Russell, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. ed. 574. As to when the rule does not apply, see Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66.

[9] Jacobson v. Allen, 12 Fed. 454, 457; Republic &c. Co. v. Swigert, 135 Ill. 150, 25 N. E. 680, 12 L. R. A. 328; Burch v. West, 33 Ill. App. 359; LaFollett v. Akin, 36 Ind. 1; Spinney v. Miller, 114 Iowa 210, 86 N. W. 317, 89 Am. St. 351.

[10] Voorhees v. Indianapolis &c. Co., 140 Ind. 220, 39 N. E. 738; National &c. Bank v. Vigo County Nat. Bank, 141 Ind. 352, 40 N. E. 799; Graham Button Co. v. Spielmann, 50 N. J. Eq. 120, 24 Atl. 571; Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858, 10 Lewis Am. R. & Corp. R. 604; Elliott Gen. Pr., § 393. The receiver of a corporation may avoid a chattel mortgage on its property on the ground that it was not filed according to law. Farmers' Loan &c. Co. v. Minneapolis &c. Works, 35 Minn. 543, 29 N. W. 349. A receiver of a corporation may properly bring an action to set aside and vacate a judgment against the corporation on the ground that it was obtained in fraud of creditors, without consideration, and by collusion with the officers of the corporation. Whittlesey v. Delaney, 73 N. Y. 571. A receiver of a corporation may repudiate the illegal transfer of its securities by its officers and secure them as assets. Talmage v. Pell, 7 N. Y. 328. A receiver of an insolvent corporation appointed at the instance of creditors is clothed with all their rights and can sue to recover unpaid stock

power has descended to the courts having equitable jurisdiction.[11] It may be exercised in aid of their jurisdiction, as a general rule, whenever necessary in order to accomplish complete justice, but not, ordinarily, where the law affords any other safe or expedient remedy.[12] The appointment of receivers for railroad corporations is regulated largely by statute in many of the states,[13] and in England[14] as well. And it has been held that specification by the legislature of the cases in

subscriptions in cases where the corporation can not sue. Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858.

[11] Meyer v. Johnston, 53 Ala. 237; Bitting v. Ten Eyck, 85 Ind. 357; McElwaine v. Hosey, 135 Ind. 481, 490, 35 N. E. 272; Williamson v. Wilson, 1 Bland (Md.) 420; Dupuy v. Transportation &c. Terminal Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910; Folsom v. Evans, 5 Minn. 418; State v. Farmers' &c. Co., 90 Nebr. 664, 134 N. W. 284, Ann. Cas. 1913B, 643, 648, and other cases there cited; United States Trust Co. v. New York &c. R. Co., 101 N. Y. 478, 5 N. E. 316; Hopkins v. Worcester &c. Canal Prop., L. R. 6 Eq. 437; Featherstone v. Cooke, L. R. 16 Eq. 298; note, 64 Am. Dec. 482. There is, however, considerable conflict as to whether the power to appoint receivers of railroad companies is inherent in courts of equity. See Gardner v. London &c. R. Co., L. R. 2 Ch. 201; American &c. Co. v. Toledo &c. R. Co., 29 Fed. 416, 421; Cole v. Philadelphia &c. Ry. Co., 140 Fed. 944; Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188. The prevailing rule seems to be that there is no such power where the object is to dissolve or wind up the affairs of the corporation, with perhaps one or two exceptions, but that it may exist in a proper case to preserve the property pendente lite. See note to Exchange Bank v. Bailey, 29 Okla. 246, 116 Pac. 812, in 39 L. R. A. (N. S.) 1032, citing and reviewing the conflicting authorities.

[12] Rice v. St. Paul &c. R. Co., 24 Minn. 464; Corey v. Long, 43 How. Prac. (N. Y.) 492; Sollory v. Leaver, L. R. 9 Eq. 22; Cremen v. Hawkes, 2 Jones & La T. 674; Elliott Gen. Pr., § 394.

[13] Under the Indiana statute it was held that a receiver of a turnpike company would be appointed at the suit of stockholders, upon a showing that the majority of the directors have converted and misappropriated the corporate revenues, tolls and earnings and suffered the road to become badly out of repair and wholly impassable for six weeks, although there is no prayer for a dissolution of the corporation. Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487.

[14] Whenever the judgment creditor of a railway company is unpaid the appointment of a re-

which a receivership may be had excludes every other case and prohibits the appointment, except as authorized.[15] But it seems to us that the better rule is that the right is inherent in courts of equity to appoint a receiver, pendente lite at least, in a proper case, that such statutes are but declaratory of the common law and must be construed in the light of equity jurisprudence, and that they do not abridge the inherent power of the court of equity.[16] The inherent authority of a court of equity to take charge of and operate a railroad and control the extensive business interests therewith connected with a view to its continuance, has been denied in some jurisdictions on the grounds that a court of chancery will not assume the management of a business except with a view to its winding up or to keep it a going concern with a view to its sale, and that the public functions of the railroad corporation cannot be delegated or transferred, but must be discharged by the company itself.[17] In such instances

ceiver or manager is a matter of right. Manchester &c. R. Co., In re, L. R. 14 Ch. Div. 645.

[15] Fellows v. Hermans, 13 Abb. Prac. N. S. (N. Y.) 1. The code of Georgia does not materially alter the equitable jurisdiction of the courts to appoint receivers. Skinner v. Maxwell, 66 N. Car. 45. In England it has been held that a court of chancery, in the absence of statute authority, has no power to appoint a manager for a railroad. Gardner v. London &c. R. Co., L. R. 2 Ch. 201. But the weight of authority in the United States is, we think, the other way, although there is some question as to the better rule.

[16] Bitting v. Ten Eyck, 85 Ind. 357; note to 64 Am. Dec. 482; McElwaine v. Hosey, 135 Ind. 481, 490, 35 N. E. 272; Hollenbeck v. Donnell, 94 N. Y. 342; U. S. Trust Co. v. New York &c. R. Co., 101 N. Y. 478, 5 N. E. 316, 25 Am. & Eng. R. Cas. 601; Skinner v. Maxwell, 66 N. Car. 45; 1 Elliott Gen. Pr., § 394. In Davis v. Gray, 16 Wall. (U. S.) 203, 220, 21 L. ed. 477, Swayne, J., says: "As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation, without its aid."

[17] East Line &c. Co. v. State, 75 Tex. 434, 12 S. W. 690; Second Ward Bank v. Upmann, 12 Wis. 499; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Gardner v. London &c. R. Co., L. R. 2 Ch. 201. Compare Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, and note; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney-General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354; Slee v.

the defect of power has generally been supplied by statute,[18] and in some states the power of courts of equity has thus been greatly extended and enlarged. Such statutes, however, are somewhat strictly construed.[19]

§ 622 (539). **Jurisdiction is sparingly exercised—Purpose of appointment.**—The appointment of a receiver is a power to be somewhat sparingly exercised, and in America it is exercised reluctantly with regard to railroads, the courts proceeding cautiously with reference to the circumstances of each particular case and reserving a broad discretion[20] on account of the inability of a court of equity in all cases to properly care for the

Bloom, 5 Johns. Ch. 366, 381; Howe v. Deuel, 43 Barb. (N. Y.) 504; Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; Baker v. Backus, 32 Ill. 79. In Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480, the court says: "The court of chancery * * * declined until the power was conferred by statute to sequestrate corporate property through the medium of a receiver, or to dissolve corporate bodies, or restrain the usurpation of corporate powers."

[18] Connelly v. Dickson, 76 Ind. 440; Hellebush v. Blake, 119 Ind. 349, 21 N. E. 976; 30 and 31 Vict. Ch. 126, § 4; 36 and 37 Victoria, §§ 3, 27.

[19] Bangs v. McIntosh, 23 Barb. (N. Y.) 591; Chamberlain v. Rochester &c. Co., 7 Hun (N. Y.) 557.

[20] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694, and cases cited; Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; People v. Albany &c. R. Co., 7 Abb. Prac. (N. S.) (N. Y.) 265; Stevens v. Davison 18 Grat. (Va.) 819, 98 Am. Dec. 692; Smith v. Port Dover &c. R. Co., 12 Ont. App. 288; Simpson v. Ottawa &c. R. Co., 1 Ch. Chamb. (Ont.) 126. In Overton v. Memphis &c. R. Co., 10 Fed. 866, Judge Caldwell said: "None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none so likely to lead to abuses. It is no. the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right, of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding." See also Vila v.

large business interests involved.[21] Courts of equity, however, will assume the management of railroads when a proper case presents itself, with a view to the winding up of insolvent companies, or the sale of their property for the benefit of creditors, and, if it is shown to be necessary, will continue the operation of the roads by the intervention of receivers in order that they may be sold without depreciation of the property, and in order that the public interests shall not suffer. They are thus enabled to protect and enforce the rights of creditors and stockholders and to insure the discharge of the public function of the corporation.[22] Where the appointment of receivers to manage railroads is authorized by statute, the circumstances under which the appointment may be made and the manner of their appointment are often specifically set forth; but these statutes are largely declaratory of the common law as administered by the courts of other jurisdictions,[23] and, in the absence of specific provisions in the statute, the jurisdiction of a court of equity may be said in general to extend to all cases where its interference is necessary to protect the property or to enforce the rights of persons interested in it, whether creditors or stockholders.[24]

§ 623 (540). General rules as to when receivers of railroads will be appointed.—It is frequently said that the appointment

Grand Island Elec. &c. Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. 400.

[21] Kelly v. Alabama &c. R. Co., 58 Ala. 489. See Gardner v. London &c. R. Co., L. R. 2 Ch. 201.

[22] See post, § 625; Long Branch &c. R. Co., In re, 24 N. J. Eq. 398.

[23] It is held in North Carolina that the code, which specifies certain cases in which a receiver may be appointed, "does not materially alter the equitable jurisdiction" of the courts of that state. Skinner v. Maxwell, 66 N. Car. 45. In New Jersey the statute provides that a receiver may be appointed for any railroad which fails for ten days to run daily trains. N. J. Supp. p. 834, pl. 42. Delaware Bay, &c. R. Co. v. Markley, 45 N. J. Eq. 139, 16 Atl. 436.

[24] Davis v. Gray, 16 Wall. (U. S.) 203, 219, 21 L. ed. 447; Meyer v. Johnson, 53 Ala. 237; Sandford v. Sinclair, 8 Paige (N. Y.) 373; Conro v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; Lawrence v. Greenwich Fire Ins. Co., 1 Paige (N. Y.) 587; Conro v. Gray, 4

of a receiver is within the sound discretion of the court.[25] This does not mean that the court can, without error, arbitrarily appoint a receiver where such appointment is unauthorized and wholly uncalled for, or refuse the appointment where the right is clear, fixed and definite, but that a sound discretion is to be exercised according to well-established principles of law.[26] It is only in clear cases that the power will be exercised, and as a general rule there must be a suit pending.[27] The English courts of chancery have always been averse to appointing receivers for railway property in operation,[28] and our courts have often expressed reluctance in exercising the power in the absence of statutory authority.[29] Such reluctance is based mainly upon

How. Prac. (N. Y.) 166; Skinner v. Maxwell, 66 N. Car. 45; Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[25] Farmers' Loan &c. Co. v. Chicago & A. R. Co., 27 Fed. 146; Walker, Ex parte, 25 Ala. 81; Mays v. Rose, Freem. Ch. (Miss.) 703, 718; Oakley v. Paterson Bank, 2 N. J. Eq. 173; Werplank v. Caines, 1 Johns. Ch. (N. Y.) 57; Simmons Hardware Co. v. Waibel, 1 S. Dak. 488, 47 N. W. 814, 11 L. R. A. 267, 36 Am. St. 755; Owen v. Homan, 4 H. L. Cas. 997, 1032; Smith v. Port Dover &c. R. Co., 12 Ontario App. R. 288, 25 Am. & Eng. R. Cas. 639; 5 Thomp. Corp. (2nd ed.), § 6355. See Elliott's Gen. Pr. 394 and cases cited.

[26] Milwaukee R. Co. v. Soutter, 5 Wall. (U. S.) 660, 18 L. ed. 678; Lenox v. Notrebe, Hempst. (U. S.) 225, Fed. Cas. No. 8246c; Vose v. Reed, 1 Woods (U. S.) 647, Fed. Cas. No. 17011; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221; Pond v. Framingham &c. R. Co., 130 Mass. 194; Orphan Asylum v. McCartee, 1 Hopk. Ch. (N. Y.) 423 (372); Daniels Ch. Pr. (6th ed.) 1664. The action of the trial court is subject to review on appeal. Tysen v. Wabash R. Co., 8 Biss. (U. S.) 247, Fed. Cas. No. 14315; Winthrop Iron Co. v. Meeker, 109 U. S. 180, 3 Sup. Ct. 111, 27 L. ed. 898; La Societe Francaise d'Epargnes &c. v. District Court, 53 Cal. 495; Cook v. Detroit &c. R. Co., 45 Mich. 453, 8 N. W. 74, Smith v. Port Dover &c. R. Co., 12 Ont. App. 288, 25 Am. & Eng. R. Cas. 639. Compare Dawson v. Parsons, 137 N. Y. 605, 33 N. E. 482.

[27] Crowder v. Moone, 52 Ala. 220; Jones v. Bank, 10 Colo. 464, 17 Pac. 272; Pressley v. Harrison, 102 Ind. 14, 1 N. E. 188; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682; National Bank v. Kent Circuit Judge, 43 Mich. 292, 5 N. W. 627; note in Ann. Cas. 1912B, 234; Post, § 641 note 2.

[28] Gardner v. London &c. R. Co., L. R. 2 Ch. 201, 212; Latimer v. Aylesbury &c. R. Co., L. R. 9 Ch. Div. 385.

[29] Sage v. Memphis &c. R. Co.,

the fact that the interests involved are generally large, the management intricate, and that the corporation is charged with a public duty of which it should not be divested, and its officers are charged with corporate duties which should not be delegated.[30] A receiver will not be appointed, as a rule, unless it clearly appears prima facie that the plaintiff is entitled to a final decree.[31] The remedy has been termed an equitable attachment,[32] and will not be employed to change the management of railroad property simply because stockholders or creditors are dissatisfied with the present existing management.[33] They must show that they have an equitable right and that it will be impaired unless the property available for its satisfaction is protected by the appointment of a receiver.[34] A court will not appoint a receiver upon slight grounds and merely because a receivership would do no harm;[35] nor upon good grounds

125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694; Overton v. Memphis &c. R. Co., 10 Fed. 866; American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416; Meyer v. Johnston, 53 Ala. 237; Kelly v. Alabama &c. R. Co., 58 Ala. 489, Stevens v. Davidson, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[30] Gardner v. London &c. R. Co., L. R. 2 Ch. 201. See St. Louis &c. R. Co. v. Dewees, 23 Fed. 519, Brewer and Treat, JJ.

[31] Beecher v. Binninger, 7 Blatchf. (U. S.) 170, Fed. Cas. No. 1222; Wilkinson v. Dobbie, 12 Blatchf. (U. S.) 298, Fed. Cas. No. 17670; Cofer v. Echerson, 6 Iowa 502; Mays v. Rose, Freem. Ch. (Miss.) 703, 718; Gregory v. Gregory, 33 N. Y. Super. Ct. 39; Owen v. Homan, 3 Macn. & G. 378; Lloyd v. Passingham, 16 Ves. 59. See also 5 Thomp. Corp. (2d ed.) § 6334, et seq. The plaintiff must show that he has a present existing right in the property in order to have a receiver appointed. Steele v. Aspey, 128 Ind. 367, 27 N. E. 739.

[32] Cincinnati &c. R. Co. v. Sloan, 31 Ohio St. 1.

[33] American &c. Co. v. Toledo &c. R. Co., 29 Fed. 416, 420, 421; Fluker v. Emporia City R. Co., 48 Kans. 577, 30 Pac. 18. In the absence of gross abuse or fraud, the remedy of the stockholders is to elect new officers. Edison v. Edison &c. Co., 52 N. J. Eq. 620, 29 Atl. 195. See generally as to dissensions in management as ground for appointment, note in L. R. A. 1918D, 229.

[34] Union Trust Co. v. St. Louis &c. R. Co., 4 Dillon (U. S.) 114, Fed. Cas. No. 14402; Union Mutual Life Ins Co. v. Union Mills &c. Co., 37 Fed. 286; Cincinnati &c. R. Co. v. Sloan, 31 Ohio St. 1; Cheever v. Rutland &c. R. Co., 39 Vt. 653.

[35] Blondheim v. Moore, 11 Md.

where it would be useless, as, for instance, where there are no assets nor anything which could be made available to satisfy a judgment;[36] nor where it appears that in the latter case the plaintiff expects some of the defendants to pay his claim rather than suffer annoyance from a receiver.[37] Indeed, a court of equity will not interfere in any case where such interference would be a "vain and fruitless thing;"[38] nor where there is an adequate remedy at law.[39]

§ 624 (541). **Receiver will not be appointed merely because parties consent.**—The mere fact that the parties consent to the appointment of a receiver is not sufficient,[40] especially where the rights of third persons are likely to be affected,[41] or the property is in the hands of a person not made a party to the suit.[42] If it appears that the consent was given for the mere

365; Orphan Asylum Soc. v. McCartee, 1 Hopk. Ch. (N. Y.) 429 (488); Smith v. Port Dover &c. R. Co., 12 Ont. App. R. 288, 25 Am. & Eng. R. Cas. 639.

[36] Bigelow v. Union Freight R. Co., 137 Mass. 478. See Birmingham &c. R. Co., In re, L. R. 18 Ch. Div. 155, 3 Am. & Eng. R. Cas. 616. Where the company is shown to have no assets a receiver will not be appointed. Barton v. Enterprise Loan &c. Assn. 114 Ind. 226, 16 N. E. 486, 5 Am. St. 608.

[37] Smith v. Port Dover &c. Co., 12 Ont. App. 288, 25 Am. & Eng. Cas. 639.

[38] Lister v. Log Cabin &c. Assn., 38 Md. 115; Simpson v. Ottawa &c. R. Co., 1 Ch. Chamb. 126. A receiver will only be appointed where the amount of the judgment warrants the expense.

[39] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 523, 17 L. ed. 900; Overton v. Memphis &c. R. Co., 10 Fed. 866; Rice v. St. Paul &c. R. Co., 24 Minn. 464; Stevens v. Davidson, 18 Grat. (Va.) 819, 98 Am. Dec. 692. See also Galvire v. McConnell, 53 Tex. Civ. App. 486, 117 S. W. 211.

[40] Whelpley v. Erie R. Co., 6 Blatchf. (U. S.) 271, Fed. Cas. No. 17504. See Sage v. Memphis &c. R. Co., 18 Fed. 571; Nesbit v. North Ga. Elec. Co. 156 Fed. 979; Saxon v. Southwestern Brick &c. Co., 113 La. Ann. 637, 37 So. 540; Vila v. Grand Island &c. Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. 400; Vermont &c. R. Co. v. Vermont Cent. R. Co., 50 Vt. 500.

[41] Whelpley v. Erie R. Co., 6 Blatchf. (U. S.) 271, Fed. Cas. No. 17504.

[42] Searles v. Jacksonville &c. R.

purpose of preventing the seizure of the property of the corporation upon legal process, and without any intent to satisfy the plaintiff's demands against it, the receiver will be discharged.[43] Courts confine themselves strictly to the business of settling, according to the principles of law and equity, the real controversies which come within the "workshop of jurisprudence," and should never lend themselves to the schemes of those who wish to manipulate railroad securities for purposes of adventurous speculation.[44]

§ 625 (542). **Extent to which jurisdiction has been exercised.**—Courts of equity, by reason either of inherent power or statutory authority, in the United States, and in most of the states, have interposed with receivers for railway property to the extent necessary to accomplish the desired auxiliary aid, sometimes accompanying the dissolution of the corporation and winding up its affairs, sometimes operating the road until the income shall have discharged the primary obligation,[45] and at other times operating and improving the road with view to its advantageous sale. They have even interfered to complete a road in construction which had been retarded on account of the temporary lack of funds,[46] and in rare instances have taken charge of lines to compel them to properly perform their public duty.[47] But the right, in such cases, to divest the corporate officers of their powers and supersede them by receivers,

Co., 2 Woods (U. S.) 621, Fed. Cas. No. 12586; Einstein v. Rosenfeld &c. Mills, 38 N. J. Eq. 309; Gluck v. Becker Rec. of Corp. 61.

[43] Sage v. Memphis &c. R. Co., 18 Fed. 571.

[44] American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416.

[45] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694; and Sage v. Memphis &c. R. Co., 18 Fed. 571. See Barton v. Barbour, 104 U. S. 126, 137, 138, 26 L. ed. 672.

[46] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706. See also Boston &c. Co. v. Pacific Short Line &c. Co., 104 Iowa 311, 73 N. W. 839. But mere insolvency is not ordinarily sufficient ground of itself. Farmers' Loan &c. Co. v. Chicago &c. R. Co., 27 Fed. 146; Boston &c. R. Co. v. Boston &c. R. Co., 65 N. H. 393, 23 Atl. 529, and see next following section.

[47] Long Branch &c. R. Co, In

when the court can command such officers by injunction or other process, has been questioned,[48] and, although the remedy has been extended in some cases, other courts have refused to appoint receivers on account of fraudulent mismanagement by corporate officers where such mismanagement is in itself ground for their removal.[49] While courts of equity are cautious in the exercise of this remedy, no rule can be laid down which would clearly define the grounds for its exercise or draw boundaries which would confine it, since the power of the equity court has been so enlarged by statute that its arm can be interposed in nearly every instance where complete justice would otherwise fail, and the railroad corporation[50] now enjoys few exemptions from the rules which apply to the receivership of other corporations.

§ 626 (543). **Insolvency as ground for appointment of receiver.**—Insolvency of a railway corporation is not of itself ground for the appointment of a receiver, unless made so by statute. Even if insolvency be shown the court will refuse to appoint a receiver, unless it can interfere usefully to prevent the impairment of some equitable right or of the value of some claim against the corporation.[51] Where insolvency is conceded

re, 24 N. J. Eq. 398; Fishback v. Citizens' St. R. Co. Nat. Corp., (Superior Ct. Marion Co., Ind.), March 4, 1892.

[48] Waterbury v. Merchants' &c. Co., 50 Barb. (N. Y.) 157; Featherstone v. Cooke, L. R. 16 Eq. 298.

[49] See preceding note; Edison v. Edison &c. Co., 52 N. J. Eq. 620, 29 Atl. 195. But compare Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4926; Fisher v. Concord R. Co., 50 N. H. 200.

[50] See Barton v. Barbour, 104 U. S. 126, 137, 138, 26 L. ed. 672, in dissenting opinion.

[51] Farmers' Loan &c. Co. v. Chicago &c. R. Co., 27 Fed. 146; McGeorge v. Big Stone &c. Co., 57 Fed. 262; Denike v. N. Y. &c. Co., 80 N. Y. 599; Floore v. Morgan (Tex. Civ. App.), 175 S. W. 737. See also Worth Mfg. Co. v. Bingham, 116 Fed. 785; Hall v. Nieukirk, 12 Idaho 33, 85 Pac. 485, 118 Am. St. 188; Sheridan Brick Works v. Marion Trust Co., 157 Ind. 292, 61 N. E. 666, 87 Am. St. 207; Virginia &c. Chemical Co. v. Hunter, 84 S. Car. 214, 66 S. E. 177; People's Investment Co. v. Crawford (Tex. Civ. App.), 45 S. W. 738. In absence of statute, a court of equity has no authority to sit as a court of insolvency to

or evident, with no probability of recovery, and there are dissensions among the parties in interest, or disagreements within the corporate management, which threaten dissipation of the assets and endanger the securities of parties in interest, a receiver will usually be appointed at the suit of the proper party.[52] But, ordinarily, if it be shown that it is for the best interest of all concerned to leave the directors in charge of affairs, a receiver will not be appointed;[53] nor will the remedy usually be exercised if the corporation, in obedience to a statute, is making the same disposition of the earnings of the road that a receiver would be required to make, and no assets would be available in his hands for payment of the plaintiff's debt.[54] Where, in addition to the insolvency of a railroad company, its property is in the hands of parties who deny the right of the stockholders to share in the management of the property, equity may, in order to afford relief to such stockholders, on their petition, appoint a receiver to take possession of the property.[55] So, if a corporation has been rendered insolvent by the fraudulent mismanagement of its officers, who remain

liquidate the affairs of an insolvent railway company. Pond v. Farmingham &c. R. Co., 130 Mass. 194; Lawrence &c. Co. v. Rockbridge Co., 47 Fed. 755. Supreme Sitting &c. v. Baker, 134 Ind. 293, 33 N. E. 1128. As to what constitutes insolvency of a railroad company, and where receiver will be appointed, see Intercontinental Rubber Co. v. Boston &c. R. Co., 245 Fed. 122; 8 Thomp. Corp., §§ 6337, 6345, 6346.

[52] Bill v. New Albany &c. R. Co., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221; Kelly v. Alabama &c. R. Co., 58 Ala. 489; Ralph v. Wisner, 100 Mich. 164, 58 N. W. 837; Atlantic Trust Co. v. Consolidated &c. Co., 49 N. J. Eq. 402, 23 Atl. 934, 11 R. & Corp. L. J. 223. See also Cole v. Philadelphia &c. R. Co., 140 Fed. 944. And see for conflicting authorities on both sides as to whether the courts have inherent power to appoint in such a case, the note in 39 L. R. A. (N. S.) 1032, referred to in a preceding section of this chapter.

[53] Union T. Co. v. St. Louis &c. R. Co., 4 Dill. (U. S.) 114, Fed. Cas. No. 14402; Tysen v. Wabash R. Co., 8 Biss. (U. S.) 247, Fed. Cas. No. 14315.

[54] Smith v. Port Dover &c. R. Co., 12 Ont. App. R. 288, 25 Am. & Eng. R. Cas. 639.

[55] Bill v. New Albany &c. R. Co., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407.

in charge of its affairs, upon a proper application by the parties in interest, its property may be put into the hands of a receiver.[56] So, where the officers of an insolvent corporation resign their respective offices and abandon its property to the court,[57] it is proper to appoint a receiver to take charge of the effects of the corporation and to preserve them for the benefit of all the parties in interest.[58]

§ 627 (544). **When insolvency is sufficient without default.** —As a general rule inadequacy of mortgage security, coupled with insolvency of the mortgagor, showing that a receiver is necessary, is sufficient ground for the relief.[59] Where the company is manifestly insolvent, is unable to meet its obligations to pay floating debts, and cannot borrow money, and is in imminent peril of breaking up, although no default has yet occurred, it has been held that a receiver may be appointed, at the suit of a bondholder, in order to preserve the corporate property,[60] but a receiver will not be appointed because of expected insolvency at some future time.[61] In all cases it must be shown that the insolvency will endanger or impair the plaintiff's rights un-

[56] Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, Fed. Cas. No. 4926. See Fisher v. Concord R. Co., 50 N. H. 200.

[57] Smith v. Danzig, 64 How. Prac. (N. Y.) 320.

[58] 5 Thomp. Corp. (2nd ed.), §§ 6334, 6346.

[59] Central Trust Co. v. Chattanooga &c. R. Co., 94 Fed. 275; Kelly v. Alabama &c. R. Co., 58 Ala. 489; Ruggles v. Southern Minnesota R. Co., (U. S. Dist of Minn.) 5 Chicago Legal News 110; Cheever v. Rutland &c. R. Co., 39 Vt. 653; Dow v. Memphis &c. R. Co., 20 Fed. 260, 17 Am. & Eng. R. Cas. 324; Kerp v. Michigan &c. R. Co., 6 Chicago Legal News 101. A receiver will be appointed where the purchasers of the equity of redemption at an assignee's sale have diverted the use of the property and appropriated the income to which the mortgagee is entitled. Gest v. New Orleans &c. R. Co., 30 La. Ann. 28; Brown, Ex parte, 58 Ala. 536.

[60] Brassey v. N. Y. &c. R. Co., 19 Fed. 663, 17 Am. & Eng. R. Cas. 285. See also Cole v. Philadelphia &c. R. Co., 140 Fed. 944.

[61] Edison v. Edison &c. R. Co., 52 N. J. Eq. 620, 29 Atl. 195. See also Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. 192; Falmouth Nat. Bank v. Cape Cod &c. Co., 166 Mass. 550, 44 N. E. 617.

less the property is preserved by a receiver.[62] In general, it is only an extreme case that will move a court of equity to exercise this extraordinary power because of insolvency,[63] and it must usually appear to be necessary in order to preserve the best interests of all concerned.[64] Insolvency is sometimes, by statute, made a ground for the appointment of a receiver,[65] and in that case, when the fact of insolvency is established, the court grants the application as a matter of course,[66] at least where it also appears that the interest of the applicant requires it.

§ 628 (545). Default in payment of indebtedness as ground for appointment.—Receivers are most frequently appointed over railway property in order to protect mortgagees and bondholders whose securities are a lien upon the road, in case of default in payment of the principal or interest upon obligations thus secured.[67] But default in itself is not necessarily ground for this extraordinary remedy;[68] it must be shown, in addition, that ultimate loss will result to the mortgagees or bondholders if the

[62] Lawrence Iron Works v. Rockbridge Co., 47 Fed. 755; McGeorge v. Big Stone Gap Imp. Co., 57 Fed. 262.

[63] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461.

[64] Stark v. Burke, 5 La. Ann. 740; People v. Northern R. Co., 42 N. Y. 217.

[65] Sewell v. Cape May &c. R. Co., 30 Am. & Eng. R. Cas. 155. The appointment of a receiver or manager under this section is a matter of right whenever the judgment creditor of a railroad corporation is unpaid. Manchester &c. R. Co., In re, L. R. 14 Ch. Div. 645.

[66] Attorney-General v. Bank of Columbia, 1 Paige (N. Y.) 511. See also New York Nat. &c. Bank v. Metropolitan Sav. Bank, 28 Wash. 553, 68 Pac. 905. The facts showing insolvency should be specifically set forth, as a mere general allegation is usually held insufficient. Newfoundland &c. Co. v. Schack, 40 N. J. Eq. 222, 1 Atl. 23; Bank of Florence v. United States &c. Co., 104 Ala. 297, 16 So. 110.

[67] 5 Thomp. Corp. (2nd ed.), 6334.

[68] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694; Morrison v. Buckner, 1 Hempst. (U. S.) 442, Fed. Cas. No. 9844; Tysen v. Wabash &c. R. Co., 8 Biss. (U. S.) 247, Fed. Cas. No. 14315; Williamson v. New Albany R. Co., 1 Biss. (U. S.) 198, Fed. Cas. No. 17753; American &c. Co. v. Toledo &c. R. Co., 29 Fed. 416; Whitehead v. Wooten, 43 Miss. 523.

property is permitted to remain in the hands of the company,[69] or that the right of foreclosure exists and that a receiver is necessary to aid the foreclosure.[70] Even though possession has been refused upon a demand made by trustees under a mortgage after there has been a default in the payment of interest upon bonds secured thereby, a receiver will not be appointed unless it is shown to be necessary in order to prevent loss to the bondholders,[71] and it has been held that a receiver will not be appointed in a case where the default is waived by agreement for extension of time, but the directors afterward disagree and a portion of them rescind the agreement and petition for a receiver.[72] But where, in case of default, there is some other attendant circumstances or condition present which endangers the security of a bondholder, creditor or other party in interest, or where the default is evidence of, or accompanies, some fraudulent or unwise mismanagement by the officers or directors which threatens loss to stockholders or others, a receiver may be appointed, as, for instance, where there has been a default for ten years in the payment of interest on the company's bonds, and the officers refuse to permit an inspection of the company's books by the bondholders,[73] or where trustees fail to take possession of the trust property upon default, as required by the instrument creating the trust, and this without regard to any probable deficiency of the trust property to discharge the debts secured by the deed of trust.[74] Where the mortgage covers the tolls and income of a road and the earnings are diverted, causing default in payment of the mortgage debt, a receiver will

[69] Union Trust Co. v. St. Louis &c. R. Co., 4 Dill. (U. S.) 114, Fed. Cas. No. 14402; Cheever v. Rutland &c. R. Co., 39 Vt. 653.

[70] American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416.

[71] Union Trust Co. v. St. Louis &c. Co., 4 Dill. (U. S.) 114, Fed. Cas. No. 14402; Cheever v. Rutland &c. R. Co., 39 Vt. 653.

[72] American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416.

[73] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461.

[74] Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775; Shaw v. Norfolk Co. R. Co., 5 Gray (Mass.) 162. See Sacramento &c. R. Co. v. Superior Court, 55 Cal. 453; Rice v. St. Paul &c. R. Co., 24 Minn. 464. It has been held that where the deed of trust authorized trustees to take possession upon default, the default itself is sufficient ground for a receiver, without refer-

ordinarily be appointed,[75] whether the default be followed by foreclosure or not. Default in the payment of taxes, the company allowing portions of its property to be sold for such taxes, has been held to be a strong indication of such hopeless insolvency as would justify the appointment of a receiver.[76] A receiver may be appointed before default where insolvency is manifest and it is shown that default is imminent and that the corporation is on the verge of dissolution.[77] So, a receiver was appointed at the suit of the corporation where it appeared that public interest required that the business be uninterrupted and default in payment of interest would have been followed by such a struggle among creditors as would have prevented continuance of the corporate business.[78] As a general rule, however, the plaintiff must first pursue his remedy at law if an adequate remedy is open to him, or if he have a simpler equitable remedy he must pursue that before asking for the extraordinary aid of a receivership; and it has been held that the fact that the right of possession and sale is given to trustees does not change the rule[79] in case possession is refused. In such cases a receiver will ordinarily be denied unless the trustee has first attempted to recover possession by other legal or equitable means available.[80] It is held that the fact that the charter of a corporation specially authorizes the appointment

ence to the inadequacy of the mortgage security. Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221.

[75] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Morrison v. Buckner, 1 Hempst. (U. S.) 442, Fed. Cas. No. 9844; Whitehead v. Wooten, 43 Miss. 523; Ruggles v. Southern Minnesota R. Co., 5 Chic. L. N. 110; Hopkins v. Worcester and Birmingham Canal Proprietors, L. R. 6 Eq. 437; De-Winton v. Brecon, 26 Beav. 533.

[76] Putnam v. Jacksonville &c. Co., 61 Fed. 440.

[77] Brassey v. New York &c. R. Co., 19 Fed. 663, 22 Blatchf. (U. S.) 72; Long Dock Co. v. Mallery, 12 N. J. Eq. 431.

[78] Wabash &c. R. Co. v. Central &c. R. Co., 22 Fed. 138, 272, 23 Fed. 513, 515. See also 5 Thomp. Corp. (2d. ed.) § 6356. But see Hugh v. McRae, Chase 466.

[79] Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706; Dow v. Memphis &c. R. Co., 20 Fed. 260; McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748.

[80] Rice v. St. Paul &c. R. Co., 24 Minn. 464.

of a receiver in a particular contingency does not oust the courts of jurisdiction to appoint one in a proper case.[81]

§ 629 (546). **Appointment in foreclosure proceedings.**—The right to a receiver does not necessarily accompany the right to foreclose;[82] but it is held to exist in foreclosure proceedings where for any reason "the complainant will not be in as good a position at the final decree as at present."[83] In the language of a judge who afterwards became a member of the Supreme Court of the United States, "It should appear that there is some danger to the property; that its protection, its preservation, the interests of the various holders, require possession by the court before a receiver should be appointed. It does not go as a matter of course; and yet it is not a matter that a court can refuse simply because it is an annoyance."[84] Generally, insolvency of the mortgagor, coupled with inadequacy of the mortgage security, is sufficient ground for this relief,[85] and when the interest has long been unpaid and the value of the property is manifestly insufficient, a receiver will usually be appointed.[86] If the entire assets of an insolvent corporation are insufficient to afford security for the payment of the mort-

[81] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Warner v. Rising Fawn Iron Co., 3 Woods (U. S.) 514, Fed. Cas. No. 17188; note 64 Am. Dec. 486; Fripp v. Chard R. Co., 11 Hare 241.

[82] Tysen v. Wabash &c. Co., 8 Biss. (U. S.) 247, Fed. Cas. No. 14315; Williamson v. New Albany &c. R. Co., 1 Biss. (U. S.) 198, Fed. Cas. No. 17753; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 36 Am. & Eng. R. Cas. 259; American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416.

[83] United States Trust Co. v. New York &c. R. Co., 101 N. Y. 478, 5 N. E. 316; Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814; United States Trust Co. v. New York &c. R. Co., 67 How. Prac. (N. Y.) 390; Ruggles v. South Minn. R. Co., 5 Chic. L. N. 110; Kerp v. Michigan &c. R. Co., 6 Chic. L. N. 101.

[84] Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 224, 36 Am. & Eng. R. Cas. 259.

[85] Kelly v. Trustees, 58 Ala. 489; Frelinghuysen v. Colden, 4 Paige Ch. (N. Y.) 204; Astor v. Turner, 2 Barb. (N. Y.) 444; Ruggles v. Southern Minn. R. Co., 5 Chic. L. N. 110; Kerp v. Michigan &c. R. Co., 6 Chic. L. N. 101.

[86] Pullan v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461. See Farmers' Loan &c. Co. v. Winona &c. R. Co., 59 Fed. 957.

gage indebtedness, and the corporation is appropriating its earnings to its own use, a receiver will be appointed pending a suit to foreclose,[87] but where it is clear that upon foreclosure the property will bring enough to pay the debt, interest and costs, the court will usually decline to exercise that power on the ground that there is another adequate remedy.[88] An application was refused on this ground in a case where mortgagees were seeking to foreclose a mortgage executed by authority of the legislature giving the mortgagees the right of possession.[89] The mere disagreement of mortgage creditors in a suit to foreclose is not sufficient ground for the appointment of a receiver, as equity will not interpose except to afford some incidental relief, and will not extend its arm simply to manage the property.[90] Where the mortgage covers the tolls and income of the road, which would otherwise be diverted from payment of the debt, a receiver will be appointed incidental to the foreclosure.[91] So, where a road hopelessly insolvent is about to be foreclosed, and owing to dissensions among bondholders there is no other

[87] Dow v. Memphis &c. R. Co., 20 Fed. 260; Pullam v. Cincinnati &c. R. Co., 4 Biss. (U. S.) 35, Fed. Cas. No. 11461; Cheever v. Rutland &c. R. Co., 39 Vt. 653. See Brassey v. New York &c. R. Co., 19 Fed. 663; Kerp v. Michigan &c. R. Co., 6 Chic. L. N. 101. The court will never appoint a receiver, except where the right and necessity to do so are clear. Dow v. Memphis &c. R. Co., supra Overton v. Memphis &c. R. Co., 10 Fed. 866; Credit Co. v. Arkansas Cent. R., 15 Fed. 46; Texas &c. R. Co. v. Rust, 17 Fed. 275; Sage v. Memphis &c. R. Co., 18 Fed. 571. See ante, § 628.

[88] Shotwell v. Smith, 3 Edw. Ch. (N. Y.) 588; Burlingame v. Parce, 12 Hun (N. Y.) 144. Where a railroad company has sublet a leased line contrary to the provisions of the lease a receiver will not be appointed in a suit by the lessor to enforce a forfeiture of the lease when it appears that the lessor is responsible, and is operating the road. Boston &c. R. v. Boston &c. R., 65 N. H. 393, 25 Atl. 529.

[89] Rice v. St. Paul &c. R. Co., 24 Minn. 464. See also Patten v. Accessory Transit Co., 4 Abb. Prac. (N. Y.) 235; Boston &c. R. Co. v. New York &c. R. Co., 12 R. I. 220.

[90] American Loan &c. Co. v. Toledo &c. R. Co., 29 Fed. 416. But the fact that the company is well managed does not always preclude the appointment of a receiver. Van Benthuysen v. Central &c. R. Co., 63 Hun 627, 17 N. Y. S. 709.

[91] De Winton v. Brecon, 26 Beav. 533; Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No.

way to apply the rents and profits of the road to its debts, an application for a receiver may be granted.[92] And a receiver has been appointed, after decree, at the suit of bondholders entitled to the net income, when, according to statute, the sale must be delayed six months.[93] Where, in a suit to foreclose, the court directs the officers of the corporation to remain in possession, to conduct the business subject to its orders, and to account to the court, it has been held that these officers are thereby constituted receivers of the court.[94]

§ 630 (547). **Other grounds for appointment.**—It is difficult to classify cases in which a receiver will be appointed, for the reason that the grounds and purpose of the relief and the extent to which it may be pursued, lie so largely in the discretion of the court.[95] There is a large number of cases in which receivers have been appointed which do not fall under the classes just discussed. Where there is no person authorized to hold the corporate property, the majority of the stockholders failing to elect directors,[96] or where the corporation has ceased to act and the officers have converted the property to their own use,[97] when the officers, owning a majority of the stock and controlling the road, fail to keep it in repair, thereby endangering the rights of stockholders and rendering the road unproductive,[98]

221. This follows the general doctrine that where the mortgage provides that the mortgagee shall have the rents, default in payment of the debt may be sufficient cause for appointment of a receiver to collect such rents. See Whitehead v. Wooten, 43 Miss. 523; also Central Trust Co. v. Chattanooga &c. R. Co., 94 Fed. 275.

[92] Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 36 Am. & Eng. R. Cas. 259.

[93] Benedict v. St. Joseph &c. R. Co., 19 Fed. 173.

[94] Fifty-four First Mortgage Bonds, In re, 15 S. Car. 304; Brown, Ex parte, 15 S. Car. 518. See Williams, Ex parte, 18 S. Car. 299, as to rights of purchasers in such a case.

[95] See Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221.

[96] Edison v. Edison &c. Co., 52 N. J. Eq. 620, 29 Atl. 195; Lawrence v. Greenwich Fire Ins. Co., 1 Paige (N. Y.) 587; Dobson v. Simonton, 78 N. Car. 63.

[97] Chicago &c. R. Co. v. Cason, 133 Ind. 49, 32 N. E. 827; Conro v. Gray, 4 How. Prac. (N. Y.) 166.

[98] Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487, 491.

or squander or embezzle its assets, with the connivance of the directors;[99] where the directors execute a lease, which works injury to the stockholders, in violation of a by-law forbidding contracts involving the franchises of the road;[1] where purchasers of an assignee in bankruptcy are operating the road for their exclusive benefit and appropriate the income to which the mortgage bondholders are entitled;[2] or where the governing body is so divided by dissension that it cannot conduct the corporate business,[3] it has been held that a receiver may be appointed upon proper application. So, where several railroad companies, tenants in common of the right to pass through a tunnel or to use a railroad station erected for their joint use,[4] are engaged in a dispute as to their respective rights therein, it has been held that the court may appoint a receiver to protect the rights of the injured party, if such rights cannot readily be protected by other means. The dissolution of a corporation by decree of court is cause for the appointment of a statutory receiver in most, if not all, of the states.[5] It has been held that bondholders have a right to have a receiver appointed to complete a road, the construction of which has been stopped on account of lack of funds, when completion by a certain time is the condition of a valuable land grant which constitutes their

[99] Forbes v. Memphis &c. R. Co., 2 Woods (U. S.) 323, Fed. Cas. 4926; Fisher v. Concord R. Co., 50 N. H. 200. See also 8 Thomp. Corp. § 6347. A receiver may be appointed to investigate the validity of sales made by a corporation, during and with knowledge of insolvency. Nichols v. Perry, 11 N. J. Eq. 126.

[1] Stevens v. Davidson, 18 Grat. (Va.) 819, 98 Am. Dec. 692.

[2] Gest v. New Orleans &c. R. Co., 30 La. Ann. 28.

[3] Edison v. Edison &c. Co., 52 N. J. Eq. 620, 29 Atl. 195; Featherstone v. Cooke, L. R. 16 Eq. Cas. 298; Trade Auxiliary Co. v. Vickers, L. R. 16 Eq. Cas. 303.

[4] Delaware &c. R. Co. v. Erie R. Co., 21 N. J. Eq. 298; Russell v. East Anglican R. Co., 3 M. & G. 104; Fripp v. Chard R. Co., 11 Hare 239; Shrewsbury R. Co. v. Chester R. Co., 14 L. T. 217, 433; Midland R. Co. v. Ambergate R. Co., 10 Hare 359.

[5] See Texas Trunk R. Co. v. State, 83 Tex. 1, 18 S. W. 199, holding that a court declaring a forfeiture of the franchise of a railroad company may appoint a receiver to operate the road in such a manner as to subserve the public interests.

principal security.[6] The fact that stockholders of a corporation disobey an injunction restraining them from voting to effect an illegal or unauthorized consolidation, is not a ground for the appointment of a receiver for the corporation, since, in the absence of any authority to consolidate, the original corporation would continue to exist in its integrity, with all its rights of property and franchises unaffected by such acts of the stockholders.[7] Where the application alleges that all the property of the company is mortgaged to one class of creditors; that it owes large amounts to other creditors, one of whom has attached all its property, and that it is proposing to lease its property to him for a long term of years at a rental which is insufficient to pay the interest upon its indebtedness, but there is no allegation that the plaintiff has any lien upon, or any particular right in, any of the property, and there is no showing of any fraud or breach of trust on the part of those who are managing the corporate affairs, a receiver will not be appointed.[8] It has also been held that a receiver will not be appointed at the suit of one who has purchased stock alleged to have been illegally issued, and who claims the right to recover the purchase-price of such stock, when it appears that the money received for the sale of the stock has been mingled with the general funds of the corporation, so that it cannot be traced nor identified.[9] Failure to perform a public duty has been held to be ground for the appointment of a receiver;[10] but the doctrine has not received any general application, and is of doubtful soundness. Indeed, we think it is clearly unsound as ap-

[6] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Kennedy v. St. Paul &c. R. Co., 2 Dillon (U. S.) 448, Fed. Cas. No. 7706.

[7] Railway Co. v. Jewett, 37 Ohio St. 649. Injunction, at the suit of the state, to prevent a corporation from misusing and abusing its corporate franchises and privileges and maintaining its property as a nuisance, though its acts also constitute a crime, may be aided, when necessary, by the more effective remedy of a receiver. Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727, 52 Am. St. 407.

[8] Pond v. Farmingham &c. R. Co., 130 Mass. 194.

[9] Whelpley v. Erie R. Co., 6 Blatchf. (U. S.) 271, Fed. Cas. No. 17504.

[10] Fishback v. Citizens' St. R. Co., Nat. Corp. Rep. (Ind. Super Ct. of

plied to ordinary cases in which there is nothing more than nonfeasance.

§ 631 (548). **Appointment upon application of unsecured creditors.**—Ordinarily the application of unsecured creditors for the appointment of a receiver will be denied on the ground that there is a remedy at law,[11] but when the remedy at law has been found unavailing or is manifestly useless,[12] and the corporation has equitable assets which are not available upon execution,[13] or which are in danger of being dissipated[14] the equitable relief may be invoked; but the general rule, unless otherwise provided by statute, is that a creditor at large, having no lien or judgment can not ordinarily have a receiver appointed, and courts have refused to interfere where the liability had not been liquidated or established,[15] where labor claims existed against several companies operating one road, but their accounts were in confusion, and the distribution of the debt was in doubt, such claims not having been reduced to judgment;[16]

Marion County), March 4, 1892; Long Branch &c. R. Co., In re, 24 N. J. Eq. 398.

[11] Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 523, 17 L. ed. 900; Putnam v. Jacksonville &c. R. Co., 61 Fed. 440; Parmly v. Tenth Ward Bank, 3 Edw. Ch. 395 (417). The case must undoubtedly be exceptional to justify this relief in a suit by a simple creditor. Johnson v. Farnum, 56 Ga. 144; Ballin v. Ferst, 55 Ga. 546; Gregory v. Gregory, 1 J. & S. 1. See note in L. R. A. 1918C, 632 et seq. But see, where the defendant admits insolvency and joins in the prayer. Horn v. Pere Marquette R. Co., 151 Fed. 627.

[12] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694; Conro v. Gray, 4 How. Prac. (N. Y.) 166; State v. Georgia Co., 109 N. C. 310, 13 S. E. 861, 54 Am. & Eng. R. Cas. 299.

[13] Covington Draw Bridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. ed. 38; Wood v. Dummer, 3 Mason (U. S.) 308, Fed. Cas. No. 17944; Ward v. Griswoldville Mfg. Co., 16 Conn. 593; Osborn v. Heyer, 2 Paige (N. Y.) 342; Bloodgood v. Clark, 4 Paige (N. Y.) 574; Palmer v. Clark, 4 Abb. N. Cas. (N. Y.) 25; Bartlett v. Drew, 57 N. Y. 587; Griffith v. Mangam, 73 N. Y. 611; Johnson v. Tucker, 2 Tenn. Ch. 398; Adler v. Milwaukee Mfg. Co., 13 Wis. 57 (63); Curling v. Marquis Townshend, 19 Ves. 628; Furness v. Caterham R. Co., 25 Beav. 614.

[14] Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375.

[15] Putnam v. Jacksonville &c. R. Co., 61 Fed. 440; Cook v. Detroit &c. R. Co., 45 Mich. 453, 8 N. E. 74.

[16] Putnam v. Jacksonville &c. R. Co., 61 Fed. 440.

and in one case, where a receiver was about to be discharged, the court refused to continue him in order to settle claims which were in dispute, and which were comparatively small.[17] Where it appears that an execution issued upon a judgment against the corporation has been returned nulla bona, but that there are equitable assets which cannot be reached by execution a court of equity will appoint a receiver.[18] And even though no execution has been issued in the latter case circumstances may be present which call for the same remedy.[19] An applica-

[17] Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 523, 17 L. ed. 900.

[18] Covington Draw Bridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. ed. 38; Wood v. Dummer, 3 Mason (U. S.) 308, Fed. Cas. No. 17944; Ward v. Griswoldville Mfg. Co., 16 Conn. 593; Palmer v. Clark, 4 Abb. N. Cas. (N. Y.) 25; Bartlett v. Drew, 57 N. Y. 587; Bartlett v. Drew, 57 N. Y. 611; Griffith v. Mangam, 73 N. Y. 611; Adler v. Milwaukee &c. Co., 13 Wis. 57 (63); Furness v. Caterham R. Co., 25 Beav. 614. In Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 458, 6 Sup. Ct. 809, 29 L. ed. 963, the court said: "The co-plaintiffs with Hervey were judgment creditors of the Paris and Decatur Co., with executions returned unsatisfied. The bill set out the precarious condition of all the property held and used by the Illinois Midland Co., and the necessity for a receiver in the interest of all the creditors of all four of the corporations [the Illinois Midland Co., and the three corporations of which it was composed, and whose debts it had assumed] to prevent the levy of executions upon such property; and it prayed for a judicial ascertainment and marshalling of all the debts of all the corporations, and their payment and adjustment as the respective rights and interests of the creditors might appear, and for general relief. The plaintiffs set forth that they represented a majority of the stock in all the corporations. This bill was quite sufficient to enable a court of equity to administer the property and marshal the debts, including those due the mortgage bondholders, making proper parties before adjudging the merits." Courts are sometimes required by statute to make an appointment under such circumstances. Manchester &c. R. Co., In re, L. R. 14 Ch. Div. 645. But it generally rests in the discretion of the court, in view of all the circumstances. Plaintiff alleged that he had recovered a judgment against one of the defendant companies, and that it had transferred its road to the other defendant, that the grantee never operated a road, nor had the grantor any power to make the transfer, which was made for the sole purpose of defrauding plaintiff; and it prayed a receiver. A receiver was appointed. Louisville &c. R. Co. v. Southworth, 38 Ill. App. 225.

[19] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694; Conro v. Gray, 4 How.

tion by a judgment creditor for the appointment of a receiver may be entertained where the bill alleges that the property is so heavily mortgaged that any attempt to enforce the plaintiff's debt by sale on execution would be unavailing, since no bids for more than a nominal amount would be received; while if the property were placed in the hands of a receiver and carefully operated for the transportation of passengers and freight there would be a large surplus each year for the payment of his debt.[20] The equitable aid formerly so frequently invoked to assist creditors at large, grew out of the narrowness of the legal remedy by execution, often useless because it could not reach equitable assets.[21] In many of the code states statutory provision has been made for the appointment of receivers in pro-

Prac. (N. Y.) 166. A tax is a "debt" which the state and county may enforce against a corporation by creditors' bill for the appointment of a receiver. The state and county are not precluded from bringing such a suit because there is a specific remedy for the collection of taxes in the revenue act; nor because the state has the right to have the charter of the corporation declared forfeited when it fails to pay its taxes. State v. Georgia Co., 109 N. Car. 310, 13 S. E. 861, 54 Am. & Eng. R. Cas. 299. See also as to what are debts and who are creditors having a right to receiver under a statute. Summit Silk Co. v. Kinston Spinning Co., 154 N. Car. 421, 70 S. E. 820, Ann. Cas. 1912 A, 897, and note citing cases.

[20] Sage v. Memphis &c. R. Co., 125 U. S. 361, 8 Sup. Ct. 887, 31 L. ed. 694. In announcing the opinion of the court in this case, Mr. Justice Harlan said; "We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as matter of right, to have its property put in the hands of a receiver, merely because of its failure or refusal to pay its debts. Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises. All that we say in this connection is that, under the circumstances presented in this case, the appointment of a receiver was within the power of the court. The order appointing him to operate and manage the property was not a nullity. See also Sage v. Memphis &c. R. Co., 18 Fed. 571, where the receiver was discharged because appointed by collusion.

[21] See Bayard v. Hoffman, 4 Johns Ch. (N. Y.) 450; Galveston &c. R. Co. v. McDonald, 53 Tex. 510.

ceedings supplementary to execution, thus doing away in some cases with the "creditors' bill" of chancery practice, and in addition the statutes have given wider scope to the writ of execution, extending legal relief to many cases where resort to equity was formerly necessary. Thus the instances in which the unsecured creditor has no other remedy are now less numerous than under the English chancery practice and the requirement that a strong, clear case must be made,[23] in connection with the reluctance of the courts to divest such large interests of the corporate management in order to satisfy claims which are generally comparatively small,[24] has resulted in a very rare and sparing exercise of this power of the court of equity in aid of the unsecured creditor of a railway corporation, although the appointment of a statutory receiver of the effects of a judgment debtor, on supplementary proceedings, is very frequent.[25]

§ 632 (549). **Appointment upon application of secured creditors.**—It is to preserve the security of the mortgagee or bondholder that the control of the property and business of railway corporations is most often assumed by a court of equity.[26] Besides being available in connection with foreclosure[27] the remedy of a receivership is often employed at the suit of mortgagees or bondholders in cases of default,[28] insolvency,[29] fraud or mismanagement by officers, or the commission or some other act that endangers the mortgage security.[30] Exigencies may

[23] 8 Thomp. Corp., § 6345.

[24] Milwaukee &c. Co. v. Soutter, 2 Wall. (U. S.) 510, 523, 17 L. ed. 900. Under N. Y. statute receiver will not be appointed at suit of a creditor at large. Lehigh &c. Co. v. Central R. of N. J., 43 Hun (N. Y.) 546.

[25] Flint v. Webb, 25 Minn. 263; Coates v. Wilkes, 92 N. Car. 376; Heroy v. Gibson, 10 Bosw. (N. Y.) 591. As to when an unsecured creditor who has not reduced his claim to judgment may have a receiver appointed see Summit Silk Co. v. Kinston Spinning Co., 154 N. Car. 421, 70 S. E. 820, Ann. Cas. 1912 A, 897, and cases cited in note citing cases showing the existence of the right under some statutes and the contrary rule in the absence of statute.

[26] Ante, § 628, and cases cited. But see Atlanta &c. R. Co. v. Carolina Portland Cement Co., 140 Ga. 650, 79 S. E. 555.

[27] See ante, § 629.

[28] See ante, § 628.

[29] See ante, § 626.

[30] See ante, § 630.

arise to threaten the destruction or depreciate the value of the property which would not justify foreclosure and which might, before cause for foreclosure could accrue, materially impair the petitioner's security[31] and equity many times intervenes with a receiver in such cases; or in cases where the mortgage covers the tolls and income of the road, they may be so diverted as to give cause for the appointment of a receiver.[32] Where bonds are secured by a deed of trust in the nature of a mortgage, it is frequently provided that the mortgagee or trustee may take possession upon default. In that case, if the trustees, being denied possession, have a remedy at law or an ordinary remedy in equity to obtain possession, they must, as a rule, first pursue such remedy before a receiver will be appointed[33] unless such remedy be manifestly useless[34] or such a condition exist as would make a receiver necessary immediately after possession should be acquired.[35] Where there is a trust deed in the nature of a mortgage, the trustee must first have failed, refused or neglected to perform his duty under the trust deed before the individual bondholder can himself petition for a receiver, to act instead of the trustee, or in conjunction with him, but where the trustee has failed to do his duty the bondholder may invoke the aid of a receiver.[36] And it has been held that when

[31] Whelpley v. Erie R. Co., 6 Blatch. (U. S.) 271, Fed. Cas. No. 17504; Kennedy v. St. Paul &c. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706; American L. & T. Co. v. Toledo &c. R. Co., 29 Fed. 416, 417; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221; Pennsylvania Co. &c. v. Jacksonville &c. R. Co., 55 Fed. 131; Long Dock Co. v. Mallery, 12 N. J. Eq. 431; Brassey v. New York &c. R. Co., 19 Fed. 663, 17 Am. & Eng. R. Cas. 285.

[32] Tysen v. Wabash R. Co., 8 Biss. (U. S.) 247, Fed. Cas. No. 14315; Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, 326, Fed. Cas. No. 221; Dumville v. Ashbrooke, 3 Russ, 99 note *; Hopkins v. Worcester &c. Proprietors, L. R. 6 Eq. 437; Ruggles v. Southern Minn. R. Co., 5 Chic. L. N. 110.

[33] Rice v. St. Paul &c. R. Co., 24 Minn. 464.

[34] Imperial Mercantile Credit Assn. v. Newry &c. R. Co., Ir. Rep. 2 Eq. 1.

[35] Allen v. Dallas &c. R. Co., 3 Woods (U. S.) 316, Fed. Cas. No. 221; Crewe v. Edleston, 1 DeG. & J. 93, 109 per Lord Justice Turner.

[36] Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas.

the trustee, on being applied to in pursuance of the terms of the trust, refuses to sue, the bondholders may themselves sue, but must make the trustee, the corporation and all other bondholders parties.[37] If one or more bondholders have a right to institute proceedings they necessarily act for all standing in a similar position and cannot secure individual relief at the expense of others holding the same security;[38] and it has been held that where the sufficiency of the security is doubtful all other creditors similarly situated must have notice in order that they may protect their interests.[39] The rule laid down by Lord Eldon in the leading English case has been followed in some states as the fundamental law concerning the right of a junior mortgagee to invoke the appointment of a receiver, but it is based upon the common-law theory of the mortgage. This rule is to the effect that while the first mortgagee is in possession and any portion of the mortgage debt remains unpaid,[40] the junior mortgagee can only secure the appointment of a receiver by paying off the balance of the first mortgage or offering to pay such claim, and in the general application of the rule it has been held that where the elder mortgagee has not asserted his right to possession or to the rents and income the junior mortgagee has a right to do so;[41] but a receivership on the application of the junior mortgagee will not operate to de-

No. 17775; Sacramento &c. R. Co. v. Superior Ct., 55 Cal. 453; Shaw v. Norfolk &c. R. Co., 5 Gray (Mass.) 162; Rice v. St. Paul &c. R. Co., 24 Minn. 464.

[37] Commonwealth v. Susquehanna &c. R. Co., 122 Pa. St. 306, 15 Atl. 448, 1 L. R. A. 225.

[38] Jackson v. Ludeling, 21 Wall. (U. S.) 616, 22 L. ed. 492; Vose v. Bronson, 6 Wall (U. S.) 452, 18 L. ed. 846; Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199; New Orleans &c. R. Co. v. Parker, 143 U. S. 42, 58, 12 Sup. Ct. 364; 36 L. ed. 66; Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 523, Fed. Cas. No. 13297.

[39] Railway Co. v. Orr, 18 Wall. (U. S.) 471, 21 L. ed. 810. See Overton v. Memphis &c. R. Co., 10 Fed. 866; Pennock v. Coe, 23 How. (N. Y.) 117.

[40] Berney v. Sewell, 1 Jac. & W. 627.

[41] Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Ranney v. Peyser, 83 N. Y. 1; Howell v. Ripley, 10 Paige (N. Y.) 43.

feat the priority or the rights of the elder mortgagee,[42] except that in some cases it is held that his right of election to take possession is defeated,[43] the court having taken possession for all parties. The stringency of this rule has been relaxed in many of the states, in the federal courts and even in rare English cases, and where a clear case is made showing that the mortgagee in possession is irresponsible, is committing waste or material injury, endangering the security, or is fraudulently or carelessly mismanaging the property so as to impair the junior mortgage, a receiver may be appointed at the suit of the junior mortgagee.[44] As we have seen, if the senior mortgagee be in possession and conduct the business so as to imperil the second mortgage security a receiver may be appointed, or if he have the right, by the terms of his mortgage, to take possession and refuses or neglects to do so, the junior mortgagee may sometimes invoke the aid of a receiver to secure the rents and profits. So, also, in cases where the mortgagor retains possession, the junior mortgagee may sometimes invoke the remedy to insure the proper management of the property and to compel the proper application of the revenues. It has been held that at the petition of the junior mortgagee a receiver may be directed to borrow money in order to pay the interest on first mortgage bonds where default would precipitate foreclosure

[42] Cortleyue v. Hathaway, 11 N. J. Eq. 42, 64 Am. Dec. 478; Berney v. Sewell, 1 Jac. & W. 627.

[43] Beverly v. Brooke, 4 Grat. (Va.) 187. Lord Eldon, in Berney v. Sewell, 1 Jac. & W. 627, held that the appointment of a receiver at the application of a junior mortgagee could not prejudice the right of the elder mortgagee to take possession at any time and thus dispossess the receiver. It seems, however, that this doctrine has yielded in Virginia to the generally accepted theory that a receiver, as an officer of the court, takes possession for all parties in interest and holds such possession until his function is discharged.

[44] Corcoran v. Doll, 35 Cal. 476; Williams v. Robinson, 16 Conn. 517; Bolles v. Duff, 35 How. Prac. (N. Y.) 481; Boston &c. R. Co. v. New York &c. R. Co., 12 R. I. 220; Beverly v. Brooks, 4 Grat. (Va.) 187; Meaden v. Sealey, 6 Hare 620; Codrington v. Parker, 16 Ves. 469; Lloyd v. Passingham, 16 Ves. 59; Huguenin v. Baseley, 13 Ves. 105; Rowe v. Wood, 2 Jac. & W. 553.

and prove disastrous to the second mortgage security[45] and a receiver has been appointed on the application of a junior mortgagee to operate a road and apply the revenues where lack of harmony existed in the management, and without the rents and profits the security was wholly inadequate, and where, under the existing management, the junior mortgagee might be postponed indefinitely.[46] The interference of the court under such circumstances rests upon the ground of necessity to compel a proper application of the revenues, and prevent dissipation of the property.[47] In case the mortgage security is inadequate, the debtor insolvent, and the property about to be sold for taxes, it has been held that a junior mortgagee, whose debt is not due, may, pending foreclosure, have an interlocutory order appointing a receiver to collect rents.[48]

§ 633 (550). Appointment upon application of stockholders.—As a general rule a receiver will not be appointed upon the application of a stockholder, because of mismanagement or internal dissensions, until after he has applied to the directors and officers of the corporation, and, in some cases, to the other stockholders.[49]

[45] Lloyd v. Chesapeake &c. R. Co., 65 Fed. 351.

[46] Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, 1 L. R. A. 397.

[47] Hiles v. Moore, 15 Beav. 175; Bryan v. Cormick, 1 Cox. 422.

[48] Buchanan v. Berkshire &c. Co., 96 Ind. 510, 531.

[49] Hawes v. Oakland, 104 U. S. 450, 26 L. ed. 827; Converse v. Dimock, 22 Fed. 573; Hand v. Dexter, 41 Ga. 454; Pond v. Framingham &c. R. Co., 130 Mass. 194; Rathbone v. Parkersburg &c. Co., 31 W. Va. 798, 8 S. E. 570; Strong v. McCagg, 55 Wis. 624, 13 N. W. 895. See also Hardee v. Sunset Oil Co., 56 Fed. 51; Roman v. Woolfolk, 98 Ala. 219, 13 So. 212; Wheeler v. Pullman &c. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; Fluker v. Emporia City R. Co., 48 Kans. 577, 30 Pac. 18. See also 5 Thomp. Corp. (2nd ed.) § 6347; Feess v. Mechanic's State Bank, 84 Kans. 828, 115 Pac. 563, L. R. A. 1915A, 606, and other cases there cited in note. There may be such dissensions in the management and such a deadlock as to vitally interfere with or even prevent business and jeopardize the corporation and rights of stockholders and others, and in such a case a stockholder may obtain a receiver. Boyle v. Superior Court, 176 Cal. 671, 170 Pac. 1140, L. R. A. 1918 D, 226, and authorities there cited in opinion and reviewed in note.

But, as we have already seen,[50] where the directors and persons in charge are fraudulently depriving the minority stockholders of their rights, dissipating the property and the like, so that it would be useless to apply to them for relief, and especially if they have already brought about a state of insolvency, a receiver may generally be appointed on the application of stockholders.[51] So, where a controlling interest in the stock of one railroad company was purchased by another, which thus secured the election of a board of trustees consisting of its own officers and employes, and such board then executed an illegal traffic agreement or lease whereby the entire control of the franchises and property of the former company was surrendered to the latter, it was held that minority stockholders of the former could maintain a bill to annul such agreement without first applying to the board of trustees for relief, and the court appointed a receiver upon their application, which also showed that the company, as managed by the company owning the majority of its shares, could not pay operating expenses and was wholly insolvent.[52] But a receiver will not be appointed upon the application of a

[50] Ante, §§ 626, 630.

[51] Towle v. American &c. Soc., 60 Fed. 131; Albert v. State, 65 Ind. 413; Wayne Pike Co. v. Hammons, 129 Ind. 368, 27 N. E. 487; Lewis, In re, 52 Kans. 660, 35 Pac. 287; Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 72 Am. St. 427; Du Puy v. Transportation &c. Co., 82 Md. 408, 33 Atl. 889, 34 Atl. 910; Miner v. Belle Isle &c. Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; State v. Second Judicial Dist. Ct., 15 Mont. 324, 39 Pac. 316, 27 L. R. A. 392, 48 Am. St. 682; Porter v. Industrial &c. Co., 5 Misc. 262, 25 N. Y. S. 328; Conro v. Gray, 4 How. Prac. (N. Y.) 166; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 28 N. W. 184; Featherstone v. Cooke, L. R. 16 Eq. 298; Hall v. Astoria &c. Co., 5 R. & Corp. L. J. 412. See 5 Thomp. Corp. (2nd. ed.), § 6347. See also Culver Lumber Co. v. Culver, 81 Ark. 102, 99 S. W. 391, 18 Am. St. 17. Several of these decisions are based on statutory provisions, but the others seem to have been decided on general principles of equity.

[52] Earle v. Seattle &c. R. Co., 56 Fed. 909. See also Evans v. Union Pac. R. Co., 58 Fed. 497; Stevens v. Davison, 18 Grat. (Va.) 819, 98 Am. Dec. 692. But compare Wallace v. Pierce-Wallace Pub. Co., 101 Iowa 313, 70 N. W. 216, 38 L. R. A. 122, 63 Am. St. 389. In Putnam v. Ruch, 54 Fed. 216, a receiver was appointed upon the application of a stockholder because the charter had been repealed.

stockholder acting in the interest of persons hostile to the company;[53] and mere insolvency is generally insufficient to authorize the appointment of a receiver at the instance of a stockholder, in the absence of any statutory provision upon the subject.[54] In many of the states, however, there are statutory provisions authorizing the appointment of a receiver, in certain cases, at the suit of a stockholder.[55] A former shareholder is not entitled to a receiver, upon the ground of mismanagement by the officers and directors, after he has parted with all his interest in the corporation and its effects,[56] and in no case in which a stockholder seeks the appointment of a receiver upon the ground of a breach of trust or mismanagement by those in control will the court appoint a receiver if he has participated or acquiesced for a long time therein.[57]

§ 634 (551). Appointment upon application of corporation.—A receiver may be appointed, in a proper case, in many jurisdictions at least, upon the application of the company itself. Thus, it has been held that a receiver may be appointed upon the application of a railroad company where it is shown that the company is hopelessly insolvent, that its property is likely to be seized by different courts and scattered abroad, its assets dissipated and its system disrupted and broken up into fragments to the irreparable injury and damage of all persons having an interest in the road.[58] It is said, however, that the court,

[53] Belmont v. Erie R. Co., 52 Barb. (N. Y.) 637.

[54] Merryman v. Carroll &c. Co., 4 Railw. & Corp. L. J. 12; ante, § 626. But see Cole v. Philadelphia &c. R. Co., 140 Fed. 944.

[55] See Supreme Sitting &c. v. Baker, 135 Ind. 293, 33 N. E. 1128, 20 L. R. A. 210, and note, where the statutes are referred to and the authorities reviewed.

[56] Smith v. Wells, 20 How. Prac. (N. Y.) 158. See also Dimpfell v. Ohio &c. R. Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. ed. 121.

[57] Hood v. First Nat. Bank, 29 Fed. 55; Hyde Park &c. Co. v. Kerber, 5 Bradw. (Ill.) 132; Hager v. Stevens, 6 N. J. Eq. 374; Downing v. Dunlap &c. R. Co., 93 Tenn. 221, 24 S. W. 122; Gray v. Chaplin, 2 Russ. 126.

[58] Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. ed. 632; Brassey v. New York &c. R. Co., 19 Fed. 663; Wabash &c. R. Co. v. Central T. Co., 22 Fed. 272; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 618, 623; Saxon v. Southwestern Brick

in such a case, cannot displace vested liens, but must require the property to be held and preserved by the receiver for the benefit of all concerned, as their interests may appear.[59] It undoubtedly requires a very strong showing to justify the appointment of a receiver upon the application of the corporation, but we think there are cases in which the court has the power to make the appointment, and is justified in exercising it. There are decisions, however, which seem to hold that a receiver can never be appointed upon the application of the corporation. In one of them it is said that a statutory provision that no receiver of a corporation shall ever be appointed upon its own petition is but a legislative declaration of the rule recognized by courts of equity.[60] In another case it is said: "That a court of equity has no inherent power, except in some few cases of particular jurisdiction, to appoint a receiver, except as an incident to and in a suit pending, has hitherto, with the exception of the Wabash case,[61] been a universally accepted doctrine; and outside of that case the doctrine that a court of equity, without statutory authority, has jurisdiction, upon the application of an insolvent corporation, to take charge and administer its affairs through a receiver, not only has no support, but whenever suggested has been repudiated."[62] It is doubtless the general rule that there must ordinarily be a pending suit, and that a corpo-

&c. Co., 113 La. Ann. 637, 37 So. 540.

[59] Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. ed. 632.

[60] Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52, citing Robinson v. Hadley, 11 Beav. 614; Leddel v. Starr, 19 N. J. Eq. 159; Marr v. Littlewood, 2 Myl. & Cr. 455. See also Kimball v. Goodburn, 32 Mich. 10. In another case the same court suggests that the directors, as trustees for stockholders and creditors, would be the proper parties to institute the suit. McIlhenny v. Binz, 80 Tex. 1, 13 S. W. 655, 26 Am. St. 705.

[61] Wabash &c. R. Co. v. Central T. Co., 22 Fed. 269, and Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 618. These cases, which we have already cited, go further, perhaps, than the others heretofore cited in the same connection, and are criticized in one of the Texas cases cited in the preceding note, as well as in the case now under consideration.

[62] State v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534. Citing

ration cannot have a receiver appointed on its ex parte application alone, and it may be true that the "Wabash Case," in so far as it seems to authorize the appointment of a receiver, in the absence of a pending suit, violates the general rule, but it is said that there is no rule without exceptions, and, in any event, we think that where a suit is pending, as, for instance, where all interested persons are made parties and the company asks other relief in addition to the appointment of a receiver, the facts may be such and the emergency so great as to require the appointment upon the application of the company.[63]

§ 635 (552). **What court may appoint.**—The power of appointing a receiver is generally exercised only by courts having original jurisdiction.[64] But where an appellate court has jurisdiction of the suit by appeal, and of the parties, it may appoint a receiver of the property in controversy pending the appeal, if necessary in order to protect its appellate jurisdiction, or to make its decree effective.[65] And it has been held that where a mortgage is foreclosed and an appeal taken from the decree

Jones v. Leadville, 10 Colo. 464, 17 Pac. 272; Hugh v. McRea, Chase, (U. S.) 466, Fed. Cas. No. 6840; Neall v. Hill, 16 Cal. 145, 76 Am. Dec. 508; French Bank Case, 53 Cal. 495; Smith v. Los Angeles Super. Ct., 97 Cal. 348, 32 Pac. 322; French v. Gifford, 30 Iowa 143; People v. St. Clair Circuit Judge, 31 Mich. 456; Kimball v. Goodburn, 32 Mich. 10; Whitehead v. Wooten, 43 Miss. 523; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Whitfield, Ex parte, 2 Atk. 315, 330. See also Vila v. Grand Island &c. Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. 400.

63 See Dickerman v. Northern T. Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. ed. 423; Park v. New York &c. R. Co., 70 Fed. 641. Directors acting in good faith, with approval of a majority of the stockholders may initiate receivership proceedings by a friendly suit on the part of a bona fide creditor. Intercontinental Rubber Co. v. Boston &c. R. Co., 245 Fed. 122.

64 Pacific R. Co. v. Ketchum, 95 U. S. 1, 24 L. ed. 347.

65 West v. Weaver, 3 Heisk. (Tenn.) 589. See Kerr v. White, 7 Baxt. (Tenn.) 394. For a case where, under the circumstances, the Supreme Court of the United States declined to appoint a receiver, but without denying its jurisdiction to do so, see Pacific

of foreclosure, the suit may be considered as still pending for the purpose of an application for a receiver of the rents and profits, and that the court that rendered the decree is the proper court to hear and determine the application.[66] The general rule is that an appeal removes the entire case, or so much as is appealed to the appellate court, but there may be collateral or independent matters, distinct from the questions involved in the appeal, which are not taken from the jurisdiction of the trial court.[67] Owing to the fact that all long lines of railroad pass through many counties, and frequently through several states, and that the immediate jurisdiction of a circuit court of the United States is usually more extensive than that of the local courts, and because it is desirable to have the receiverships of the various parts of a railroad controlled by courts which administer a uniform system of laws and are governed by the same rules when sitting as courts of equity, applications for the appointment of receivers for railroad corporations are usually made to the federal courts. These courts are controlled by the principles of equity as developed in the high court of chancery of England, which principles, indeed, are followed in the interpretation and construction of the various statutes that have been enacted to regulate the appointment of receivers.[68] In the states in which courts of law and courts of equity remain distinct, the power to appoint receivers is usually in the courts of chancery, while in the code states it is usually in the courts of general jurisdiction having both law and equity jurisdiction. The particular court having jurisdiction to appoint a statutory receiver of a corporation for insolvency, non-user or abuse of its

R. Co. v. Ketchum, 95 U. S. 1, 24 L. ed. 347; Pacific R. Co. v. Missouri Pacific R. Co., 15 Am. Rep. 80; Allen v. Harris, 4 Lea (Tenn.) 190.

[66] Brinkman v. Ritzinger, 82 Ind. 358. See also Penn Mut. Ins. Co. v. Semple, 38 N. J. Eq. 314; Beard v. Arbuckle, 19 W. Va. 145; Grantham v. Lucas, 15 W. Va. 425, 431; Lottimer v. Lord, 4 E. D. Smith (N. Y.) 183. But compare Havemeyer v. Superior Court, 84 Cal. 327, 24 Pac. 121. 10 L. R. A. 627, 18 Am. St. 192.

[67] Elliott App. Proc., §§ 541-546.

[68] It has been held that the federal courts will follow the supreme court of the state in its interpretation of a state statute, but that the Texas statute does not apply to receivers of a fed-

corporate rights, or any other cause leading to its dissolution, is generally determined by the statutory law in the several states having statutes upon this subject.[69] It was formerly the practice, in many cases, to refer the matter to a master to select the receiver, but this practice is seldom resorted to at the present time, and, in most jurisdictions, the appointment must be made by the court. A court commissioner, it has been held, has no jurisdiction to appoint a receiver.[71] Where a suit is pending in a federal court for the foreclosure of a railroad mortgage and the appointment of a receiver, it will take jurisdiction of another bill filed by lienholders, without regard to the citizenship of the parties, on the ground that their right to enforce their liens in the state court will be cut off when the federal court takes possession of the property, and hence their suit may be regarded as an ancillary suit.[72]

§ 636 (553). Court first obtaining jurisdiction retains it—Conflict of jurisdiction.—The court which first acquires jurisdiction of an action for the appointment of a receiver will retain it to the end of the litigation, to the exclusion of other courts of coordinate jurisdiction.[73] One court will not attempt, by a writ

eral court. Guaranty Trust Co. v. Galveston City R. Co., 107 Fed. 311.

[69] It is held to be a question of local law and its determination by the highest court of the state is usually followed by the federal courts. McKinney v. Kansas Nat. Gas Co., 206 Fed. 772.

[71] Quiggle v. Trumbo, 56 Cal. 626.

[72] Central Trust Co. v. Bridges, 57 Fed. 753. See also Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. ed. 145; Conwell v. White Water Canal Co., 4 Biss. (U. S.) 195, Fed. Cas. No. 3148; Pacific R. Co. v. Missouri Pac. R. Co., 1 McCrary 647, 3 Fed. 772.

[73] Gaylord v. Fort Wayne &c. R. Co., 6 Biss. (U. S.) 286, Fed. Cas. No. 5284; Bill v. New Albany &c. R. Co., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407; Judd v. Bankers &c. Co., 31 Fed. 182; Ohio &c. R. Co. v. Fitch, 20 Ind. 498; Stearns v. Stearns, 16 Mass. 167; McCarthy v. Peake, 18 How. Prac. 138, 9 Abb. Prac. (N. Y.) 164; O'Mahony v. Belmont, 37 N. Y. Super. Ct. 380; Pugh v. Brown, 19 Ohio 202, 211; Riesner v. Gulf &c. R. Co., 89 Tex. 656, 36 S. W. 53, 33 L. R. A. 171, 59 Am. St. 84; 5 Thomp. Corp. (2nd ed.), § 6331. This rule applies in general as between state and federal courts as well as between different state or federal courts. Lewis v. American Naval Stores Co., 119 Fed. 391; Knott v. Evening Post Co.,

of mandamus, to control the action of receivers appointed by another court.[74] A state court will refuse to entertain a suit to foreclose against property in the hands of a federal court,[75] and a federal court will not entertain a bill to compel an accounting by a receiver who is acting under the order of a state court by which he was appointed.[76] Nor will a federal court enjoin a receiver in possession of a railroad under the appointment of a state court from issuing receiver's certificates, or restrain the parties from carrying out an agreement sanctioned by the state court.[77] But the pendency of an action in a state court to set aside an assignment as fraudulent and have a receiver appointed has been held to be no bar to creditors' bill in a federal court by parties not before the state court.[78] Where a receiver has been regularly appointed and has obtained possession of the property, he cannot be interfered with by the officers of another court in which a second suit has been begun.[79] Indeed it would seem to be the better law that it is not necessary that the court which first takes jurisdiction of the case, shall also first take, by its officers, actual possession of the property in controversy, and

124 Fed. 342; Milwaukee &c. R. Co. v. Milwaukee &c. Co., 20 Wis. 174, 88 Am. Dec. 740.

74 State v. Marietta &c. R. Co., 35 Ohio St. 154. See also Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. ed. 660.

75 Milwaukee &c. R. Co. v. Milwaukee &c. R. Co., 20 Wis. 165 (174), 88 Am. Dec. 735. See also State v. Miller, 54 Kans. 244, 38 Pac. 269. But compare Attorney-General, In re, 113 Wis. 623, 88 N. W. 912.

76 Conkling v. Butler, 4 Biss. (U. S.) 22, Fed. Cas. No. 3100.

77 Reinach v. Atlantic &c. R. Co., 58 Fed. 33. See generally as to when federal court will not interfere with or displace receiver appointed by state court, Lancaster v. Asheville St. R. Co., 90 Fed. 129; Central Trust Co. v. South Atlantic &c. R. Co., 57 Fed. 3; Davis v. Railroad Co., 1 Woods (U. S.) 661, Fed. Cas. No. 3648; Wood v. Oregon &c. Co., 55 Fed. 901.

78 Rejall v. Greenhood, 60 Fed. 784. But see Central Trust Co. v. South Atlantic &c. R. Co., 57 Fed. 3.

79 Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775; Young v. Montgomery &c. R. Co., 2 Woods (U. S.) 606; Fed. Cas. No. 18166; Fort Wayne &c. R. Co. v. Mellett, 92 Ind. 535; O'Mahony v. Belmont, 5 J. & S. (N. Y.) 380. Property in the hands of a receiver of a state court can not be levied upon by the United States marshal in behalf of a judgment creditor. Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. ed. 322.

that it is sufficient that it shall have jurisdiction of the subject-matter and of the parties, and that its aid shall have been regularly invoked.[80] The fact that an action covering substantially the same issues is begun in a state court after the filing of a bill against a railroad company in the United States Circuit Court in which the appointment of a receiver is asked for, but before an appointment is made, and that the state court proceeds to appoint a receiver and to put him in possession of the property, will not affect the jurisdiction of the circuit court; but it will proceed in due course to appoint a receiver, if occasion for such

[80] Adams v. Mercantile Trust Co., 66 Fed. 617; Illinois Steel Co. v. Putnam, 68 Fed. 515; Sedgwick v. Menck, 6 Blatch. (U. S.) 156, Fed. Cas. No. 12616; Union Trust Co. v. Rockford &c. R. Co., 6 Biss. (U. S.) 197, per Blodgett, J., Fed. Cas. No. 14401; May v. Printup, 59 Ga. 128; Kerp v. Michigan &c. R. Co., 6 Chicago Leg. News 101. But see Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981. In Texas it is held that on an appeal from an order of a state court appointing a receiver of a railroad, where it appears that the federal court had already appointed a receiver for such road, but it does not appear when the suit in which he was appointed was instituted, the order of the state court will not be disturbed. Texas Trunk R. Co. v. State, 83 Tex. 1, 18 S. W. 199; Wilmer v. Atlanta &c. Co., 2 Woods 409 (U. S.), Fed. Cas. No. 17775. In New York, under the code, the court has jurisdiction of a cause and all the subsequent proceedings from the time process is served or a provisional remedy is allowed, and a second court will decline to take jurisdiction or appoint a receiver where the first court has granted an injunction. McCarthy v. Peake, 18 How. Pr. 138. In Gaylord v. Fort Wayne &c. R. Co., 6 Biss. (U. S.) 286, Fed. Cas. No. 5284, Drummond, J., says: "The principle upon this subject is properly stated in the opinion of the circuit court of the northern district of Illinois, in the case of the U. T. Co. v. Rockford R. Co., reported in 7 Chicago Legal News 33, that the court which first takes cognizance of the controversy is entitled to retain jurisdiction to the end of the litigation, and incidentally to take the possession or control of the res, the subject-matter of the controversy, to the exclusion of all interference from other courts of concurrent jurisdiction, and that the proper application of this principle does not require that the court which first takes jurisdiction of the controversy shall also first take the actual possession of the thing in controversy."

action is shown, and will assert its jurisdiction.[81] And it is even held that after the technical but not necessarily final dismissal of a suit in the federal court, a suit in a state court for the appointment of a receiver will not supersede the jurisdiction of the federal court as to any further matters connected with the receivership in that court.[82] It has been held, however, that when the second suit relates to a different cause of action, this rule does not apply, although the thing which the litigation concerns is the same in both cases, and that, in such a case, priority of possession determines the priority of right to hold the property.[83] Where a receiver appointed by a state court in a suit between the railroad company and a judgment creditor was in actual possession, it was held that the United States Circuit Court had no jurisdiction to compel such receiver to surrender

[81] Memphis v. Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326; Jones Corp. Bonds, § 463. In Bill v. New Albany &c. R. Co., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407, it was held that such action on the part of the state court would, if justice required it, be treated as an interference, and the federal court would refuse to recognize a decree of foreclosure rendered in the state court in an action brought after suit was begun in the federal court, but before final adjudication.

[82] Union Trust Co. v. Rockford &c. R. Co., 6 Biss. (U. S.) 197, Fed. Cas. No. 14401.

[83] Memphis v. Dean, 8 Wall. (U. S.) 64, 19 L. ed. 326. In Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Woods, J., Fed. Cas. No. 17775, in taking the opposite view, says: "It is well settled that realty out of the state may be reached by acting on the person. Mitchell v. Bunch, 2 Paige Ch. (N. Y.) 606, 22 Am. Dec. 669; Ramsey v. Brailsford, 2 Des. (S. Car.) 582, note 2 Am. Dec. 698. In the case in Paige it was held that if the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property situated without such jurisdiction. When the property is situated outside of the territorial jurisdiction of the court, the court may require assignments to be made by the defendant to the receiver. * * * Especial attention is called to the cases of Wiswall v. Sampson, 14 How. (N. Y.) 52; Chittenden v. Brewster, 2 Wall. (N. S.) 191, 17 L. ed. 839; Bill v. The New Albany R. Co., 2 Biss. (U. S.) 390, Fed. Cas. No. 1407. An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction of the court in a case where the possession of the property is necessary to the relief sought.

possession to a receiver appointed by it in a suit between the mortgage creditors and the company, instituted before the suit in the state court was begun.[84] The soundness of this decision

The commencement of the action and service of process, or, according to some of the cases, the simple commencement of the suit by the filing of the bill, is sufficient to give the court jurisdiction to the exclusion of all other courts. * * * If this court, upon the bill filed in this case, has the power to take possession of the entire property granted by the trust deed, as we have already decided it has, then the filing of the bill asking this court to take possession of and administer the trust property, and the service of process excluded the jurisdiction of all other courts to take possession of, and administer the same property or any part thereof." But see opinion of Bradley, J., in next note.

[84] Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, 425, Fed. Cas. No. 17775, per Mr. Justice Bradley. In refusing a writ of assistance to put the receiver appointed by Judge Woods of the federal court in possession of the property, Mr. Justice Bradley said: "It is too well settled to admit of controversy that where two courts have concurrent jurisdiction of a subject of controversy the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suit are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases. * * * The controversy not being the same nor the parties the same, there is no conflict as to the question or cause. But * * * there has arisen a conflict of jurisdiction as to the thing or subject-matter. * * * The test, I think, is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or, having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close and judicial possession has ceased. Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction. The alleged collusion and fraud of the parties can not alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We can not take

has many times been questioned,[85] although it has received recognition in some jurisdictions.[86] It has been held, however,

the property out of its hands unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied." See also Barton v. Keyes, 1 Flip. (U. S.) 61; Covell v. Heyman, 111 U. S. 176, 3 Sup. Ct. 355, 28 L. ed. 390; Heidritter v. Oilcloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; Walker v. Flint, 7 Fed. 435; Erwin v. Lowry, 7 How. (U. S.) 172, 12 L. ed. 655; Levi v. Columbia &c. Ins. Co., 1 Fed. 206; Griswold v. Central &c. R. Co., 9 Fed. 797.

[85] See May v. Printup, 59 Ga. 128, where it was held that the filing of a bill is sufficient to give jurisdiction of the thing in controversy, in a case where the only recovery can be out of the property; and that a state court which takes possession of a railroad pending an application to the United States Circuit Court for the appointment of a receiver should surrender such possession when it is shown that the suit in the state court was filed by collusion of the parties after the suit in the federal court was begun. In Adams v. Mercantile Trust Co., 66 Fed. 617, Pardee, J., says, concerning the opposing views of Judge Woods and Mr. Justice Bradley, Wilmer v. Atlanta &c. Co., supra: "The views expressed by Judge Woods have been accepted and followed in this circuit, at least, and we fully concur therein, as a correct exposition of the law, and one particularly applicable to the present case; while the decision of Mr. Justice Bradley, doubted by himself, is open to the objection that thereby jurisdiction is frequently made to depend upon a race between marshals and sheriffs, likely to result in unseemly controversies between the state and federal courts." In Illinois Steel Co. v. Putnam, 68 Fed. 515, 517, McCormick, J., says: "Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, * * * and the possession and control of the property, are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be in gremio legis. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property."

[86] East Tenn. &c. R. Co. v. Atlanta &c. R. Co., 49 Fed. 608; Merchants' &c. Bank v. Trustees, 63 Ga. 549.

that the general rule that the court which first takes cognizance of a suit has the exclusive right to decide every question arising therein, is subject to limitations, that it is only when property is in possession of the court, either actually or constructively that it can be protected from the process of other courts,[87] and that other courts may take any action which does not amount to an interference with the possession of the first court acquiring jurisdiction.[88] So, in a comparatively recent case,[89] it was held that the fact that a prior suit for foreclosure was pending in the state court, with no immediate purpose to ask for a receiver, did not prevent the federal court from taking jurisdiction and appointing a receiver, and that after such receiver had taken possession he could not be required to deliver possession to a receiver afterwards appointed by the state court in the prior suit.

[87] Buck v. Colbath, 3 Wall. (U. S.) 334, 18 L. ed. 257.

[88] Andrews v. Smith, 19 Blatchf. (U. S.) 100, 5 Fed. 833. The appointment of a receiver by one court will not be regarded as an interference with the jurisdiction of another court, which has granted an injunction concerning property without taking it into possession. San Antonio &c. R. Co. v. Davis (Tex. Civ. App.), 30 S. W. 693.

[89] East Tennessee &c. R. Co. v. Atlanta &c. R. Co., 49 Fed. 608. The court said: "The rule upon that subject in this state is deducible from the decision of the supreme court in Merchants' &c. Bank v. Trustees, 63 Ga. 549, where the court uses this language: 'But it would seem here that the stockholders' bill has been pending here for a long time in the circuit court of the United States, and no receiver is yet appointed. Perhaps none ever will be. Is the judgment creditor to wait until one is to be appointed? He is not even in this case made a party to the bill in the United States court. If he were, and if the bill there filed was similar to this in review here, and could accomplish the same end, to wit, the collection of this debt by the judgment creditor, having the final process of the state court in his hands, even then we should rule that neither law, nor equity, nor comity would require the equity court to wait upon the United States court in a case like this.' The application of that decision is that neither law, equity, nor comity will require the United States court to wait upon the state court in a case like this."

§ 637 (554). **Extraterritorial jurisdiction.**—A court of equity cannot, as a rule at least, acquire extraterritorial jurisdiction by appointing receivers for property lying entirely outside of the state or district in which such court is organized.[90] Many cases are found, however, in which a receiver has been appointed over property lying within the jurisdiction and other property lying outside of the state or country where the parties interested in the property were personally before the court and subject to its orders, and the property in separate jurisdictions went to make up an entity or belonged to the same corporate body.[91] Thus, where a single railroad corporation created by the concurrent legislation of several states owns a line extending into each of those states, a court having jurisdiction over the corporate body may acquire control of all its property by requiring it to execute assignments, or otherwise transfer the title to the receiver.[92] And it was held in one case that even though receivers had already been appointed by the state

[90] Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Atkins v. Wabash &c. R. Co., 29 Fed. 161; Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52, where the court carefully reviews the authorities bearing upon the question. See also Hale v. Hardon, 89 Fed. 283; Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 Atl. 620. But see Lewis v. American &c. Co., 119 Fed. 391, where the corporation made no objection. So it is the general rule that a receiver will not be appointed to wind up or interfere with the internal affairs of a foreign corporation. VanDyke v. Railway Mail Assn., 118 Minn. 390, 137 N. W. 15, Ann. Cas. 1913E, 455, 457, and note citing many cases and distinguishing this from the appointment of a receiver to preserve assets or property within the jurisdiction of the court.

[91] Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Farmers' Loan &c. Co. v. Northern Pac. R., 69 Fed. 871; Mead v. New York &c. R. Co., 45 Conn. 199, 223; State v. Northern Cent. R. Co., 18 Md. 193; Ellis v. Boston &c. R. Co., 107 Mass. 1; Ante, § 36. See also Blackburn v. Selma &c. R. Co., 2 Flip. (U. S.) 525, Fed Cas. No. 1467, 3 Fed. Cas. 526; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 618; Stewart v. Laberee, 185 Fed. 471. Where the property is situated in different federal districts of a state, a federal court in one of the districts has jurisdiction to appoint a receiver for all the property. Shelbyville v. Glover, 184 Fed. 234.

[92] Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How.

courts of Georgia, North Carolina and South Carolina to take charge of the several parts of a railroad incorporated by and extending across the three states, but having its principal office at Atlanta, in the state of Georgia, the circuit court for the northern district of Georgia, in which suit had been brought before any suit had been instituted in the state courts, had jurisdiction to appoint a receiver for the whole line.[93] On the other hand, it has been held that a federal court in one state has no jurisdiction over a railroad in another state and cannot appoint a receiver of such railroad, although it is the property of a consolidated corporation created by congress.[94] It is some-

(U. S.) 233, 14 L. ed. 674; Muller v. Dows, 94 U. S. 444, 24 L. ed. 207; Port Royal &c. R. Co. v. King, 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730.

[93] Wilmer v. Atlanta &c. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775. In announcing the opinion of the court appointing a receiver, Judge Woods said: "As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this court should not appoint a receiver for the whole, even though a part of the property may extend into another state. The court having jurisdiction of the defendant can compel it to do all in its power to put the receiver in possession of the entire property. If other persons outside of the territorial jurisdiction of this court have seized the property of the defendant the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession, but that is no reason why we should hesitate to appoint a receiver for the whole property. We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of this court in possession." But on a subsequent application to that court for a writ of assistance to enable the receiver to get possession of the property of the railroad company in Georgia, which the receiver appointed by the courts of that state refused to surrender, the application was refused by Judge Bradley. The reason upon which Judge Bradley based his refusal of the writ was that the state court had first acquired jurisdiction over the property by taking actual possession thereof, and such jurisdiction should not, therefore, be disturbed by a court of co-ordinate jurisdiction in a suit by other plaintiffs upon a different cause of action. See Guarantee Trust Co. v. Philadelphia &c. R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804.

[94] Texas &c. R. Co. v. Gay, 86

what difficult to reconcile or distinguish the apparently conflicting decisions upon this subject, but we are inclined to think that the true distinction is this: Where the corporation is not within the jurisdiction of the court, or where no part of the property is within its jurisdiction, and it cannot get possession or control of the property without sending its process to another state, it has no power to appoint a receiver of such property; but where the corporation is a corporation of the same state, consolidated or otherwise, although it may have lines extending into other states, if it is an indivisible entirety and the court has jurisdiction of all necessary parties, a receiver may be appointed for the entire road.[95]

§ 638 (555). Ancillary appointment—Comity.—Railroad receiverships are generally extended over the property of the company in other jurisdictions by ancillary appointment, for the rule of comity and the interests of all concerned require that the road should be operated as an entirety and under one management.[96] For this reason the question considered in the preceding section, as to the power of a court to appoint a receiver of an entire road extending into other jurisdictions, is

Tex. 571, 25 S. W. 599, 25 L. R. A. 52. The court also held that the person so appointed, being permitted by the company to take possession and operate the road, was merely the agent of the company and that the company was liable for his negligence.

[95] The appointment of a receiver for a foreign corporation does not, necessarily at least, prevent the corporation from exercising its franchises elsewhere. Sims v. United Wireless Tel. Co., 179 Fed. 540.

[96] Platt v. Philadelphia &c. R. Co., 54 Fed. 569; New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268; Dillon v. Oregon &c. R. Co., 66 Fed. 622; Port Royal &c. R. Co. v. King, 93 Ga. 63, 19 S. E. 809, 24 L. R. A. 730. See also Bay State Gas Co. v. Rogers, 147 Fed. 557; Culver Lumber Co. v. Culver, 81 Ark. 102, 99 S. W. 391, 118 Am. St. 17; Guarantee Trust Co. v. Philadelphia &c. R. Co., 69 Conn. 709, 38 Atl. 792, 38 L. R. A. 804; Condon v. Mutual &c. Assn., 89 Md. 99, 42 Atl. 944, 73 Am. St. 169, 44 L. R. A. 149; Person v. Leary, 126 N. Car. 504, 36 S. E. 35, 127 N. Car. 114, 37 S. E. 149. But see Mercantile Trust Co. v. Kanawha &c. R. Co., 39 Fed. 337, in which it was held, contrary to the ruling in some of the other cases above cited, that a United States

not of such vital importance as it would otherwise be. It is customary to appoint as ancillary receiver the same person that was originally appointed and to leave the management of the receivership very largely to the court in which the receiver was first appointed, to which court the receivers are usually required to account.[97] But it is held that these matters, so far as the appointment and control of the ancillary receiver are concerned, rest in the discretion of the court appointing him.[98] In a comparatively recent case[99] the court refused to appoint a separate receiver for a branch line of a street railway where a receiver had already been appointed for the entire railway. Where a new suit is brought in the same court concerning the same property, requiring the aid of a receiver, as, for instance, where creditors obtain the appointment of a receiver and a new suit is brought by the mortgage trustees to foreclose, the receivership will be extended so as to reach the subject-matter of the second suit, and independent receivers will not be appointed.[1] The appointment of a receiver by the courts in one jurisdiction will usually be recognized by the courts of other jurisdictions, and his title to the property of

circuit court would not take jurisdiction of a bill whose only purpose is to obtain an ancillary receivership.

[97] Jennings v. Philadelphia &c. R. Co., 23 Fed. 569; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 618; Chattanooga &c. R. Co. v. Felton, 69 Fed. 273; Port Royal &c. R. Co. v. King, 93 Ga. 63, 19 S. E. 909, 24 L. R. A. 730. See also Baldwin v. Hosmer, 101 Mich. 432, 59 N. W. 432; Ware v. Supreme Sitting (N. J.), 28 Atl. 1041; Clyde v. Richmond R. Co., 56 Fed. 539; 5 Thomp. Corp. (2nd ed.), § 6332.

[98] Atkins v. Wabash &c. R. Co., 29 Fed. 161; Central Trust Co. v. Texas &c. R. Co., 22 Fed. 135. See also Shinney v. North American &c. Co., 97 Fed. 9; Sands v. Greely, 88 Fed. 130; Security Sav. &c. Assn. v. Moore, 151 Ind. 174, 50 N. E. 869. And compare Sims v. United Wireless Tel. Co., 179 Fed. 540; Thornley v. J. C. Walsh Co., 200 Mass. 179, 86 N. E. 355.

[99] Clap v. Interstate R. Co., 61 Fed. 537. The court said that the appointment of a separate receiver would do no good, but would simply complicate matters and cause additional expense.

[1] Mercantile Trust Co. v. Kanawha &c. R. Co., 39 Fed. 337; Lloyd v. Chesapeake &c. R. Co., 65 Fed. 351; State v. Jacksonville &c. R. Co., 15 Fla. 201; Buswell v. Supreme Sitting &c., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846;

the insolvent corporation be enforced by those courts,[2] so long, at least, as his claims are not opposed to those of the citizens of the state in which he is compelled to sue.[3] The rule of comity between the courts of different states requires that a receiver appointed by a competent court of another state, with authority to sue, shall be permitted to maintain a suit in his own name,[4] but this courtesy will not, ordinarily, be extended so as to work detriment to citizens of the state in which the suit is brought.[5] Comity does not, as a rule, require that property should be turned over to a receiver appointed by the courts of another state if such action is opposed to the interests of local creditors, and courts will not, in such a case, enforce the claims of such a receiver in opposition to those of citizens of

Howell v. Ripley, 10 Paige (N. Y.) 43; Gilman v. Ketcham, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, 36 Am. St. 899.

[2] Davis v. Gray, 16 Wall. (U. S.) 219, 21 L. ed. 453; Central Trust Co. v. Wabash &c. R. Co., 29 Fed. 618; Failey v. Talbee, 55 Fed. 892; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 69 Fed. 871; Hale v. Tyler, 104 Fed. 757; Boulware v. Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; Patterson v. Lynde, 112 Ill. 196; Metzner v. Bauer, 98 Ind. 425; Buswell v. Supreme Sitting &c., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846. See generally as to the title and rights of a receiver in other jurisdictions than that in which he is appointed, Gilman v. Hudson River &c. Co., 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, and note, 36 Am. St. 899; Schuyler's &c. Co., Re, 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391, and note; Actions by Foreign Receivers, 37 Cent. L. J. 315; Equitable Trust Co. v. Wabash R. Co., 244 Fed. 66.

[3] Chandler v. Siddle, 3 Dill. (U. S.) 477, Fed. Cas. No. 2594; Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291. See also Wyman v. Eaton, 107 Ia. 214, 77 N. W. 865, 70 Am. St. 193, 43 L. R. A. 695; Toronto Gen. Trust Co. v. Chicago &c. R. Co., 123 N. Y. 37, 25 N. E. 198, 20 Am. St. 718; Frowart v. Blank, 205 Pa. St. 299, 54 Atl. 1000.

[4] Metzner v. Bauer, 98 Ind. 425; Hurd v. Elizabeth, 41 N. J. Law 1; Peters v. Foster, 56 Hun 607, 10 N. Y. S. 389; Toronto &c. Trust Co. v. Chicago &c. R. Co., 123 N. Y. 37, 47, 25 N. E. 198; Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526. But see Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Hazard v. Durant, 19 Fed. 471; Day v. Postal Telegraph Co., 66 Md. 354.

[5] Runk v. St. John, 29 Barb. (N. Y.) 585; Merchants' Nat. Bank v. McLeod, 38 Ohio St. 174. See also State v. Denton, 229 Mo. 187, 129 S. W. 709.

their own state.[6] It has also been held that a receiver appointed by a foreign court does not acquire, by such appointment, any title superior to that of a non-resident attaching creditor;[7] as the available legal remedy of a receiver is coextensive only with the jurisdiction of the court by which he was appointed when the right of precedence or priority of creditors is asserted in respect to property or funds of a non-resident debtor which the receiver has not yet reduced to possession.[8] But in regard to this question, as in regard to the entire subject of the relative rights of a receiver in a foreign jurisdiction, and attaching or garnishing creditors, the authorities seem to be hopelessly in conflict. The solution of the problem depends so largely upon the idea of comity entertained in the particular jurisdiction in which the question arises, that it is impossible to lay down any rule that will be applied in all jurisdictions. We think, however, that one who is a resident of the same state in which the debtor resides and in which a receiver has been appointed should not be permitted to go into a foreign jurisdiction and there obtain relief which he could not obtain in his own state, by attachment or garnishment proceedings, securing

[6] Fawcett v. Supreme Sitting &c., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815 (a questionable decision); Hurd v. Columbus Ins. Co., 55 Maine 228; Day v. Postal Tel. Co., 66 Md. 354, 7 Atl. 608; Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 351; Runk v. St. John, 29 Barb. (N. Y.) 585; Lycoming &c. Insurance Co. v. Wright, 55 Vt. 526. See also Boulware v. Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601, and note; Clark v. Chosen Friends, 146 Cal. 598, 80 Pac. 931. "That the officer of a foreign court should not be permitted, as against the claims of creditors resident here, to remove from this state the assets of the debtor, is a proposition that seems to be asserted by all the decisions." Hurd v. Elizabeth, 41 N. J. L. 1.

[7] Patterson v. Lynde, 112 Ill. 196; Catlin v. Wilcox &c. Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. 338. In Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476, 3 L. R. A. (N. S.) 1073, a creditor who attached real estate before a receiver was appointed was held to have a better right which could not be interfered with.

[8] State v. Jacksonville &c. R. Co., 15 Fla. 201; Catlin v. Wilcox &c. Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. 338; Farmers' &c. Ins. Co. v. Needles, 52 Maine 17; Hunt v. Columbian Ins. Co., 55 Maine 290.

a priority over the receiver appointed for the entire property.[9] But, as we have already seen, it is held by some courts, in accordance with what is probably the weight of authority, that a resident of a third state may obtain priority over a foreign receiver. It seems to us, however, that, to be consistent, the court ought, at least, to refuse to aid an attaching non-resident creditor to obtain priority over a receiver of the property, although he was appointed in a foreign jurisdiction.[10] There is more reason for holding, in accordance with the exception generally made in favor of domestic creditors, that the courts of one state may allow its own creditors to obtain priority, by attachment or garnishment of property therein, over a foreign receiver who has not yet taken actual possession of such property,[11] but the practical effect of such action might sometimes be very disastrous to great interests and its justice may well be doubted. Some courts, however, have gone so far as to hold that after a receiver has taken actual possession of property and brought it in the course of his duty into another jurisdiction, domestic creditors therein may attach it and thus obtain a superior right to it.[12] This seems to us to be palpably erro-

[9] Merchants' Nat. Bank v. McLeod, 38 Ohio St. 174; Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291; Gilman v. Ketcham, 84 Wis. 60, 54 N. W. 395, 23 L. R. A. 52, and note, 36 Am. St. 899. See also Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. ed. 538; Halsted v. Straus, 32 Fed. 279; Woodward v. Brooks, 128 Ill. 222, 20 N. E. 685, 3 L. R. A. 702, 15 Am. St. 104; Whipple v. Thayer, 16 Pick. (Mass.) 25, 26 Am. Dec. 626; Waite, Re, 99 N. Y. 433; Bacon v. Horne, 123 Pa. St. 452, 16 Atl. 794, 2 L. R. A. 355.

[10] May v. First Nat. Bank, 122 Ill. 551, 13 N. E. 806; Hurd v. Elizabeth, 41 N. J. L. 1; Schuyler's &c. Co., Re, 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391, and note; Long v. Girdwood, 150 Pa. St. 413, 24 Atl. 711, 23 L. R. A. 32, and note; Bockover v. Life Assn., 77 Va. 85.

[11] Taylor v. Columbian Ins. Co., 14 Allen (Mass.) 353; Warren v. Union Nat. Bank, 7 Phila. (Pa.) 156; Cleveland &c. Co. v. Crawford, 9 Railw. & Corp. L. J. 171. See also Rhawn v. Pearce, 110 Ill. 350, 51 Am. Rep. 691; Lichtenstein v. Gillett, 37 La. Ann. 522; Hunt v. Columbian Ins. Co., 55 Maine 290, 92 Am. Dec. 592; Willits v. Waite, 25 N. Y. 577.

[12] Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. 76 (Thornton and McFarland, JJ., dissenting).

neous and unsound.[13] Where a suit in which a state court has appointed a receiver is removed to the United States Court under the law for the removal of causes, the receiver is not thereby discharged, but remains in possession until removed by the federal court, and may be required to account to it for the manner in which he has discharged his trust.[14]

§ 639 (556). **Procedure—Ex parte application.**—Courts of equity are very unwilling to appoint a receiver upon an ex parte application[15] and should not do so under ordinary circumstances, since it would be unjust to condemn a man unheard and to dispossess him of property prima facie his, and hand over its enjoyment to another whose claim to it he has had no opportun-

[13] Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Chicago &c. R. Co. v. Keokuk &c. Co., 108 Ill. 317, 48 Am. Rep. 557; Killmer v. Hobart, 58 How. Prac. (N. Y.) 452; Cagill v. Wooldridge, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716. See also the criticism of Mr. Freeman in 15 Am. St. 81. See further, upon the general subject of attachment and garnishment of property over which a receiver has been appointed and protection of receivers by the courts, Schindelholz v. Cullum, 55 Fed. 885; Parsons v. Charter Oak Ins. Co., 31 Fed. 305; Cole v. Oil Well &c. Co., 57 Fed. 534; Ames v. Union &c. R. Co., 60 Fed. 966; United States Trust Co. v. Omaha &c. R. Co., 61 Fed. 531; Central Trust Co. v. Chattanooga &c. R. Co., 68 Fed. 685; Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Reynolds v. Adden, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. ed. 360; Barnett v. Kinney, 147 U. S. 476, 13 Sup. Ct. 403, 37 L. ed. 247; Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. 147; McAlpin v. Jones, 10 La. Ann. 552; Chafee v. Quidnick Co., 13 R. I. 442; Vermont &c. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792; Straughan v. Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. 29, and note.

[14] Hinckley v. Gilman &c. Co., 100 U. S. 153, 25 L. ed. 591; Mack v. Jones, 31 Fed. 189.

[15] Bisson v. Curry, 35 Iowa 72; Blondheim v. Moore, 11 Md. 365; Cook v. Detroit &c. R. Co., 45 Mich. 453, 8 N. W. 74; Whitehead v. Wooten, 43 Miss. 523; Vila v. Grand Island &c. Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791, 110 Am. St. 400; People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344, 369; People v. Albany &c. R. Co., 7 Abb. Prac. (N. S.) (N. Y.) 265; Devoe v. Ithaca &c. R. Co., 5 Paige (N. Y.) 521; Young v. Rollins, 85 N. Car. 485; Cleveland &c. R. Co. v. Jewett, 37 Ohio St. 649. See also as to the necessity for due notice to the oppos-

ity to contest.[16] But in exceptional cases, where it is shown that the defendant has left the state or cannot be found,[17] or where, for some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party, in order to prevent the destruction or loss of property,[18] a receiver may be appointed without notice. The

ing party, State v. Jacksonville &c. R. Co., 15 Fla. 201; Crowder v. Moore, 52 Ala. 221; Word v. Word, 90 Ala. 81, 7 So. 412; Johns v. Johns, 23 Ga. 31; French v. Gifford, 30 Iowa 148; Howe v. Jones, 57 Iowa 130, 8 N. W. 451, 10 N. W. 299; Turgeau v. Brady, 24 La. Ann. 348; Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375; Meridian News &c. Co. v. Diem &c. Co., 70 Miss. 695, 12 So. 702; Ruffner v. Mairs, 33 W. Va. 655, 11 S. E. 5; Fredenheim v. Rohr, 87 Va. 764, 13 S. E. 193. In Whitney v. Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531, it was held that the appointment of a receiver for a bank on its own ex parte application was void and subject to collateral attack.

[16] Baker v. Backus, 32 Ill. 79; Arnold v. Bright, 41 Mich. 207, 2 N. W. 16. Notice is sometimes required by statute. May v. Greenhill, 80 Ind. 124; Moritz v. Miller, 87 Ala. 331; Whitehead v. Wooten, 43 Miss. 523. See also Feess v. Mechanics' State Bank, 84 Kans. 828, 115 Pac. 563, L. R. A. 1915A, 606, and cases there cited.

[17] People v. Norton, 1 Paige (N. Y.) 17; Sandford v. Sinclair, 8 Paige (N. Y.) 373; Gibbons v. Mainwaring, 9 Sim. 77; Dowling v. Hudson, 14 Beav. 423. See Pressley v. Harrison, 102 Ind. 14, 19; Whitehead v. Wooten, 43 Miss. 523. Thus, where no officer of the corporation can be found on whom service of notice can be made, the court may, in its discretion, appoint a receiver without notice to the corporation. Maish v. Bird, 59 Iowa 307; Dayton v. Borst, 31 N. Y. 435. See also Mestier v. Chevallier Pavement Co., 51 La. Ann. 142, 24 So. 799. So, where a foreign corporation has discontinued its organization, and its officers have neglected to hold meetings, but have converted the corporate property to their own use, sold it, and retain the proceeds of the sale. De Bemer v. Drew, 57 Barb. (N. Y.) 438. But where it is shown that all the property of the defendant is in the hands and under the control of another railroad corporation which is operating the road, the non-residence of the defendant's officers will not excuse a failure to give notice to its lessee of an application for a receiver. Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823.

[18] Platt v. Philadelphia &c. R. Co., 54 Fed. 569; Olmstead v. Distilling &c. Co., 67 Fed. 24; Sims v. Adams, 78 Ala. 395; Ashurst v.

particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which the application is founded,[19] and the court should, it seems, in case a receiver is granted, save to the defendant the right thereafter to apply, upon meritorious grounds, for relief against the order.[20]

Lehman, 86 Ala. 370; Hardy v. McClellan, 53 Miss. 507; Gibson v. Martin, 8 Paige Ch. (N. Y.) 481; Cleveland &c. R. Co. v. Jewett, 37 Ohio St. 649; Oil Run Petroleum Co. v. Gale, 6 W. Va. 525, 545. See also 5 Thomp. Corp. (2nd ed.), § 6337. In a suit by judgment creditors against a railroad company for the appointment of a receiver, although the complaint alleged that executions had been levied on defendant's rolling stock, preventing its operation, that it and its predecessor were both insolvent, that there were large quantities of stock along the road under contract for immediate shipment, and a great quantity of grain to be threshed within the next ten days, which would be shipped over defendant's road if it was in operation, and that if trains were not running on the road at once, great damage would accrue both to citizens and to defendants, it was, nevertheless, held that the facts alleged did not justify the appointment of a receiver without notice to defendant. Chicago &c. R. Co. v. Cason, 133 Ind. 49, 32 N. E. 827. See Wabash &c. R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823.

[19] Moritz v. Miller, 87 Ala. 331, 6 So. 269; Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823; French v. Gifford, 30 Iowa 148; People v. Albany &c. R. Co., 55 Barb. (N. Y.) 344; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438. See also Burrougs v. Toxaway Co., 182 Fed. 129; Jones v. Rakestraw, 59 Fla. 537, 57 So. 927. Affidavits of the belief of plaintiff or his attorneys that immediate action is necessary for the protection of complaints, and that the defendants would make use of the delay occasioned by giving notice to spirit away or dispose of their effects, have been held insufficient. Moritz v. Miller, 87 Ala. 331, 6 So. 269; Thompson v. Tower Mfg. Co., 87 Ala. 733, 6 So. 928. In Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823, the court said: "The statement in the verified complaint that there was an emergency for the immediate appointment of a receiver, without notice, was not a sufficient showing. This was a mere statement of an opinion. The facts on which the opinion was founded should have been pleaded in order to enable the court to judge of its correctness."

[20] People v. Norton, 1 Paige (N. Y.) 17. See generally Dixon v Dixon, 119 Md. 413, 86 Atl. 1042.

§ 640 (557). Parties to proceedings for appointment of receiver.—If the property of the defendant corporation is in the possession of a lessee, such lessee should be made a party to the proceedings for the appointment of a receiver[21] and served with notice of the application.[22] But it seems that a receiver of the rents and profits may be appointed without making the lessee a party.[23] It has also been held that an insolvent stockholder is not a necessary party defendant to a proceeding for the appointment of a receiver and to compel individual stockholders to pay their subscriptions for the benefit of the corporate creditors.[24] Many of the states have laws providing that upon the dissolution of any corporation if a receiver is not appointed by some court of competent authority the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses. After the title to the corporate property has vested in the officers as trustees under such a statute, a receiver can afterward be appointed only in an action or proceeding to which they are parties.[25]

§ 641. (558). Appointment upon motion or petition and notice—Affidavits.—Since the appointment of a receiver is gen-

[21] Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823; Kerp v. Michigan &c. R. Co., 6 Chicago Leg. N. 101. See also Searles v. Jacksonville &c. R. Co., 2 Woods (U. S.) 621, 626, Fed. Cas. No. 12586.

[22] Wabash R. Co. v. Dykeman, 133 Ind. 56, 32 N. E. 823. The corporation, of course, is a necessary party where a receiver is to be appointed for it. Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098; Elkhart Nat. Bank v. Northwestern &c. Co., 84 Fed. 76; 5 Thomp. Corp (2nd ed.), § 6337.

[23] Kerp v. Michigan &c. R. Co., 6 Chicago Leg. N. 101.

[24] Wilson v. California &c. Co., 95 Mich. 117, 54 N. W. 643. It is not ordinarily necessary to make stockholders or directors parties. Ward v. Farwell, 97 Ill. 593; Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567; East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690.

[25] People v. O'Brien, 111 N. Y. 1, 7 Am. St. 684; Parker v. Brown-

erally regarded as an interlocutory order, and not as a decision upon the merits,[26] the appointment is usually made upon motion,[27] or petition supported by affidavit,[28] with notice to the opposite party.[29] It is the better practice to pray for a receiver in the original bill,[30] but a receiver may be appointed on the final hearing, even after decree, although not prayed for in the original bill.[31] In passing upon the necessity for a receiver the court will consider the sworn answer of the defendant,[32] and

ing, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

[26] Hottenstein v. Conrad, 9 Kans. 435; Cincinnati &c. R. Co. v. Sloan, 31 Ohio St. 1; Chicago &c. Min. Co. v. United States &c. Co., 57 Pa. St. 83.

[27] Commercial &c. Bank v. Corbett, 5 Sawy. (U. S.) 172, Fed. Cas. No. 3057; Hursh v. Hursh, 99 Ind. 500; Hottenstein v. Conrad, 9 Kans. 435; Blakeney v. Dufaur, 15 Beav. 40, 42; Cooke v. Gwyn, 3 Atk. 689 (653).

[28] An application for the appointment of a receiver pending litigation is made upon petition or motion. Affidavits and counter affidavits may be filed, or oral testimony heard as to the necessity for a receiver. Pouder v. Tate, 96 Ind. 330; Hursh v. Hursh, 99 Ind. 500. See 1 Elliott Gen. Pr., § 395.

[29] See ante, § 639. It has been held unnecessary to serve notice on a trustee for bondholders, who is insane and confined in an asylum in a foreign country. Ettlinger v. Persian &c. Co., 66 Hun 94, 30 N. Y. S. 772. In Beck v. Ashkettle, 18 R. I. 374, 27 Atl. 505, it was held that personal notice was necessary under the statute, and that leaving a copy at the last and usual abode of the debtor, who had absconded, was insufficient. We doubt the soundness of this decision. See as to short notice being sufficient in an emergency, Miltenberger v. Logansport R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 158, 27 L. ed. 117; Haugan v. Netland, 51 Minn. 552, 53 N. W. 873.

[30] See 1 Elliott Gen. Pr., § 395.

[31] Connelly v. Dickson, 76 Ind. 440; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437; Bowman v. Bell, 14 Sim. 392. See also Merritt v. Gibson, 129 Ind. 155, 27 N. E. 136, 15 L. R. A. 277.

[32] Rankin v. Rothschild, 78 Mich. 10, 43 N. W. 1077; Goodman v. Whitcomb, 1 J. & W. 569; 1 Elliott Gen. Pr., § 395. As a general rule the answer is to be taken as true in so far as it is responsive to the allegations of the bill, at least in the absence of sufficient evidence to the contrary. Thompson v. Diffenderfer, 1 Md. Ch. 489; Callahan v. Shaw, 19 Iowa 183; Voshell v. Hynson, 26 Md. 82; Buchanan v. Comstock, 57 Barb. (N. Y.) 568. The answer of one defendant only, where a material co-defendant has not an-

affidavits offered in its support.[33] Under the modern practice affidavits may also be received in opposition to the answer.[34] A receiver my be appointed, in a proper case, before answer[35] and even before an appearance is entered,[36] but the court will only act where a clear case of necessity for the appointment of a receiver at such a time is made out.[37]

§ 642 (559) **Who may appoint—Appointment in vacation.**—In the absence of a statute specially authorizing such a proceeding, a receiver cannot be appointed by a judge or judges of a court in vacation.[38] It is competent, however, for the legislature by statute to grant to a judge in vacation authority to

swered, must be regarded merely as an affidavit. Kershaw v. Mathews, 1 Russ. (Eng. Ch.) 362. Where affidavits are offered in support of the answer and to overcome the case made by the affidavits in support of the motion, counter affidavits may be admitted on the part of the plaintiff. There can be no just reason for excluding any facts material to the judgment of the court and which will enable it to act intelligently in the exercise of a sound discretion. Young v. Rollins, 85 N. Car. 485, 12 Am. & Eng. R. Cas. 455.

[33] Rhodes v. Lee, 32 Ga. 470; Pouder v. Tate, 96 Ind. 330; Hursh v. Hursh, 99 Ind. 500; Ladd v. Harvey, 21 N. H. 514.

[34] See Hayes v. Heyer, 4 Sandf. Ch. (N. Y.) 485, 517; Sobernheimer v. Wheeler, 45 N. J. Eq. 614, 18 Atl. 234.

[35] Weis v. Goetter, 72 Ala. 259; Williams v. Jenkins, 11 Ga. 595; Whitehead v. Wooten, 43 Miss. 523; Vann v. Barnett, 2 Bro. Ch. 158. But see Ranger v. Champion &c. Co., 52 Fed. 609; Union Mut. L. Ins. Co. v. Union &c. Co., 37 Fed. 286.

[36] Tanfield v. Irvine, 2 Russ. 149. See also Henshaw v. Wells, 9 Humph. (Tenn.) 568.

[37] Latham v. Chaffee, 7 Fed. 525; Micou v. Moses, 72 Ala. 439; Clark v. Ridgely, 1 Md. Ch. 70; Turnbull v. Prentiss Lumber Co., 55 Mich. 387, 21 N. W. 375. Facts should be specifically stated and not merely upon information and belief. Cofer v. Echerson, 6 Iowa 502; Heavilon v. Farmers' Bank, 81 Ind. 249; Hanna v. Hanna, 89 N. Car. 68; Grandin v. LeBar, 3 N. Dak. 447, 50 N. W. 151.

[38] Hammock v. Loan &c. Co., 105 U. S. 77, 26 L. ed. 1111; Hervey v. Illinois Midland R. Co., 28 Fed. 169; Newman v. Hammond, 46 Ind. 119. See also Chase v. Miller, 88 Va. 791, 14 S. E. 545; Conkling v. Ridgley, 112 Ill. 36, 54 Am. Rep. 204. But compare Walters v. Anglo-American &c. Co., 50 Fed. 316; Greeley v. Provident Sav.

appoint a receiver,[39] even upon an ex parte application.[40] It has been held by the supreme court of Georgia that the appointment of a receiver for a corporation is not necessarily the exercise of a judicial power, but that such an appointment might be made by the legislature, or authorized by it to be made by the executive department of the state.[41] The case referred to has been cited by several text-writers,[42] apparently with approval, but we doubt its soundness. Other questions relating to the subject of this section have already been considered elsewhere.[43]

§ 643 (560). **Suit must generally be pending.**—Since the appointment of a receiver by a court of equity is generally held to be merely an auxiliary proceeding in aid of a pending suit to determine the ultimate rights of the parties to the property for which a receiver is sought,[44] it is the general rule that a receiver can only be appointed for a corporation when there is

Bank, 103 Mo. 212, 15 S. W. 429. May do so in chambers. Horn v. Pere Marquette R. Co., 151 Fed. 627.

[39] Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682. See also Horn v. Pere Marquette R. Co., 151 Fed. 626; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; First National Bank v. U. S. Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846; Bitting v. Ten Eyck, 85 Ind. 357; Greeley v. Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429; McMurtry v. Tuttle, 13 Nebr. 232, 13 N. W. 213; Morriss v. Virginia Insurance Co., 85 Va. 588, 8 S. E. 383. In Pressley v. Lamb, supra, the court held that a judge in vacation, acting under the statute authorizing the appointment of a receiver, is exercising quoad hoc "the judicial power of the state."

[40] Real Estate Associates v. Superior Court, 60 Cal. 223. We presume, however, that this is where it is only interlocutory and not final. See Pressley v. Harrison, 102 Ind. 14, 1 N. E. 188; Hardy v. McClellan, 53 Miss. 507.

[41] Carey v. Giles, 9 Ga. 253. See also United States v. Ferreira, 13 How. (U. S.) 40, 14 L. ed. 373; Foote v. Forbes, 25 Kans. 359; Toledo &c. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271.

[42] High Receivers, §§ 39, 343; Beach Receivers, § 407.

[43] See ante, § 635.

[44] Bufkin v. Boyce, 104 Ind. 53, 3 N. E. 615; Hottenstein v. Conrad, 9 Kans. 435; Cincinnati &c. R. Co. v. Sloan, 31 Ohio St. 1; Chicago &c. Min. Co. v. U. S. Petroleum Co., 57 Pa. St. 83; Cooke v. Gwyn, 3 Atk. 698 (653).

a suit actually pending and that a court of chancery is not ordinarily justified in appointing a receiver before the filing of a complaint or bill.[45] Under the ancient practice of the court of chancery in England, a receiver was not appointed until after the coming in of the defendant's answer, but it is now settled, both in this country and in England, that the appointment may be made before answer, provided a special necessity therefor is shown to exist.[46] Except under extraordinary circumstances, as where the defendant had left the state to avoid process or the like, the rule seems to have been that a court could get no jurisdiction to appoint a receiver until after service of process and notice of the motion.[47] If an immediate necessity therefor is shown to exist, the application for a receiver may be entertained when the action is commenced, which, under the rule in Indiana, is when process is issued, or an appearance to the action entered, in the manner recognized.[48] In a recent case where the service was defective and the defendant had entered a special appearance to quash the notice, it was held that a suit was pending so as to warrant the appointment of a receiver.[49]

§ 644 (561). Who may be appointed receiver.—It is customary where all the parties in interest are before the court and can agree upon a person to act as receiver, to appoint the receiver chosen

[45] Crowder v. Moone, 52 Ala. 220; Dale v. Kent, 58 Ind. 584; Pressley v. Harrison, 102 Ind. 14, 1 N. E. 188; Guy v. Doak, 47 Kans. 236, 27 Pac. 968; Merchants' &c. Bank v. Kent, 43 Mich. 292, 5 N. W. 627; Hardy v. McClellan, 53 Miss. 507; Bank of Meadville v. Hardy, 94 Miss. 587, 48 So. 731; ante, §§ 620, 623. See also Vila v. Grand Island &c. Co., 68 Nebr. 222, 94 N. W. 136, 97 N. W. 613, 63 L. R. A. 791; Brant, In re, 96 Fed. 257, and authorities cited; Howell v. Harris &c. Co., 168 Ala. 383, 52 So. 935, Ann. Cas. 1912B, 234, 236, and other cases there cited in note.

[46] 5 Thomp. Corp. (2nd ed.) § 6334.

[47] Whitehead v. Wooten, 43 Miss. 523.

[48] Crowder v. Moone, 52 Ala. 220; Jones v. Bank of Leadville, 10 Colo. 464, 17 Pac. 272; Pressley v. Harrison, 102 Ind. 14, 18, 1 N. E. 188, per Mitchell, J.; Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682, and dissenting opinion of Judge Mitchell, on page 191 et seq.; Jones v. Schall, 45 Mich. 379, 8 N. W. 68.

[49] Hellebush v. Blake, 119 Ind. 349, 21 N. E. 976.

by them.[50] Where this cannot be done, two or more persons are often agreed upon, each of whom is expected to represent and look after the interests of one of the parties.[51] But the court is not necessarily controlled by the expressed wish of the parties, in making its selection of a receiver. Other interests may be affected by the action of the court besides those of the parties to the suit. It is also practically impossible in many cases to obtain the consent of the several holders of the capital stock of the corporation and of the different series of bonds secured by mortgage upon its property.[52] As was well said by Justice Miller, in pronouncing a judgment removing the receivers chosen by the parties, to make way for a receiver selected by the court: "A receiver is strictly and solely the officer of the court. It is his duty so to conduct the business that the lawful rights and legal interest of all persons in the property and in the business shall be protected, as far as possible, with equal and exact justice. This is much more likely to be done by a receiver who has no interest in the capital stock of the road, none in its debts, and no obligation to those who have. Such a person, acting under the control of the court, seeking its advice, and bound in a sufficient surety for the faithful performance of his duty, is the proper one for such an office. On the other hand, while it may be true that a large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offered, will be directed unduly to advancing that personal interest, and that activity to securing personal advantages."[53] In accordance

[50] In Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221, Judge Brewer said: "If parties agree upon a receiver, of course I shall appoint whoever you agree upon." See also Pound, In re, 42 Ch. D. 402.

[51] Jones Corp. Bonds and Mortg., § 459.

[52] In Sage v. Memphis &c. R. Co., 18 Fed. 571, it appeared that a receiver had been appointed by collusion between the plaintiff and defendant, for the purpose of preventing unsecured creditors from recovering their claims by actions at law, and the court removed the receiver.

[53] Meier v. Kansas Pac. R. Co., 5 Dill. (U. S.) 476, Fed. Cas. No. 9395. See also Wood v. Oregon &c. Co., 55 Fed. 901; Shannon v. Hanks, 88 Va. 338, 13 S. E. 437.

with this rule, a party to the cause should not, as a rule, be appointed receiver.[54] But a party whose interest extends only to a single claim is sometimes appointed receiver to wind up the business of the corporation.[55] Stockholders and directors of insolvent corporations should not be appointed unless the case is exceptional and urgent,[56] nor, as a general rule, should persons nearly related to a party or to the judge,[57] preferred or other creditors having hostile interests to the majority,[58] or others whose interests or relations are such that they cannot well stand indifferent between the interested parties.[59] Where insolvency is due to the mismanagement of the officers, it would be clearly inadvisable to hand over the road to those whose administration has proved disastrous.[60] A person who cannot,

[54] Finance Co. v. Charleston &c. R. Co., 45 Fed. 436; Young v. Rollins, 85 N. Car. 485. Neither the solicitor employed by complainant, nor his law partner, is such a disinterested person as may properly be appointed to act as receiver in a foreclosure suit. Merchants' &c. Nat. Bank v. Kent Circuit Judge, 43 Mich. 292, 5 N. W. 627; Baker v. Backus, 32 Ill. 79. But see Shannon v. Hanks, 88 Va. 338, 13 S. E. 437. Special circumstances may justify the appointment of a party. Robinson v. Taylor, 42 Fed. 803, 812; Blakeney v. Dufaur, 15 Beav. 40.

[55] Taylor v. Life Assn. of America, 3 Fed. 465; In the matter of Knickerbocker Bank, 19 Barb. (N. Y.) 602.

[56] Atkins v. Wabash &c. R. Co., 29 Fed. 161; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 61 Fed. 546. See also Coy v. Title &c. Co., 157 Fed. 794; Mercantile &c. Co. v. Florence Water Co., 111 Ala. 119, 19 So. 17; McCullough v. Merchants' &c. Co., 29 N. J. Eq. 217; Attorney-General v. Bank, 1 Paige (N. Y.) 511. But compare Fifty-four First Mortgage Bonds, In re, 15 S. Car. 304. Certainly an officer who is speculating in the stock of a corporation should not be appointed. Olmstead v. Distilling &c. Co., 67 Fed. 24.

[57] Williamson v. Wilson, 1 Bland 418; Barnes' Fed. Code, § 829.

[58] People's Bank v. Fancher, 21 N. Y. S. 545.

[59] New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268; State Trust Co. v. National Land &c. Co., 72 Fed. 575; Benneson v. Bill, 62 Ill. 408; Lupton v. Stephenson, 11 Ir. Eq. 484; Sutton v. Jones, 15 Ves. 584.

[60] Williamson v. New Albany &c. R. Co., 1 Biss. (U. S.) 198, Fed. Cas. No. 17753; People v. Third Avenue Savings Bank, 50 How. Prac. (N. Y.) 22. See also Atkins v. Wabash &c. R. Co., 29 Fed.

with the aid of others, manage a business successfully, is as a general rule regarded as unfit to wind it up alone.[61] But since it is necessary that the receiver of a railroad shall be some person who, by reason of his responsibility and business capacity and of his familiarity with the conduct of a business enterprise of this character is fully competent to have the management of the road, cases may arise in which it is proper that officers of the corporation, to whom no fault is imputed, should be made receivers.[62] The selection of the receiver is a matter resting very largely in the discretion of the court, and while the court will usually be guided by the rules already stated, the relationship of the receiver either to the parties or the cause will seldom constitute an absolute disqualification, in the absence of any statutory provision upon the subject. Thus, a party to the

161; Finance Co. v. Charleston &c. R. Co., 45 Fed. 436.

[61] McCullough v. Merchants' Loan &c. Co., 29 N. J. Eq. 217; Jones Corporate Bonds and Mortg., § 459.

[62] Meyer v. Johnston, 53 Ala. 237. An order that the president and directors of a railroad corporation, under the order and subject to this court, shall continue in possession of the road, conduct and carry on its business, and make a report to the court of its condition, earnings, profits and expenditures, was held to constitute such president and directors receivers of the road. But upon their failure to file accounts and perform the other duties required of them, they were removed and a single receiver appointed in order to place the property "more substantially in the hands and under the custody and order of this court." Gibbes v. Greenville &c. R. Co., 15 S. Car. 304. The fact that one is an officer of a railroad company will not prevent his appointment as receiver thereof where he is familiar with the condition and necessities of the railway, is an efficient manager, and the insolvency of the company was not promoted by bad management on his part, and where the parties interested consent. Farmers' Loan &c. Co. v. Northern Pac. R. Co., 61 Fed. 546; Fowler v. Jarvis &c. Co., 63 Fed. 888; Ralston v. Washington &c. R. Co., 65 Fed. 557. See also Mercantile Trust &c. Co. v. Florence &c. Co., 111 Ala. 119, 19 So. 17; Barber v. International Co., 73 Conn. 587, 48 Atl. 758; Moran v. Wayne Cir. Judge, 125 Mich. 6, 83 N. W. 104; Manchester &c. R. Co., In re, 14 Ch. D. 645. So, held where the officer was specially fitted for the place and all parties agreed upon him except a small minority of the bondholders, although he had not only been an officer but was also related to some of the large

suit may be perfectly competent in some cases.[63] So may a relative of one of the parties,[64] or a non-resident.[65] And one corporation, having authority to act as trustee and receiver, may be appointed receiver of another corporation.[66]

§ 645 (562). **Order appointing receiver.**—The order of appointment should clearly designate the property over which the receiver is appointed,[67] and the court may embody such directions and impose such conditions therein as are just and proper.[68] The penalty of the bond should usually be fixed and the general terms of the order prescribed at the time it is granted.[69] But it is customary, in most jurisdictions, for the attorney of the moving party to draw up and submit the form of order to the opposite party and to the court, after which it

stockholders and bondholders. Bowling Green Trust Co. v. Virginia &c. Co., 133 Fed. 186.

[63] Hubbard v. Guild, 1 Duer (N. Y.) 662.

[64] See Shainwald v. Lewis, 8 Fed. 878.

[65] Taylor v. Life Assn., 3 Fed. 465; Farmers' Loan &c. Co. v. Cape Fear &c. R. Co., 62 Fed. 675; Wilmer v. Atlanta &c. R. Co., 2 Woods (U. S.) 409, Fed. Cas. No. 17775. See also Farmers' Loan &c. Co. v. Chicago &c. R. Co., 27 Fed. 146; Roby v. Smith, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792, 31 Am. St. 439. But, for obvious reasons, the appointment of a non-resident is not advisable. Meier v. Kansas Pac. R. Co., 5 Dill. (U. S.) 476, Fed. Cas. No. 9395; Borton v. Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597.

[66] Kimmerle v. Dowagiac Mfg. Co., 105 Mich. 640, 63 N. W. 529 (trust company); Knickerbocker Bank, In re, 19 Barb. (N. Y.) 602; Vermont &c. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792.

[67] O'Mahoney v. Belmont, 62 N. Y. 133; Crow v. Wood, 13 Beav. 271; 2 Dan. Chanc. Pl. & Pr. 1737.

[68] Fosdick v. Schell, 99 U. S. 235, 25 L. ed. 339; United States Trust Co. v. New York &c. R. Co., 25 Fed. 800; Central Trust Co. v. St. Louis &c. R. Co., 41 Fed. 551; West v. Chasten, 12 Fla. 315. The order may provide that the company shall turn over to the receiver its books and papers. American Const. Co. v. Jacksonville &c. R. Co., 52 Fed. 937 (also its seal); Engel v. South &c. Co., 66 L. T. R. 155. And the order may be modified changing conditions prior to a sale in a proper case. Royal Trust Co. v. Washburn &c. R. Co., 113 Fed. 531; Union Trust Co. v. Curtis, Receiver, &c., 182 Ind. 61, 105 N. E. 562, L. R. A. 1915 A, 699, and other cases there cited.

[69] Capital City Water Co. v. Weatherby, 108 Ala. 412, 18 So. 841.

is filed with the clerk in the form approved by the court. Copies are also required, in some jurisdictions, to be served upon all the interested parties.[71] If the mortgagor is in possession the order may direct him to deliver possession to the receiver,[72] and it is proper to direct the receiver therein to account from time to time and to keep down incumbrances out of the rents and profits.[73] It may also, in a proper case, reserve to other incumbrancers or parties the right to afterwards come in, and may state that the appointment is made without prejudice.[74] In short, the court may give therein all such directions as are just and proper to enable the receiver to perform his duties until the further order of the court and to preserve the rights of interested parties until the merits of the case can be fully determined. But the court has no power, ordinarily at least, to take into its custody or control, through a receiver, upon a bill to foreclose a mortgage, property not covered by the mortgage, nor to make any order which will delay and hinder creditors from subjecting property not covered by the mortgage to the payment of their debts.[75]

§ 646 (563). **Effect of appointment.**—As already stated, the appointment of a receiver usually determines no rights and is not an adjudication upon the merits of the case.[76] It gives him the right to the possession and control of the property,[77] but

[71] Whitney v. Belden, 4 Paige Ch. (N. Y.) 140; Rankin v. Pine, 4 Abb. Prac. (N. Y.) 309; Wiltsie Mort. Foreclosures, § 644.

[72] Griffith v. Griffith, 2 Ves. Sen. 400; Everett v. Belding, 22 L. J. Ch. 75.

[73] 5 Thomp. Corp. (2nd ed.), § 6338.

[74] Smith v. Effingham, 2 Beav. 232. The court may withhold from the receiver a portion of the assets upon which there is a mortgage about to be enforced under power of sale. Weihl v. Atlanta &c. Co., 89 Ga. 297, 15 S. E. 282.

[75] Hook v. Bosworth, 64 Fed. 443; Scott v. Farmers' Loan &c. Co., 69 Fed. 17.

[76] Ante, § 641; Central &c. Co. v. Buchanan, 90 Fed. 454; Colvin, In re, 3 Md. Ch. Dec. 278; Beverley v. Brooke, 4 Grat. (Va.) 187; Tripp v. Chard R. Co., 11 Hare 264; 1 Elliott's Gen. Pr., § 194.

[77] Post, § 648. Property in his possession is in custodia legis. Merchants' Ins. Co., In re, 3 Biss. (U. S.) 162, Fed. Cas. No. 9441; Robinson v. Atlantic &c. Co., 66 Pa. St. 160; 1 Elliott's Gen. Pr., § 195. But see Illinois Steel Co. v. Putnam, 68 Fed. 515.

it does not divest or retroactively affect existing liens or vested rights of third persons.[78] It has also been held that it does not deprive secured creditors of the right to possess and enforce their securities, and if the receiver has obtained possession of them he may be compelled to deliver them up.[79] But the lienholder may be compelled to go into the same court to enforce his lien where the entire estate is being administered.[80] The legal title is not transferred to the receiver by a mere interlocutory appointment,[81] but, at least after he has once taken possession, he has a possessory title or special property.[82] His rights to the property are superior to subsequent attachments, or executions[83] in the same jurisdiction, but not to prior valid

[78] Favorite v. Deardorff, 84 Ind. 555; Lorch v. Aultman &c. Co., 75 Ind. 162; Snow v. Winslow, 54 Iowa 200, 6 N. W. 191; Arnold v. Weimer, 40 Nebr. 216, 58 N. W. 709; Davenport v. Kelly, 42 N. Y. 193; Wilson v. Allen, 6 Barb. (N. Y.) 542; Artizan's Bank v. Treadwell, 34 Barb. (N. Y.) 553; State v. Superior Court, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354. See also Pennsylvania Steel Co. v. New York City R. Co., 198 Fed. 721.

[79] Risk v. Kansas &c. Co., 58 Fed. 45.

[80] Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. ed. 322; Skinner v. Maxwell, 68 N. Car. 400; Robinson v. Atlantic &c. R. Co., 66 Pa. St. 160; Ellis v. Vernon Ice &c. Co., 86 Tex. 109, 23 S. W. 858. See also Cole v. Philadelphia &c. R. Co., 140 Fed. 944; Park v. New York &c. R. Co., 70 Fed. 641.

[81] Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. ed. 341; St. Louis &c. Co. v. Sandoval &c. Co., 111 Ill. 32; Manlove v. Burger, 38 Ind. 211; Ellis v. Boston &c. R. Co., 107 Mass. 1; Kenney v. Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Foster v. Townshend, 2 Abb. N. Cas. (N. Y.) 29; Tillinghast v. Champlin, 4 R. I. 173, 67 Am. Dec. 510; Attorney-General v. Coventry, 1 P. Wms. 306.

[82] Chicago &c. R. Co. v. Keokuk, 108 Ill. 317, 48 Am. Rep. 557; Singerly v. Fox, 75 Pa. St. 112; Boyle v. Townes, 9 Leigh (Va.) 158. His title dates back to the time of making the order. East Tennessee &c. R. Co. v. Atlanta &c. R. Co., 49 Fed. 608; Connecticut &c. Co. v. Rockbridge Co., 73 Fed. 709; Maynard v. Bond, 67 Mo. 315; Steele v. Sturges, 5 Abb. Prac. (N. Y.) 442; Ardmore Nat. Bank v. Briggs &c. Co., 20 Okla. 427, 94 Pac. 532, 23 L. R. A. (N. S.) 1074n, 129 Am. St. 747; Texas Trunk R. Co. v. Lewis, 81 Tex. 1, 16 S. W. 647, 26 Am. St. 776; Baldwin v. Spear Bros., 79 Vt. 43, 64 Atl. 235, notes in 20 L. R. A. 391, and 15 L. R. A. (N. S.) 658.

[83] Swift's &c. Works v. John-

attachments,[84] or executions already levied.[85] The appointment of a receiver for a corporation does not dissolve the corporation.[86] Pending suits against the corporation are not necessarily abated,[87] but the right of the corporation to sue is generally suspended by the appointment.[88] It may keep up its organization and still perform many acts as a corporation, notwithstanding the fact that the custody, control and management of its property are in the hands of a receiver.[89] The subject of the liabilities of the corporation and of the receiver will be treated in another section.

sen, 26 Fed. 828; State v. Ellis, 45 La. Ann. 1418, 14 So. 308; Skinner v. Maxwell, 68 N. Car. 400; McDonald v. Charleston &c. R. Co., 93 Tenn. 281, 24 S. W. 252; Harrison v. Waterberry &c. Co. (Tex.), 27 S. W. 109; Ames v. Trustees, 20 Beav. 332. See also Horn v. Pere Marquette R. Co., 151 Fed. 627. But see as to real estate when there is no conveyance to the receiver, St. Louis &c. Co. v. Sandoval &c. Co., 111 Ill. 32.

[84] Jones v. Bank, 10 Colo. 464, 20 Am. & Eng. Corp. Cas. 554; Kittredge v. Osgood, 161 Mass. 384, 37 N. E. 369.

[85] Talladega &c. Co. v. Jenifer &c. Co., 102 Ala. 259, 14 So. 743; Chautauqua &c. Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Becker v. Torrance, 31 N. Y. 631. See also Squire v. Princeton Lighting Co., 72 N. J. 883, 68 Atl. 176, 15 L. R. A. (N. S.) 657.

[86] National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 693; Jones v. Bank, 10 Colo. 464, 20 Am. & Eng. Corp. Cas. 554; Heath v. Missouri &c. R. Co., 83 Mo. 617; State v. Railroad Comrs., 41 N. J. L. 235; Kincaid v. Dwinelle, 59 N. Y. 548.

[87] Wilder v. New Orleans, 87 Fed. 843; Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28 Am. Rep. 613; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; St Louis &c. R. Co. v. Holladay, 131 Mo. 440, 33 S. W. 49. So it is held that it may still be sued. Wyatt v. Ohio &c. R. Co., 10 Ill. App. 289; Allen v. Central R. Co., 42 Iowa 683; St Joseph &c. R. Co. v. Smith, 19 Kans. 225; Pringle v. Woolworth, 90 N. Y. 502.

[88] Post, § 651; Kokomo City St. R. Co. v. Pittsburgh &c. R. Co., 25 Ind. App. 335, 58 N. E. 211. But see American Bank v. Cooper, 54 Maine 438; People v. Barnett, 91 Ill. 422. There are probably exceptions to this rule in regard to franchises or matters in which the receiver may have no interest.

[89] See McCalmont v. Philadelphia &c. R. Co., 7 Fed. 386, 3 Am. & Eng. R. Cas. 163; Louisville &c. R. Co. v. Cauble, 46 Ind. 277; State v. Wabash R. Co., 115 Ind. 466, 17 N. E. 909; Lehigh &c. Co. v. Central &c. R. Co., 35 N. J. Eq. 349;

§ 647 (564). **Collateral attack on appointment.**—The order or judgment appointing a receiver is not open to collateral attack for any errors in the proceedings if the appointment was made by a court having jurisdiction of the case. It can only be assailed, as a rule, in a direct proceeding for that purpose.[90] Thus, where a receiver was appointed by the judge in vacation, under a statute authorizing such an appointment in certain actions, and a complaint was duly filed and both parties appeared before the judge, it was held that the appointment could not be collaterally attacked by a creditor for error of the judge in deciding that the complaint stated a cause of action of the kind designated, nor for any other mere irregularity or error in the order and proceedings.[91] So, where a complaint for the foreclosure of a mortgage prayed for the appointment of a receiver to collect the rents, it was held that it challenged the mortgagor to assert his right to the rent as well as to contest the appointment of a receiver, and that a decree adjudging that the mortgagee was entitled to the rents and appointing a

State v. Merchant, 37 Ohio St. 251, 9 Am. & Eng. R. Cas. 516; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 23 Am. & Eng. R. Cas. 149. See as to dealing with the corporation thereafter, Buchanan v. Hicks, 98 Ark. 370, 136 S. W. 177, 34 L. R. A. (N. S.) 1200, and note.

[90] Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. ed. 660; Comer v. Bray, 83 Ala. 217, 3 So. 554; Richards v. People, 81 Ill. 551; Cook v. Citizens' Nat. Bank, 73 Ind. 256; Booher v. Perrill, 140 Ind. 529, 40 N. E. 36; Hatfield v. Cummings, 153 Ind. 280, 50 N. E. 817; Greenawalt v. Wilson, 52 Kans. 109, 34 Pac. 403; Skinner v. Lucas, 68 Mich. 424, 36 N. W. 203; Keokuk &c. Co. v. Davidson, 13 Mo. App. 561; Attorney-General v. Guardian &c. Ins. Co., 77 N. Y. 272; Jones v. Blun, 145 N. Y. 333, 39 N. E. 954; Edrington v. Pridham, 65 Tex. 612; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050; Russell v. East Anglian R. Co., 3 Macn. & C. 104. But see State v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; Edee v. Strunk, 35 Nebr. 307, 53 N. W. 70; Whitney v. Hanover Nat. Bank, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531, where receiver's title is necessarily in question. It may be collaterally attached where absolutely void because the court has no jurisdiction. State v. District Ct., 21 Mont. 155, 53 Pac. 272, 69 Am. St. 645.

[91] Pressley v. Lamb, 105 Ind. 171, 189, 4 N. E. 682.

receiver to collect them and apply them to the mortgage debt rendered the matter res adjudicata and could not be collaterally attacked by the mortgagor.[92] But it has been held that a stockholder may show, in a suit by a receiver to collect an unpaid subscription, that the receiver was improperly appointed by a decree not binding upon the stockholder.[93] The soundness of this decision, however, is questionable.[94]

§ 648 (565). **Title and possession of receiver.**—The appointment of a receiver usually gives him the right to immediate possession and control of the property over which he is appointed.[95] Where the defendants, or persons claiming under them, refuse to surrender possession, the court appointing him will assist the receiver by an order directing the surrender of the specific property to him[96] and will, if necessary, enforce its order by attachment.[97] In Iowa it is held that a receiver may call upon the sheriff to aid in enforcing his right to take possession of property committed to his charge by the court.[98] But

[92] Storm v. Ermantrout, 89 Ind. 214.

[93] Chandler v. Brown, 77 Ill. 333. See also Libby v. Rosekrans, 55 Barb. (N. Y.) 202.

[94] See Schoonover v. Hinckley, 48 Iowa 82; Burton v. Schildbach, 45 Mich. 504, 8 N. W. 497. The appointment of a receiver can not be attacked on the ground of mere irregularity or error, in a proceeding by him to enforce a mechanic's lien in favor of the corporation for which he is receiver. Florence &c. Co. v. Hanby, 101 Ala. 15, 13 So. 343.

[95] Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339; Union Trust Co. v. Weber, 96 Ill. 346, 3 Am. & Eng. R. Cas. 583; Ellis v. Boston &c. R. Co., 107 Mass. 1; Yeager v. Wallace, 44 Pa. St. 294. See also Appleton Water Works Co. v. Central Trust Co., 93 Fed. 286. But see Illinois Steel Co. v. Putnam, 68 Fed. 515; Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. ed. 322.

[96] Cohen, In re, 5 Cal. 494; People v. Central City Bank, 53 Barb. (N. Y.) 412; Thornton v. Washington Savings Bank, 76 Va. 432; Geisse v. Beall, 5 Wis. 224. See also Horn v. Pere Marquette R. Co., 151 Fed. 627.

[97] Miller v. Jones, 39 Ill. 54. Or punish interference as a contempt. Thomas v. Cincinnati &c. R. Co., 62 Fed. 803; Secor v. Toledo &c. R. Co., 7 Biss. (U. S.) 513, Fed. Cas. No. 12605. Or enjoin it. Fidelity Trust &c. Co. v. Mobile St. R. Co., 53 Fed. 687; Metropolitan Trust Co. v. Columbus &c. R. Co., 95 Fed. 18.

[98] State v. Rivers, 66 Iowa 653, 24 N. W. 260.

where a third person holds property under claim of title the court will, in general, require the title of the receiver to be established by action before it will interfere.[99] The title of a receiver vests, by relation, at the date of his appointment, notwithstanding delay on his part in qualifying.[1] Indeed, it is held that even though the receiver does not qualify at all, but declines to act, the property is still in the custody of the court,[2] since a receiver is only the ministerial officer of the court which appoints him and his possession is the possession of the court.[3] This rule has even been applied as against the claim of a state for taxes, and it is held that property in the hands of a receiver of a federal court cannot be reached by proceedings for the collection of state taxes without the consent of such court.[4] Where a person purchases property with notice that proceedings are pending for the appointment of a receiver, it has been held that he takes it subject to the rights of such receiver, if one is granted.[5]

§ 649 (566). Authority, rights and duties of receiver—Control by court.—The term "receiver," as used in England, is employed to designate a person appointed by a court of chancery at the suit of some party in interest who receives rents, or other

[99] Coleman v. Salisbury, 52 Ga. 470; Levi v. Karrick, 13 Iowa 344; Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Gelpeke v. Milwaukee &c. R. Co., 11 Wis. 454. In Gelpeke v. Milwaukee &c. R. Co., 11 Wis. 454, Dixon, C. J., speaking for the court, said: "I know of no case where it has been adjudged that the possession of a stranger, who sets up a superior title, in pursuance of which he claims to have entered and to hold, might be thus disturbed. * * * Courts can only act in such cases, where the rights of the parties are obvious, and not the subject of doubts or serious controversy."

[1] Hardwick v. Hook, 8 Ga. 354; Maynard v. Bond, 67 Mo. 315; Rutter v. Tallis, 5 Sandf. (N. Y.) 610. See also ante, § 668.

[2] Skinner v. Maxwell, 68 N. Car. 400.

[3] Merchants' Ins. Co., In re, 3 Biss. (U. S.) 162, Fed. Cas. No. 9441; Ohio &c. R. Co. v. Fitch, 20 Ind. 498; Skinner v. Maxwell, 68 N. Car. 400; Robinson v. Atlantic &c. R. Co., 66 Pa. St. 160.

[4] Tyler, In re, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. ed. 689; Oakes v. Myers, 68 Fed. 807.

[5] Weed v. Smull, 3 Sandf. Ch. (N. Y.) 273.

income, and pays ascertained outgoings with a view to conserving property until it can be sold for the payment of debts and liabilities of an insolvent person or corporation. If it is necessary to continue the business a "manager" is appointed.[6] But in the United States a receiver of a railroad is understood to be a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, whose duty it is not only to preserve the tangible property of the corporation, but, also, its franchises and business, that the value of the railroad as a whole may not be impaired,[7] and that the rights of the public to have it kept in operation as a public highway may not be infringed. To this end he is empowered to hire and pay workmen, agents, and all necessary assistants, to make contracts for the carriage of passengers and freight, and to do such other acts as are necessary in maintaining the railroad as a going concern.[8] In the management of such a complicated business as the operation of a railroad a large discretion is necessarily given to a receiver. It may, perhaps, be laid down as a general proposition that all outlays made by the receiver, in good faith, in the ordinary course, with a view to promote the

[6] Manchester &c. R. Co., In re, L. R. 14 Ch. 645. A manager of a railway company may be appointed at the suit of a judgment creditor. 38 and 39 Vict. Ch. 31; 30 and 31 Vict. Ch. 127.

[7] Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Wallace v. Loomis, 97 U. S. 146, 162, 24 L. ed. 895; Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Mercantile Trust Co. v. Missouri &c. R. Co., 36 Fed. 221; Florida v. Jacksonville &c. R. Co., 15 Fla. 201, 206. See also 24 U. S. Stat. at Large, p. 554 (Act Cong. Mar. 3, 1887, § 2), as to the duty of a receiver appointed by a federal court to comply with laws of state in which property is situated.

[8] Ordinarily, the duties of a receiver only comprise the operation and management of the road, the payment of current expenses, and the application of the residue of the earnings and receipts to the extinguishment of the indebtedness, to secure which the receiver was appointed. Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518. While a receiver may, of course, purchase material essential for the operation of the road, he can not bind the trust by a purchase of material not wanted, excessive in price and defective in quality. Lehigh Coal &c. Co. v. Central R. Co., 35 N. J. Eq. 426. See generally as to his appointment and powers for the purpose of keeping in a going

business of the road and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad in his hands.[9] Thus, rebates of freight, paid in accordance with a customary practice necessary to secure business for the railway, when not illegal, the purchase-price of a truck and team of horses, and the expenses of drayage and wharfage have been held to be outlays properly within the discretion of the receiver.[10] So of counsel and witness fees in necessary litigation involving the receivership.[11] But the receiver should usually seek the advice of the court in advance, especially in case of any unusual expenditures,[12] and even then, if the hearing is ex parte, the judge may afterwards change his mind.[13]

concern, Erb. v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819, 44 L. ed. 897; Merley v. Saginaw Circuit Judge, 117 Mich. 246, 75 N. W. 466, 41 L. R. A. 817; Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188. And as to his authority to make shipping contracts see Northern Pac. R. Co. v. American Trading Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269; Kansas &c. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744.

[9] Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed Cas. No. 3293; Martin v. New York &c. R. Co., 36 N. J. Eq. 109. See also Continental Trust Co. v. Toledo &c. R. Co., 59 Fed. 514. He must comply with proper orders of the railroad or public service commissions in the states in which the railroad is operated. Railroad Com. v. Alabama &c. R. Co., 185 Ala. 354, 64 So. 13.

[10] Cowdrey v. Railroad Co., 1 Woods (U. S.) 334, Fed. Cas. No. 3293.

[11] Cowdrey v. Railroad Co., 1 Woods (U. S.) 334, Fed. Cas. No. 3293; Trustees of Internal &c. Fund v. Greenough, 105 U. S. 527, 26 L. ed. 1157; Montgomery v. Petersburg Sav. &c. Co., 70 Fed. 746.

[12] Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950. See also Missouri &c. Interurban R. Co. v. Edson, 198 Fed. 819 (not ordinarily personally liable where he follows directions of court); Metropolitan Trust Co. v. North Carolina Lumber Co., 162 Fed. 170; Williams v. Owensboro Sav. Bank &c. Co., 153 Ky. 789, 156 S. W. 899.

[13] Missouri Pac. R. Co. v. Texas &c. R. Co., 31 Fed. 862. See also Chamberlain, Ex parte, 55 Fed. 704, 706.

§ 650 (567). **Contracts of receivers.**—A receiver may, in general, make binding contracts on any subject within the scope of his authority; and one who has, in good faith, executed such a contract, should not be denied compensation, even though the contract should appear to have been improvident and opposed to the best interests of the trust.[14] He may contract to carry freight at a specified rate even from points beyond the terminus of his road to a point on such road and an order of court is not necessary to authorize him to do so.[15] So, he may effect insurance upon the property in his hands without special authority from the court.[16] But a receiver cannot bind the company by a contract to perform duties of a personal nature through a long series of years,[17] nor bind the trust property by a lease involving a large expenditure of money and extending beyond the time of the receivership.[18] Where an executory contract cannot, consistently with the interests of the trust, be

[14] Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188. A receiver of a railroad who is operating the road and managing and controlling its business will be presumed to have authority to make contracts relative to the carriage of goods, until the authority conferred upon him by the court is shown. Bayles v. Kansas Pac. R. Co., 13 Colo. 181, 22 Pac. 341, 5 L. R. A. 480. See also Lorain Steel Co. v. Union R. Co., 174 Fed. 262.

[15] Kansas Pac. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744. See also Northern Pac. R. Co. v. American &c. R. Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269; Philadelphia Investment Co. v. Ohio &c. R. Co., 41 Fed. 378; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 120 Fed. 873; Vanderbilt v. Little, 51 N. J. Eq. 289, 26 Atl. 1025; San Antonio &c. R. Co. v. Barnett (Tex. Civ. App.), 44 S. W. 20.

[16] Thompson v. Phoenix Ins. Co., 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. ed. 408; 3 Lewis' Am. R. & Corp. R. 119. See also Brown v. Hazlehurst, 54 Md. 26.

[17] Martin v. New York &c. R. Co., 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448. In this case the receiver agreed with a landowner to give him a free annual pass for himself over the road during his life, in part consideration of the release of a right of way across his land, and the court held that the contract could not be enforced against the company.

[18] Chicago Vault Co. v. McNulta, 153 U. S. 554, 14 Sup. Ct. 915, 38 L. ed. 819. See also McMinnville &c. R. Co. v. Huggins, 3 Baxt. (Tenn.) 177. (He should obtain the permission of the court un-

enforced against the receiver, and the contractor has in good faith expended money in preparation for its performance, it is said that he should yet be made whole by an allowance of damages out of the fund, unless it appears that he has been guilty of collusion or bad faith.[19] For a court of equity cannot revoke or annul at the pleasure of the chancellor the contracts of a receiver within the scope of the authority conferred by the order appointing him.[20] But one who contracts with a receiver must be assumed to know that, if he seeks to enforce his contract, it must come under the scrutiny of a court of equity; and it will not be enforced when it appears that the unreasonableness and improvidence of the contract were brought to his notice before he had taken any steps toward its performance.[21] And no contracts beyond such as are essential or at least proper in order to the successful operation of the road may be made without the sanction of the court.[22] There are some contracts, of course, made by the corporation before the appointment of a receiver which remain binding after his appointment, but there are others which are not binding upon him unless he, in

less authorized by statute or the order appointing him.)

[19] Little v. Vanderbilt, 51 N. J. Eq. 289, 26 Atl. 1025. Vanderbilt v. Little, 51 N. J. Eq. 289, 26 Atl. 1025. If the conduct of the receiver require it, the court might compel him to reimburse the fund for what would thus be taken from it. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188. See Moran v. Lydecker, 27 Hun (N. Y.) 582.

[20] Vanderbilt v. Central R. Co., 43 N. J. Eq. 669, 12 Atl. 188.

[21] In Lehigh Coal &c. Co. v. Central R. Co., 35 N. J. Eq. 426, the court, by Van Fleet, V. C., said: "All persons dealing with receivers do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court." See also Knickerbocker Trust Co. v. Green Bay &c. Co., 62 Fla. 519, 56 So. 699. But see as to reimbursement for expenses and losses incurred in good faith, Vanderbilt v. Little, 51 N. J. Eq. 289, 26 Atl. 1025.

[22] Taylor v. Philadelphia &c. R. Co., 9 Fed. 1; Lehigh Coal &c. Co. v. Central R. of N. J., 35 N. J. Eq. 426; McMinnville &c. R. Co. v. Huggins, 3 Baxt. (Tenn.) 177. See as to liability of receivers personally on contracts beyond his powers. Kalb &c. Mfg. Co., In re, 165 Fed. 895. And as to how contracts should be signed, see note in 42 L. R. A. (N. S.) 61.

some way, ratifies them.[23] Where a receiver is appointed for a railroad which embraces leased lines he does not necessarily assume responsibility for the covenants of the leases, nor take the place of the lessees, but he is entitled to a reasonable time in which to determine whether to adopt or renounce them.[24] In extraordinary cases, involving a large outlay of money, the receiver should apply to the court in advance and obtain its authority for the purchase or improvement proposed,[25] and this is always the safest course in case of doubt. In several cases the courts have refused to confirm the action of receivers in reducing wages of employes without notice to the employes.[26] A receiver, in a suit to foreclose a second mortgage, may be directed to pay interest on first mortgage bonds to prevent the foreclosure of the first mortgage, where it is to the interest of the second mortgage bondholders and the general creditors to prevent such foreclosure, although the application is opposed by the first mortgage bondholders and a majority of the second

[23] Girard &c. Co. v. Cooper, 51 Fed. 332; Central Trust Co. v. Wabash &c. R. Co., 52 Fed. 908; Ames v. Union Pac. R. Co., 60 Fed. 966; Seattle &c. R. Co., In re, 61 Fed. 541; Kansas Pac. R. Co. v. Bayles, 19 Colo. 348, 35 Pac. 744; Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 18 Am. St. 17; 1 Lewis' Am. R. & Corp. 502. See also Union Trust Co. v. Curtis, 182 Ind. 61, 105 N. E. 562, L. R. A. 1915A, 699; Brown v. Warner, 78 Tex. 543, 14 S. W. 1032, 11 L. R. A. 394, 22 Am. St. 67.

[24] St. Joseph &c. R. Co. v. Humphreys, 145 U. S. 105, 12 Sup. Ct. 795, 36 L. ed. 640, 60 Am. & Eng. R. Cas. 431, and note; United States Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. ed. 1085; Ames v. Union Pac. R. Co., 60 Fed. 966, citing numerous authorities; Clyde v. Richmond &c. R. Co., 63 Fed. 21. See also Pennsylvania Steel Co. v. New York City R. Co., 192 Fed. 135; Fisher v. Columbia Nat. Bank, 54 Ind. App. 558, 103 N. E. 119. But compare New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268.

[25] Bradley, J., in Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293.

[26] Ames v. Union Pac. R. Co., 60 Fed. 674; Ames v. Union Pac. R. Co., 62 Fed. 7, 4 Inters. Com. R. 619. As to controversies with employes, see generally, Platt v. Philadelphia &c. R. Co., 65 Fed. 660; Continental Trust Co. v. Toledo &c. R. Co., 59 Fed. 514; Seattle &c. R. Co., In re, 61 Fed. 541; Thomas v. Cincinnati &c R. Co., 62 Fed. 17; United

mortgage bondholders who are also interested in the first mortgage.[27] So, a receiver may be authorized in a proper case to complete work already begun,[28] or to pledge collaterals to secure loans necessary for the operation of the road.[29]

§ 651 (568). **Suits by receivers—Authority to sue.**—The right of a corporation to sue or prosecute an action previously commenced is generally suspended by the appointment of an acting receiver.[30] But the receiver, unless specially empowered by statute, cannot, ordinarily, institute an action upon any debt or claim accruing to the corporation which he represents without an order from the court appointing him, directing such suit to be brought.[31] A general permission to bring all necessary suits is usually given, however, in the order making the appointment.[32] But authority to sue will extend only to causes of action embraced within the terms of the order.[33] The weight of authority is to the effect

States Trust Co. v. Omaha &c. R. Co., 63 Fed. 737; Arthur v. Oakes, 63 Fed. 310; Dexter v. Union Pac. R. Co., 75 Fed. 947; Ellis v. Boston &c. R. Co., 107 Mass. 1.

[27] Lloyd v. Chesapeake &c. R. Co., 65 Fed. 351.

[28] Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Florence &c. Co. v. Hanby, 101 Ala. 15, 13 So. 343; Morrison v. Forman, 177 Ill. 427, 53 N. E. 73; Gibert v. Washington City &c. R. Co., 33 Grat. (Va.) 586. But not, ordinarily, to complete the road. See last three authorities above cited.

[29] Clarke v. Central R. Co., 54 Fed. 550.

[30] Davis v. Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494; Kokomo City St. R. Co. v. Pittsburgh &c. R. Co., 25 Ind. App. 335, 58 N. E. 211; Griffin v. Long Island R. Co., 102 N. Y. 449; Curtis v. McIlhenny, 5 Jones Eq. (N. Car.) 290.

[31] Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Bishop v. McKillican, 124 Cal. 321, 57 Pac. 76, 71 Am. St. 68; Glenn v. Busey, 5 Mackey (D. C.) 233; Screven v. Clark, 48 Ga. 41; Garver v. Kent, 70 Ind. 428; Davis v. Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494; Patrick v. Eells, 30 Kans. 680, 2 Pac. 116; State v. Games, 68 Mo. 289; Coope v. Bowles, 28 How. Prac. (N. Y.) 10; Merritt v. Merritt, 16 Wend. (N. Y.) 405; Battle v. Davis, 66 N. Car. 252; Davis v. Snead, 33 Grat. (Va.) 705; Ward v. Swift, 6 Hare (Eng.) 309. See also ante, § 620.

[32] Such general authority may be given by an order made subsequent to the order appointing the receiver. Lathrop v. Knapp, 37 Wis. 307.

[33] An order authorizing the receiv-

that even where leave to sue has been granted, a receiver cannot, in the absence of statutory authority, institute and conduct actions in his own name, in matters concerning his receivership, unless specially authorized by the court from which he receives his appointment,[34] and that he must, unless so authorized, bring his action in the name of the corporation or party in whom was the right of action before the receiver was appointed.[35] The reason for this is that the legal title to choses in action or other property which he is authorized to reduce to possession, is ordinarily not transferred to the receiver, but remains in the owner. Neither the reason nor the rule, it seems, controls in case a receiver brings suit upon a contract made with him as such,[36] or seeks to recover damages for the seizure and conversion of property after it came into his possession,[37] since a receiver, being the instrument used by the court in accomplishing its purpose, or carrying into effect its decree, must be presumed to have the power to take all such steps as are essential to enforce the performance of contracts and agreements made with him in the course of his receivership,[38] and to protect the property in his possession.[39] That a court of equity may empower its receiver

er to sue for all the assets of every kind and character does not give a right to maintain an action for injury to property not in the receiver's possession. Alexander v. Relfe, 9 Mo. App. 133. See Screven v. Clark, 48 Ga. 41.

[34] Manlove v. Burger, 38 Ind. 211; Newell v. Fisher, 24 Miss. 392; Yeager v. Wallace, 44 Pa. St. 294; King v. Cutts, 24 Wis. 627.

[35] Cases in preceding note. Where statute authority is lacking, it must appear by the averments of the complaint that the court appointing the plaintiff as receiver authorized him to sue in his own name in matters concerning his receivership, or he cannot recover in an action in his own name for a debt due the corporation. Garver v. Kent, 70 Ind. 428. But see Boyd v. Royal Ins. Co., 111 N. Car. 372, 16 S. E. 389.

[36] Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66.

[37] Kehr v. Hall, 117 Ind. 405, 20 N. E. 279; Singerly v. Fox, 75 Pa. St. 112. A receiver may maintain replevin for property which has been wrongfully taken out of his possession. Boyle v. Townes, 9 Leigh (Va.) 158.

[38] Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66.

[39] Kehr v. Hall, 117 Ind. 405, 20 N. E. 279. See also Littlefield v. Maine Cent. R. Co., 104 Maine 126, 71 Atl. 657.

to bring all actions in his own name as receiver which may be necessary, instead of suing in the name of the corporation or joining it with him even in the absence of any statutory provisions on the subject is the settled doctrine of nearly all the modern cases.[40] And the courts of some of the states have gone to the extent of holding that the appointment of a receiver authorizes him, virtute officii, to bring all necessary suits in the discharge of his trust, and makes him so far the assignee of the legal title that he must sue in his own name.[41] Authority is expressly given to the receiver by statute in many of the states to

[40] Davis v. Gray, 16 Wall. (U. S.) 203, 21 L. ed. 447; Hardwick v. Hook, 8 Ga. 354; Inglehart v. Bierce, 36 Ill. 133; Helme v. Littlejohn, 12 La. Ann. 298; Frank v. Morrison, 58 Md. 423; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Wray v. Jamison, 10 Humph. (Tenn.) 185; Boyle v. Townes, 9 Leigh (Va.) 158; Lathrop v. Knapp, 27 Wis. 215. But in Pennsylvania and some other states, where the receiver is the mere custodian of the property, he is held to have no title upon which to maintain a suit in his own name, but, if authorized to bring suit must sue in the name of the corporation. Dick v. Struthers, 25 Fed. 103; Comer v. Bray, 83 Ala. 217, 3 So. 554; Farmers' &c. Ins. Co. v. Needles, 52 Mo. 17; Yeager v. Wallace, 44 Pa. St. 294.

[41] Helme v. Littlejohn, 12 La. Ann. 298; Baker v. Cooper, 57 Maine 388; Wray v. Jamison, 10 Humph. (Tenn.) 185. In Wilkinson v. Rutherford, 49 N. J. L. 241, 8 Atl. 507, the court said: "It has already been shown that there is no statutory definition of the powers of the receiver. The question, consequently, that arises, is as to the inherent abilities of a receiver by force of the usual rules or jurisdiction. I can not agree to the doctrine that a receiver is a mere custodian of the property of the person whom, in certain cases, he is made to supplant, and it would seem he is an assignee of the assets within the scope of his office. There seems to be no reason why his power should not be held to be co-extensive with his functions; and it is clear that he can not conveniently perform those functions unless upon the theory that some interest in the property, akin to that of an assignee's passes to him. The receiver is to discharge the executory duty of collecting the debts, and taking into his possession, even against antagonistic claims, the tangible property; and after his appointment, a sale of such property by the insolvent would, it is presumed, be absolutely void; and yet, if the interest in the property was not vested in the receiver, it would be diffi-

prosecute and defend actions in his own name as receiver.[42] Where this power is made absolute it is not necessary for him to show a special authority from the court appointing him to prosecute an action,[43] though he must set forth sufficient facts to show his character as receiver, and that he is the person authorized by the statute to act on behalf of the corporation.[44] Where, as is the case in Indiana, a receiver is given power to bring and defend actions, collect debts, etc., in his own name, "under the control of the court, * * * and generally to do such acts respecting the property, as the court or judge thereof may authorize," the complaint must allege that suit was brought by direction of the court appointing the receiver or it will be fatally defective.[45]

§ 652 (569). **When receiver may maintain suit—Defenses to receiver's suit.**—The court may empower its receiver to sue upon any rights of action which belong to the person or corporation whose property has been put into the receiver's hands.[46] But a receiver usually has no power to maintain suits where the party whose effects he receives could not have sued,

cult to find ground on which to validate the transaction. * * * These embarrassments, as well as many others of a like kind, are obviated by the adoption of the doctrine that, virtute officii, a receiver be comes provisional assignee of the property committed to him, and this doctrine is recognized in the case of Harrison v. Maxwell, 44 N. J. L. 316."

[42] See Burns' Ann. Stat. Ind. 1914, § 1285.

[43] Miller v. Mackenzie, 29 N. J. Eq. 291.

[44] Asheville Division No. 15 v. Aston, 92 N. Car. 578; Miami Exporting Co. v. Gano, 13 Ohio 269; Gluck & Becker Rec. of Corp. 156.

[45] Garver v. Kent, 70 Ind. 428; Moriarity v. Kent, 71 Ind. 601. See Davis v. Ladoga Creamery Co., 128 Ind. 222, 27 N. E. 494.

[46] Litchfield Bank v. Peck, 29 Conn. 384; McIlrath v. Snure, 22 Minn. 391; Griffin v. Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Coope v. Bowles, 28 How. Prac. (N. Y.) 10, 42 Barb. (N. Y.) 87. As to suits against stockholders for unpaid subscriptions, see Cutting v. Damerel, 88 N. Y. 410; Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731; Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203; Schoonover v. Hinckley, 48 Iowa 82; Starke v. Burke, 5 La. Ann. 740; Stillman v. Dougherty, 44 Md. 380; Sagory v. Dubois,

and the fact that an order of court directs him to bring the suit will not add to his right to maintain it.[47] This rule, however, as we have elsewhere shown,[48] is not without its exceptions, for there are cases in which a receiver may maintain a suit that the corporation could not have maintained. As a general rule, the same defenses may be interposed to an action by the receiver on a demand due the corporation that could have been set up in a suit by the corporation itself.[49] This rule is subject to the exception, however, that where the receiver is suing in the interest of the creditors, no defense is available against him which could not equitably be opposed to a suit by them. Thus, it has been held that a receiver appointed at the instance of creditors may recover dividends that were fraudulently paid by the corporation after it became insolvent,[50] or a subscription which the creditors themselves could enforce although the corporation could not[51] and it has been held that a debtor cannot interpose a judgment recovered upon a promissory note of the corporation as a set-off to an action by the receiver to enforce payment of his indebtedness due the corporation.[52]

3 Sandf. Ch. (N. Y.) 466; Clarke v. Thomas, 34 Ohio. St. 46; Means' Appeal, 85 Pa. St. 75; Lathrop v. Knapp, 37 Wis. 307. In Illinois a suit can be maintained against the stockholders only when they were made parties to the suit in which a receiver was appointed. Chandler v. Brown, 77 Ill. 333. As to suits against corporate officers for breach of trust and for gross mismanagement and neglect of duty, see McCarty's Appeal, 110 Pa. St. 379, 4 Atl. 925; Ackerman v. Halsey, 37 N. J. Eq. 356.

[47] La Follett v. Akin, 36 Ind. 1; State v. Sullivan, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325; Hyde v. Lynde, 4 N. Y. 387.

[48] Ante, § 620.

[49] Litchfield Bank v. Peck, 29 Conn. 384; Moise v. Chapman, 24 Ga. 249; Brooks v. Bigelow, 142 Mass. 6, 6 N. E. 766; Cox v. Volkert, 86 Mo. 505; Van Wagoner v. Paterson &c. Co., 23 N. J. Law 283; Thomas v. Whallon, 31 Barb. (N. Y.) 172; Hade v. McVay, 31 Ohio St. 231; Chase v. Petroleum Bank, 66 Pa. St. 169.

[50] Osgood v. Ogden, 4 Keyes (N. Y.) 70.

[51] Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. 858. See generally as to collection of subscriptions by receivers, note to Thompson v. Reno Sav. Bank, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797, 833.

[52] Where the effect of allowing

§ 653 (570). **Right of receiver to sue in other jurisdictions —Comity.**—Some authorities hold that a receiver owing his appointment to the common law jurisdiction of a court of equity cannot sue outside of the jurisdiction of the court which appointed him.[53] This rule is generally followed, in the older cases, and also in some of the more recent ones, by the federal courts with regard to receivers appointed by the United States courts in other districts,[54] and is based upon the ground that a court of chancery has no authority to act beyond its jurisdiction, and that consequently a receiver at common law is not clothed

a set-off would be to prefer one creditor over another, a set-off will not be allowed. Singerly v. Fox, 75 Pa. St. 112; Litchfield Bank v. Church, 29 Conn. 137; Williams v. Traphagen, 38 N. J. Eq. 57; Clark v. Brockway, 3 Keyes (N. Y.) 13. See also Lanier v. Gayoso &c. Inst., 9 Heisk. (Tenn.) 506. But a set-off may sometimes be allowed. See Colt v. Brown, 12 Gray (Mass.) 233; Cox v. Volkert, 86 Mo. 505; Berry v. Brett, 6 Bosw. (N. Y.) 627; Hade v. McVay, 31 Ohio St. 231. See further as to when there may or may not be set-off in actions by the receiver. Hynes v. Illinois Trust &c. Bank, 226 Ill. 95, 80 N. E. 753, 10 L. R. A. (N. S.) 472, and note; and authorities cited in note in 41 L. R. A. (N. S.) 996.

[53] Farmers' &c. Ins. Co. v. Needles, 52 Mo. 17; Hope Mut. L. Ins. Co. v. Taylor, 2 Robt. (N. Y.) 278; Warren v. Union Nat. Bank, 7 Phila. (Pa.) 156; Moseby v. Burrow, 52 Tex. 396. See Bartlett v. Wilbur, 53 Md. 485; Graydon v. Church, 7 Mich. 36; Moreau v. Du Bellet (Tex. Civ. App.), 27 S. W. 503. See also "Actions by Foreign Receivers," 37 Cent. L. J. 315.

[54] Booth v. Clark, 17 How. (U. S.) 322, 15 L. ed. 164; Holmes v. Sherwood, 3 McCrary (U. S.) 405, 16 Fed. 725; Wilkinson v. Culver, 23 Blatchf. (U. S.) 416, 25 Fed. 639; Brigham v. Luddington, 12 Blatchf. (U. S.) 237, Fed. Cas. No. 1874; Hazard v. Durant, 19 Fed. 471, Fowler v. Osgood, 141 Fed. 20. See also Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. ed. 632; Hale v. Allison, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. ed. 380; Great Western Min. &c. Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. ed. 1163; Fairview Fluor Spar &c. Co. v. Ulrich, 192 Fed. 894; Fowler v. Osgood, 141 Fed. 20, 4 L. R. A. (N. S.) 824. In the note to this case as last reported the authorities on both sides are reviewed. In Booth v. Clark, supra, the court said: "A receiver has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's proper-

with power to sue in a foreign jurisdiction.[55] But the better rule, as it seems to us, and one which is well sustained by authority, is that, although a receiver has not, as a matter of absolute right, any extraterritorial jurisdiction or authority to sue in a foreign jurisdiction, yet as a matter of comity, receivers duly appointed and qualified, and invested with authority to sue for and collect the corporate assets situated in other states, may, and usually will, be permitted to maintain suits in the courts of such other states.[56] This rule, however, is said to be subject to the exception that

ty; none which can give him, upon the principle of comity a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. * * * We think that a receiver could not be admitted to the comity extended to judgment creditor without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the assets of the debtor and the application and distribution of them." It may be that the act of March 3, 1887, as corrected August 13, 1888, found in 25 U. S. Stat. L. 433, Barnes' Fed. Code §§ 827, 828, may have some bearing upon this question, but so far as we know, the point has never been made.

[55] But where the receivers were appointed under statutory provisions existing at the organization of the corporation and entering into and forming part of its charter, by which the rights and duties of such receivers were defined, it was held that the shareholders and creditors of the corporation were charged with notice of the charter right of the corporation to have all of its property transferred to a receiver if it should become insolvent, and must be held to have impliedly agreed that, in such case, they would be bound by the laws of the state in which the corporation was organized, so far as they formed a part of the charter of the company. Parsons v. Charter Oak L. Ins. Co., 31 Fed. 305; Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337; Davis v. Life Assn., 11 Fed. 781; Bockover v. Life Assn., 77 Va. 85.

[56] Sercomb v. Catlin, 128 Ill. 556, 21 N. E. 606, 15 Am. St. 147; Metzner v. Bauer, 98 Ind. 425; Hurd v. Elizabeth, 41 N. J. L. 1; Hoyt v. Thompson, 5 N. Y. 320; Bagby v. Atlantic &c. R. Co., 86 Pa. St. 291; Lycoming Fire Ins. Co. v. Wright, 55 Vt. 526; ante, § 638. See also "Actions by Foreign Receivers," 37 Cent. L. J. 315, and authorities cited on page 318;

while a receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction, aid will only be extended as against those who were parties to, or in some way in privity with, the proceedings in which his appointment was made, or who are in possession of the property or effects of the estate without right.[57] It is generally the policy of each state to retain within its control the property of a foreign debtor until all domestic claims have been satisfied, and in many of the states comity will not be extended by the courts to enable a receiver to take possession of, and withdraw from the state, property or funds which were already in such state and which resident creditors are seeking to subject to the payment of their debts, by proceedings duly instituted for that purpose.[58] After a receiver has reduced the property or effects of the corporation to possession he becomes vested with a special property therein, and is entitled to protect this special property, while it continues, by action, in like manner as if he was the absolute owner.[59] This property interest of the receiver will usually be recognized and enforced by the courts of other states, not alone upon principles of comity, but as a matter of right.[60] If he recovers

Davis v. Gray, 16 Wall. (U. S.) 219, and note in 4 L. R. A. (N. S.) 825, 21 L. ed. 447; New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268; Wigton v. Bosler, 102 Fed. 70; Strout v. United Shoe Mach. Co., 195 Fed. 313; Wyman v. Eaton, 107 Iowa 214, 77 N. W. 865, 43 L. R. A. 695, 70 Am. St. 193; Castleman v. Templemann, 87 Md. 546, 40 Atl. 275, 41 L. R. A. 367, 67 Am. St. 363; Howarth v. Angle, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

[57] Catlin v. Wilcox &c. Co., 123 Ind. 477, 24 N. E. 250, 8 L. R. A. 62, 18 Am. St. 340.

[58] Ward v. Pacific Mut. L. Ins. Co., 135 Cal. 235, 67 Pac. 124; Stockbridge v. Beckwith, 6 Del. Ch. 72, 33 Atl. 620; Hurd v. Elizabeth, 41 N. J. L. 1; Willitts v. Waite, 25 N. Y. 577; Lycoming Fire Insurance Co. v. Wright, 55 Vt. 526. See State v. Jacksonville &c. R. Co., 15 Fla. 201; Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 351. "We decline to extend our wonted courtesy so far as to work detriment to citizens of our own state who had been induced to give credit to the foreign insolvent." Runk v. St. John, 29 Barb. (N. Y.) 585. See ante, § 638.

[59] Kehr v. Hall, 117 Ind. 405, 20 N. E. 279; Pouder v. Catterson, 127 Ind. 434, 26 N. E. 66.

[60] See ante, §§ 638, 646, also

judgment against a debtor in his own name as receiver, he may maintain an action against the debtor in another jurisdiction upon such judgment, as a judgment creditor.[61] So where he takes the debtor's note in payment of a claim due the corporation, the receiver may bring suit in a foreign state to collect the note.[62] A receiver may take property of which he has obtained legal possession into other jurisdictions without affecting his title thereto. And the citizens of other states into which the property is taken by the receiver in the performance of his duties, cannot proceed against such property by attachment for the debts of the corporation.[63] So, if property is wrongfully and without the receiver's consent, taken out of his possession, it has been held that he may follow it and reclaim it wherever found, and the courts of foreign states will aid him to recover it.[64]

§ 654 (571). Suits against receivers—Leave to sue must be obtained.—In the absence of any statutory provisions on the subject, it is the general rule that a suit cannot be maintained against a receiver without leave of the court appointing him,[65]

Robertson v. Staed, 135 Mo. 135, 36 S. W. 610, 33 L. R. A. 203, 58 Am. St. 569.

[61] Wilkinson v. Culver, 25 Fed. 639. See also Comstock v. Fredrickson, 51 Minn. 350, 53 N. W. 713; Aldrich v. Aucher &c. Co., 24 Ore. 32, 32 Pac. 756, 41 Am. St. 831; Wilson v. Keels, 54 S. Car. 545, 32 S. E. 702, 71 Am. St. 816; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. 881.

[62] Inglehart v. Bierce, 36 Ill. 133.

[63] Crapo v. Kelly, 16 Wall. (U. S.) 610, 21 L. ed. 430; Pond v. Cooke, 45 Conn. 126; Chicago &c. R. Co. v. Keokuk &c. Co., 108 Ill. 317; Cagill v. Wooldridge, 8 Baxter (Tenn.) 580. But it has been held in California that cars belonging to a railroad which is being operated by a receiver appointed by the United States Circuit Court in another state may be attached for a debt due a citizen of California, if they are sent into that state in the transaction of the business of the company. Humphreys v. Hopkins, 81 Cal. 551, 22 Pac. 892, 6 L. R. A. 792, 15 Am. St. 76. See however comments on this case in note to § 638, ante.

[64] McAlpin v. Jones, 10 La. Ann. 552.

[65] Wiswall v. Sampson, 14 How. (U. S.) 52, 14 L. ed. 322; Barton v. Barbour, 104 U. S. 126, 26 L. ed.

but it has been held that where the suit is brought in such court, the fact that it entertains the suit is sufficient to establish the granting of leave to sue.[66] Since the receiver is but the "hand" of the court, it is held that any interference with his possession and control of the property by suit or otherwise is an interference with the process of the court, and not to be tolerated.[67] And it is argued that to permit the institution of such suits and the taking of judgments against the receiver would result in the creation of new liens upon the property in the hands of the receiver, over which the court would have no control, thereby clouding the title to the property, and that the whole purpose of the litigation in equity and of the taking possession of property through the receiver, would be defeated.[68] In accordance with this view it was held that a court had no jurisdiction to entertain a suit against the receiver of a railroad corporation, where it was shown that leave to sue had not been obtained, although the receiver was appointed by a court of the state of Virginia and was transacting business in the District of Columbia, where the suit was brought.[69] The court also held that the rule requiring

672; De Graffenried v. Brunswick &c. R. Co., 57 Ga. 22; Martin v. Atchison, 2 Idaho 590, 33 Pac. 47; Keen v. Breckenridge, 96 Ind. 69; St. Joseph &c. R. Co. v. Smith, 19 Kans. 225; Meredith &c. Bank v. Simpson, 22 Kans. 414; Heath v. Missouri &c. R. Co., 83 Mo. 617, 623; Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Miller v. Loeb, 64 Barb. (N. Y.) 454; Rogers v. Mobile &c. R. Co. (Tenn.), 12 Am. & Eng. R. Cas. 442; Melendy v. Barbour, 78 Va. 544; Reed v. Axtell & Myers, 84 Va. 231, 4 S. E. 587. A judgment in favor of a receiver in an action against him begun without leave of court is, it seems, a nullity, and constitutes no defense to a subsequent action. Comer v. Felton, 61 Fed. 731.

[66] Ft. Dodge v. Minneapolis &c. R. Co., 87 Iowa 389, 54 N. W. 243. In this case it was held that, where mandamus against a receiver is instituted in the court which appointed him, and the court entertains the action, he can not object that it is an improper remedy, or that the relief sought might have been obtained in a more summary and less formal manner. See also Ratcliff v. Baer &c. Co., 71 Ark. 269, 72 S. W. 896.

[67] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Thompson v. Scott, 4 Dill. (U. S.) 508, Fed. Cas. No. 13975.

[68] Thompson v. Scott, 4 Dill. (U. S.) 508, Fed. Cas. No. 13975.

[69] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; but in this

leave to sue applies not only to cases where the purpose of the suit is to take from the receiver property which is actually in his possession, placed there by order of the court, but embraces as well any suit to recover judgment against a receiver for a money demand, even though the cause of action arose out of the operation of a railroad by the receiver.[70] In cases where leave to sue is essential, it may be given, in the case of a railroad operated by a receiver, by a general leave to all persons having demands against the receiver as such, for liabilities incurred by him in operating the road, without applying to the court for leave to do so, to bring suit thereon in any other court having jurisdiction.[71] It is held that an application for leave to sue is addressed to the sound discretion of

case the injury sued for was received while traveling on defendant's road in Virginia, and the fund from which payment was sought to be enforced was in Virginia, and the court declined to pass upon the general question as to the right to sue foreign receivers doing business outside of the jurisdiction by which they were appointed. In Fort Dodge v. Minneapolis &c. R. Co., 87 Iowa 389, 54 N. W. 243, 55 Am. & Eng. R. Cas. 58, it was held that comity does not demand that the enforcement of a statute requiring the construction of railroad crossings should be deferred to wait the action of the courts of another state, which appointed a receiver in reference to the property of the corporation situated in that state.

[70] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672. Mr. Justice Woods, in delivering the opinion of the court in this case, said: "The evident purpose of a suitor who brings his action against a receiver without leave is to obtain some advantage over the other claimants, upon the assets in the receiver's hands. His judgment, if he recovered one, would be against the defendant in his capacity as receiver, and the execution would run against the property in his hands as such." See this case severely criticized in Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346, and see also cases cited in notes to next following section, and § 817, 5 Thomp. Corp. (2d ed.), § 6421.

[71] Dow v. Memphis &c. R. Co., 20 Fed. 260. In this case the following order was made: That persons having demands or claims of any character against the receiver may, without applying to this court for leave to do so, bring suit thereon against the receiver in any court in this state having jurisdiction, or may file their petition and have their claim adjudicated in this court at

the court,[72] and should not be granted unless the petition states a prima facie cause of action against the receiver; but the

their election. This clause shall not be construed as authorizing the levy of any writ or process on the property in the hands of the receiver, or taking the same from his custody or possession. Judge Caldwell said: "The general license to sue the receiver is given because it is desirable that the right of the citizens to sue in the local state courts on the line of the road should be interfered with as little as possible. It is doubtless convenient and a saving and protection to the railroad company and its mortgage bondholders, to have the litigation growing out of the operation of a long line of railroad concentrated in a single court, and on the equity side of that court, where justice is administered without the intervention of a jury. But, in proportion as the railroad and its bondholders profit by such an arrangement, the citizen dealing with the receiver is subjected to inconvenience and expense, and he is deprived of the forum, and the right of trial by jury, to which, in every other case of legal cognizance, he has the right to appeal for redress. * * * Where property is in the hands of a receiver simply as a custodian, or for sale or distribution, it is proper that all persons having claims against it, or upon the fund arising from its sale, should be required to assert them in the court appointing a receiver. But a very different question is presented where the court assumes the operation of a railroad hundreds of miles in length, and advertises itself to the world as a common carrier. This brings it into constant and extensive business relations with the public Out of the thousands of contracts it enters into daily as a common carrier, some are broken and property is damaged and destroyed, and passengers injured and killed by the negligent and tortious acts of its receiver and its agents. * * * When a court, through its receiver, becomes a common carrier, and enters the lists to compete with other common carriers for the carrying trade of the country, it ought not to claim or exercise any special privileges denied to its competitors and oppressive to the citizen. The court appointing a receiver can not, of course, permit any other jurisdiction to interfere with its possession of the property, or control its administration of the fund, but in the case of long lines of railroad, the question of the legal liability of its receiver to the demands of the citizen, growing out of the operation of the road, should be remitted to the tribunals that would have jurisdiction if the controversy had arisen between the citizen and the railroad company, giving to the citizen the option of seeking his redress in such tribunals, or in the court appointing the receiver."

[72] Meeker v. Sprague, 5 Wash. St. 242, 31 Pac. 628. But see Con-

court should not, as a rule, undertake to decide the case in advance.[73]

§ 655 (572). **Effect of failure to obtain leave to sue.**—It has been held that a complaint in such a suit which does not allege that leave to bring an action has been obtained is insufficient on demurrer.[74] But it has also been held that a complaint which does not aver that leave to sue has been obtained is sufficient to withstand a motion in arrest of judgment after verdict upon issue joined.[75] The objection that the action was begun without leave of court should be interposed by the receiver at the first opportunity, if he relies upon the protection of the court as a defense. After he has voluntarily submitted to the authority of the court and joined issue without objection, it has been held to be too late for him to urge that leave to sue him was not first obtained.[76] It has been held, however, that parties who bring such a suit without leave may be pun-

well v. Lawrence, 46 Kans. 83, 26 Pac. 461.

[73] Jordan v. Wells, 3 Woods (U. S. C. C.) 527, Fed. Cas. No. 7524. See Palys v. Jewett, 32 N. J. Eq. 302, to the effect that leave will usually be granted unless there is some good reason for not granting it, and of course, a statute may give the right.

[74] Barton v. Barbour, 104 U. S. 126, 26 L. ed. 672; Keen v. Breckenridge, 96 Ind. 69; Wayne Pike Co. v. State, 134 Ind. 672, 34 N. E. 440. And see Central Trust Co. v. Wheeling &c. R. Co., 189 Fed. 82. Compare also International &c. R. Co. v. Bradt, 57 Tex. Civ. App. 82, 122 S. W. 59. And see as to leave not being required in case of cross-bill, Venner v. Denver &c. Co., 40 Colo. 212, 90 Pac. 623, 122 Am. St. 1036. But see Kinney v. Crocker, 18 Wis. 74; Allen v. Central R. Co., 42 Iowa 683; St. Joseph &c. R. Co. v. Smith, 19 Kans. 225.

[75] Elkhart Car Works Co. v. Ellis, 113 Ind. 215, 15 N. E. 249.

[76] Naumburg v. Hyatt, 24 Fed. 898, 901; Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702; Elkhart Car Works Co. v. Ellis, 113 Ind. 215, 15 N. E. 249; Flentham v. Steward, 45 Nebr. 640, 63 N. W. 924; Hubbell v. Dana, 9 How. Prac. (N. Y.) 424; Roxbury v. Central Vermont R. Co., 4 R. & Corp. L. J. 204. See Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136; Comer v. Felton, 61 Fed. 731; 8 Thomp. Corp. § 6420, and see article in 25 Am. L. Reg. (N. S.) 289, in which the position is taken that the receiver can not give jurisdiction by waiving the objection. As already shown a few courts, including the Supreme Court of the United States, seem to regard leave to sue as jurisdictional.

ished for contempt,[77] and that the proceedings may be restrained,[78] or stayed, or set aside on motion.[79] The constitutional right to sue in the federal courts in certain cases does not enable a litigant to maintain a suit without leave in one of those courts against a receiver appointed by a state court.[80] It has been held, however, that where the receiver, wrongfully or by mistake, takes possession of the property of a third person, such person may bring suit therefor against him personally as a matter of right; for, in such case, the receiver would be acting ultra vires, and cannot be held to represent the court by which he was appointed.[81] A number of cases, also, while admitting the general doctrine that a court of equity may draw to itself all controversies to which the receiver is a party, hold that it is not bound to do so, but may properly leave the determination of actions at law for money demands, the exact amount of which is uncertain, to be determined by other courts of competent jurisdiction,[82] and that the lack of leave to sue does not affect the jurisdiction of the court in

[77] Kennedy v. Indianapolis &c. R. Co., 3 Fed. 97; Wiswall v. Sampson, 14 How. (U. S.) 52, 67, 14 L. ed. 332; 5 Thomp. Corp. (2nd. ed.), § 6421, citing additional cases to same effect.

[78] Evelyn v. Lewis, 3 Hare 472; Tink v. Rundle, 10 Beav. 318.

[79] De Groot v. Jay, 30 Barb. (N. Y.) 483; Taylor v. Baldwin, 14 Abb. Prac. (N. Y.) 166.

[80] Reed v. Axtell, 84 Va. 231, 4 S. E. 587.

[81] Kenney v. Ranney, 96 Mich. 617, 55 N. W. 982; Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; Paige v. Smith, 99 Mass. 395; Hills v. Parker, 111 Mass. 508, 15 Am. Rep. 63. In this latter case the owner of a locomotive in use upon the road of an insolvent railroad corporation was permitted to maintain an action of replevin against the receiver of such corporation to recover his property, without having first obtained leave of court. Christian Jansen Co., In re, 128 N. Y. 550, 28 N. E. 665, holds that even though property is wrongfully in the possession of a corporation, it can not be replevied without leave of court after it comes into the possession of a receiver appointed in voluntary proceedings to dissolve the corporation.

[82] Allen v. Cent. R. &c., 42 Iowa 683; St. Joseph &c. R. Co. v. Smith, 19 Kans. 225; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Kinney v. Crocker, 18 Wis. 74.

which such a suit is brought,[83] and does not invalidate a judgment rendered by such court in case the proceedings are not stayed by the court which appointed the receiver.[84]

§ 656 (573). Effect of recent Act of Congress.—It would seem highly proper that suits upon causes of action arising from the negligent operation of a railroad by a receiver, or from a breach of contracts made in the course of such operation,[85] should be tried in a court of law with the aid of a jury, and this is sometimes urged as a reason for denying that

[83] Allen v. Central R. Co., 42 Iowa 683; Nichols v. Smith, 115 Mass. 332; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346; Kinney v. Croker, 18 Wis. 74. See also Mulcahey v. Strauss, 151 Ill. 70, 37 N. E. 702. In Kinney v. Crocker, 18 Wis. 74, the court said: "A court of equity will, on proper application, protect its own receiver, when the possession which he holds under the order of the court is sought to be disturbed." And again: "But in all these cases it is not a question of jurisdiction in the courts of law, but only a question whether equity will exercise its own acknowledged jurisdiction of restraining suits at law, under such circumstances, and itself dispose of the matter involved. It follows that although a plaintiff in such case, desiring to prosecute a legal claim for damages against a receiver might, in order to relieve himself from the liability to have his proceedings arrested by an exercise of its equitable jurisdiction very properly obtain leave to prosecute; yet his failure to do so is no bar to the jurisdiction of the court of law, and no defense to an otherwise legal action in the trial. There can be no room to question this conclusion in all cases where there is no attempt to interfere with the actual possession of property which the receiver holds under the order of the court of chancery, but only an attempt to obtain a judgment at law in a claim for damages."

[84] De Groot v. Jay, 30 Barb. (N. Y.) 483; Taylor v. Baldwin, 14 Abb. Prac. (N. Y.) 166.

[85] For instances in which such suits have been maintained, see Allen v. Central R. Co., 42 Iowa 683; Lamphear v. Buckingham, 33 Conn. 237; Ballou v. Farnum, 9 Allen (Mass.) 47; Paige v. Smith, 99 Mass. 395; Nichols v. Smith, 115 Mass. 332; Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Kain v. Smith, 80 N. Y. 458; Blumenthal v. Brainerd, 38 Vt. 402, 91 Am. Dec. 349; Newell v. Smith, 49 Vt. 255; Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346. See also Klein v. Jewett, 26 N. J. Eq. 474.

leave to sue is jurisdictional.[86] The view that leave to sue in such a case ought not to be required has been taken by Congress, and it is now provided[87] that every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the

[86] In a dissenting opinion in the case of Barton v. Barbour, 104 U. S. 126, Mr. Justice Miller said: "In the case before us the plaintiff sues to recover damages for a personal injury, caused by an act done by the receiver or his agents in the transaction of business as a common carrier, in which he was largely and continuously engaged. Why should the receiver not be sued like any one else on such a cause of action, in any court of competent jurisdiction? The reply is because he is a receiver of the road on which plaintiff was injured, and holds his appointment at the hands of a Virginia court of chancery. If this be a sufficient answer, then the railroad business of the entire country, amounting to many millions of dollars per annum, may be withdrawn from the jurisdiction of the ordinary courts having cognizance of such matters, and all the disputes arising out of these vast transactions must be tried alone in the court which appointed the receiver. Not only this, but the right of trial by jury, which has been regarded as secured to every man by the constitutions of the several states and of the United States, is denied to the person injured, and though his case has no element of equitable jurisdiction he is compelled to submit it to a court of chancery or to one of the masters of such court. In an action for a personal injury, which has always been considered as eminently fitted for a jury, and especially in the assessments of damages, this constitutional right is denied because the receiver of a railroad, and not its owners, committed the wrong." We fail to see, however, how these considerations meet the question. They may constitute forcible reasons against requiring a trial without a jury in the court which appointed the receiver, but they do not seem to be in point upon the mere question of the jurisdiction of another court where no leave to sue is granted. Leave will be given unless there is good reason for withholding it, and trial by jury may be had in any proper case.

[87] Act of Congress of March 3, 1887, as corrected by act of August 13, 1888, § 3, 24 U. S. St. 554, 25 U. S. St. 436, Barnes' Fed. Code § 828.

general equity jurisdiction of the court in which he was appointed, so far as the same shall be necessary to the ends of justice. It is held that this act gives an absolute right to sue a receiver appointed by a federal court in any court having jurisdiction of the subject-matter.[88] The judgment of the court trying such suit is as final and conclusive against the receiver as against any other suitor, and will not be disturbed by the court appointing him because of any suggestion that he has not obtained justice in the other court.[89] The act applies to receivers appointed before it was passed as well as to those afterwards appointed, and they may be sued without leave in

[88] McNulta v. Lochridge, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. ed. 796; Central Trust Co. v. St. Louis &c. R. Co., 40 Fed. 426; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. 753; Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52. See also Wheeler v. Smith, 81 Fed. 319; Nashville &c. Co. v. Bunn, 168 Fed. 862; Chicago Great Western R. Co. v. Hulbert, 205 Fed. 248; Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. 278. In Railroad Com. v. Alabama Gt. So. R. Co., 185 Ala. 354, 64 So. 13, it is also held that under the Act of Congress (U. S. Comp. St. 1901, p. 509) a receiver appointed by a federal court may be made a defendant without leave, to a proceeding by the commission to compel him and other railroad companies to unite in maintaining a union depot. Notwithstanding an order of court discharging the receiver and restoring the property to the receiver without foreclosure, and giving a limited time within which all claims must be presented, a suit may subsequently be brought against the receiver personally to recover damages for personal injuries due to the negligence of his employes. Texas &c. R. Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81. But see Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480.

[89] "This court will not entertain the suggestion that its receiver will not obtain justice in the state courts." Central Trust Co. v. St. Louis &c. R. Co., 41 Fed. 551, 42 Am. & Eng. R. Cas. 26; Dillingham v. Hawk, 60 Fed. 494. The appointing court has no jurisdiction to enjoin the prosecution of an action against its receiver where authorized by the statute. Texas &c. R. Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81; Central Trust Co. v. East Tennessee &c. R. Co., 59 Fed. 523. But this statute does not limit nor destroy the right of the federal court to protect property in the hands of its receivers from

the same manner as those subsequently appointed.[90] And it has been held that a receiver may be sued under the provisions of this act, in respect to an act of his predecessor in the office.[91] Actions for personal injuries caused by a station platform being out of repair are included,[92] as well as actions for injuries caused in the running of trains. But it has been held that such statute does not authorize a suit by a stockholder against the directors and receivers, without leave of court, upon a cause of action which accrued before the appointment of the receivers and upon which they have refused to bring suit.[93] Neither is a proceeding in garnishment a suit against the receiver for "any act or transaction of his," within the meaning of the statute.[94] The subjection of such suits to the general equity jurisdiction of the court does not invest it with appellate or supervisory jurisdiction over state courts in which the suits may be brought, and it cannot annul, vacate or modify their judgments. This provision merely gives the United States court a right to control suits which seek to deprive the receiver

external attack. Tyler, Ex parte, 149 U. S. 164, 191, 13 Sup. Ct. 785, 793, 37 L. ed. 689.

[90] See Texas &c. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829. But see Missouri Pac. R. Co. v. Texas &c. R. Co., 41 Fed. 311.

[91] McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 796. But see Jones v. Schlapback, 81 Fed. 274.

[92] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. 516. See also Central Trust Co. v. St. Louis &c. R. Co., 40 Fed. 426; Texas &c. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; McNulta v. Lochridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362.

[93] Swope v. Villard, 61 Fed. 417. And that it does not authorize an independent suit, without leave of court, to foreclose a mortgage on property in the hands of a receiver. American Loan &c. Co. v. Central Vt. R. Co., 84 Fed. 917.

[94] Central Trust Co. v. East Tennessee &c. R. Co., 59 Fed. 523; Central Trust Co. v. Chattanooga &c. R. Co., 68 Fed. 685. Contra, Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987, 26 L. R. A. 218, 49 Am. St. 495. As to the general rule forbidding garnishment of property in the hands of a receiver, see Jackson v. Lahee, 114 Ill. 287, 2 N. E. 172; McGowan v. Myers, 66 Iowa 99, 23 N. W. 282; Columbian Book Co. v. De Golyer, 115 Mass. 67; Smith v. McNamara, 15 Hun (N. Y.) 447; Taylor v. Gillean, 23 Tex. 508.

of possession of the property, and all process of execution which would have the effect, so far as may be necessary to the ends of justice, in preventing the road from being broken into parts, or deprived of its rolling stock, so as to impair the value as a going concern.[95] In other words, the time and mode of paying a judgment rendered by a state court remain under the control of the court appointing the receiver, although the amount of such judgment cannot be changed. Some of the states have similar statutes, conferring a general authority upon all persons to sue receivers engaged in operating railroads under appointment by any court of equity. The act of congress giving permission to sue a federal receiver applies in any court of competent jurisdiction and is not limited to suits in the federal courts.[96] But it does not give permission to sue a receiver of a state court without the consent of the court appointing him,[97] and it has been held that a receiver cannot be sued under such act, without leave of court, for alleged wrongful acts committed in the operation of the road before he became receiver.[98]

§ 657 (574). Rule where suit has been commenced before appointment of receiver.—Where suit has been commenced against the corporation before the appointment of a receiver, it has been held that such suit may be prosecuted to judgment,

[95] Central Trust Co. v. St. Louis &c. R. Co., 41 Fed. 551; Eddy v. Lafayette, 49 Fed. 807; Dillingham v. Hawk, 60 Fed. 494.

[96] Texas &c. R. Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81; Central Trust Co. v. East Tenn. &c. R. Co., 59 Fed. 523. Applied to a receiver appointed by a territorial court in Wheeler v. Smith, 81 Fed. 319.

[97] Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. ed. 815.

[98] Jones v. Schlapback, 81 Fed. 274. But compare McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 796. See also to the effect that the statute relates only to suits arising out of the acts of the receiver relative to his duties concerning the property in his hands. Coster v. Parkersburg Branch R. Co., 131 Fed. 115; Minot v. Martin, 95 Fed. 734. See also to the effect that a receiver required to manage and operate the property according to the laws of the state in which it is situated in the same manner as

and such judgment will establish as against the receiver the rightful amount of the claim.[99] In some jurisdictions, however, the receiver should be substituted as a party defendant. The recovery of a judgment against the receiver appointed by a court of equity has no further effect than to fix the amount of the plaintiff's claim. An execution issued thereon cannot be levied upon the property in the receiver's hands without leave from the court by which the receiver was appointed.[1] This rule is not changed as to the United States courts by the provisions of the "Federal Judiciary Act," but the levying of execution or other judicial process upon property in the hands of its receivers is, by that act, left under the control of the court which they represent.[2] Indeed, the very object of ap-

the owner or possessor thereof, under said act, is subject to a law of the state making railroad companies liable for the negligence of employes having superior authority. Peirce v. Van Dusen, 78 Fed. 693, 69 L. R. A. 705.

[99] Pine Lake Iron Co. v. Lafayette Car Works, 53 Fed. 853. But such a judgment does not constitute a lien upon the property in the receiver's hands. Bell v. Chicago &c. R. Co., 34 La. Ann. 785. See also Clark v. Bacorn, 116 Fed. 617. The receiver of a railroad company may be substituted as defendant in an action for tort committed by the company before his appointment. Decker v. Gardner, 58 Hun (N. Y.) 602, 11 N. Y. 388. But see Jones v. Pennsylvania R. Co., 19 D. C. (8 Mackey) 178, holding that the fact that a receiver of the property of a railroad company has been appointed will not affect the right of recovery against the company itself for personal injuries, where the receiver has allowed existing officers to manage the business, and received the net earnings of the road, without taking any part in its management, the same remaining with the company. Receivers have been allowed to come in in many cases. Rust v. United Water Works Co., 70 Fed. 129; Andrews v. Steele City Bank, 57 Nebr. 173, 77 N. W. 342. But it is held that he is not a necessary party and need not be substituted. Speckert v. German Nat. Bank, 98 Fed. 151; Kittridge v. Osgood, 161 Mass. 384, 37 N. E. 369; United States Vinegar Co. v. Spanner, 143 N. Y. 676, 38 N. E. 731.

[1] Missouri &c. R. Co. v. Love, 61 Kans. 433, 59 Pac. 1072; Skinner v. Maxwell, 68 N. Car. 400; Coe v. Columbus &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Russel v. East Anglian R. Co., 6 Eng. Railway & Canal Cases 501. See also Union Trust Co. v. Curtis, 182 Ind. 61, 105 N. E. 562, L. R. A. 1915A, 699, 705 (citing text, but not directly in point).

[2] See Central Trust Co. v. St. Louis &c. R. Co., 41 Fed. 551.

pointing a receiver would be defeated, if he could be stripped of the property piecemeal by process issued by rival courts at the suit of individual creditors. It has been held that a sale of property upon execution while it was in the possession of a receiver and without leave of court was illegal and void, although the levy was made before the receiver was appointed.[3]

§ 658 (575). **Protection of receiver by the court.**—Not only in the matter of suits, but in all other respects, the court will protect its receiver in his possession and control of the property committed to his care. An attempt to disturb him in the discharge of his duties with reference to such property may be a contempt of court.[4] The offender may be attached, and, if the circumstances justify it, punished by fine and imprison-

[3] Walling v. Miller, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. 400. Earl, J., speaking for the court, says: "The lien of the execution was not destroyed by the appointment of the receiver, but the rights and interests of all parties in the property were thereafter to be adjusted by the court which appointed the receiver, and the property could not be taken out of the possession of the receiver, and sold upon execution, without leave of court. The execution creditor could bring his lien to the attention of the court in the action in which the receiver was appointed, and ask to have the execution satisfied out of the proceeds of the property. But persons having liens upon the property had no right to interfere with its possession by the receiver and without any application to or adjudication of the court, sell and dispose of it, and thus dissipate it, and deprive the court of jurisdiction to administer it." See also Pelletier v. Greenville &c. Co., 123 N. Car. 596, 31 S. E. 855, 68 Am. St. 837. It has been held otherwise where the sheriff retains actual possession under an attachment. State v. Superior Court, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; State v. Graham, 9 Wash. 528, 36 Pac. 1085.

[4] King v. Ohio &c. R. Co., 7 Biss. (U. S.) 529, Fed. Cas. 7800; Secor v. Toledo &c. R. Co., 7 Biss. (U. S.) 513, Fed. Cas. No. 12605; United States v. Kane, 23 Fed. 748; Wabash &c. R. Co., In re, 24 Fed. 217; Higgins, In re, 27 Fed. 443; Richards v. People, 81 Ill. 551; Hazelrigg v. Bronaugh, 78 Ky. 62; O'Mahoney v. Belmont, 62 N. Y. 133; Chafee v. Quidnick Co., 13 R. I. 442; Vermont & Canada R. Co. v. Vermont Cent. R. Co., 46 Vt. 792; Helmore v. Smith, 56 L. J. Ch. Div. 145.

ment.[5] The wrongful seizure of property in the hands of a receiver upon process from another court is a contempt on the part of the officers executing the writ.[6] And it is also contempt of the court appointing the receiver to take property from his possession upon distraint for rent.[7] Actual violence offered to a receiver in the discharge of his duties, or such threats of violence as to intimidate the receiver may amount to such an interference.[8] So may violence or threats by which the servants or employes of the receiver are prevented from carrying on the business as directed by the court. It is the duty of the court to see that property which is put into its hands, or in the hands of its receivers, is absolutely protected, and that nobody, directly or indirectly, wrongfully interferes with the management of that property.[9] Where the employes of another road who have struck, or any other persons, prevent the servants of a receiver from working and thereby interfere with the operation of the road as directed by the order of the court, they are guilty of contempt of court.[10] The employes of a railroad operated by a receiver have the same right to quit work that other employes have, and it is not unlawful

[5] See cases in preceding note. An interference with the possession and use of a street railway in the hands of a receiver may be enjoined. Fidelity Trust &c. Co. v. Mobile St. R. Co., 53 Fed. 687. The rule that property in the hands of a receiver is in custodia legis, and that interference with such possession without leave of the court is a contempt, is as applicable in the case of seizure thereof to enforce payment of taxes due the state as in any other case. Tyler, Ex parte, 149 U. S. 164, 191, 13 Sup. Ct. 785, 793, 37 L. ed. 689.

[6] Commonwealth v. Young, 11 Phila. (Pa.) 606. See Mercantile Trust Co. v. Baltimore &c. R. Co., 79 Fed. 389; Royal Trust Co. v. Washburne &c. R. Co., 113 Fed. 531; Citizens' Bank v. Bay &c., 110 Mich. 683, 68 N. W. 649; Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) Ch. 373.

[7] Noe v. Gibson, 7 Paige (N. Y.) Ch. 513.

[8] Fitzpatrick v. Eyre, 1 Hogan (Irish Rolls) 171.

[9] United States v. Kane, 23 Fed. 748.

[10] Doolittle, In re, 23 Fed. 544; Wabash R. Co., In re, 24 Fed. 217; Higgins, In re, 27 Fed. 443; King v. Ohio &c. R. Co., 7 Biss. (U. S.) 529, Fed. Cas. No. 7800; Secor v. Toledo &c. R. Co., 7 Biss. (U. S.) 513, Fed. Cas. No. 12605.

for them to use arguments and persuasion to induce their fellow employes to do the same. But if a mere request, or mere advice to quit work, is accompanied by such demonstration of force as is calculated to intimidate the receiver's employes, and induce them to abandon his service against their will, it will be punished as a contempt.[11] In case of a disagreement between the receiver and his employes, the proper course for them to pursue is to petition the court for an order directing a just and equitable settlement of the differences. The court will direct the receiver to enter into such agreements and contracts with his employes as may give them reasonable protection and at the same time guard the rights of creditors and others interested in the trust property.[12] Punishment for contempt is usually by fine and imprisonment, which is largely within the discretion of the court against which the contempt was committed,[13] and while the court will not be tenacious of any mere prerogative to notice an unintentional interference,[14] or to visit severe punishment upon the offenders for a first or unpremeditated offense,[15] it is the duty of the court to see that property which is put into its hands, or in the hands of its receivers, is absolutely protected, and the punishment must be made severe enough to restrain and prevent all inter-

[11] United States v. Kane, 23 Fed. 748; Higgins, In re, 27 Fed. 443. See also Arthur v. Oakes, 63 Fed. 310; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 60 Fed. 803; Debs, In re, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092.

[12] Waterhouse v. Comer, 55 Fed. 149, 53 Am. & Eng. R. Cas. 329. In this case, Judge Speer granted the petition of the Brotherhood of Locomotive Engineers for an order directing the receiver to enter into a contract with them prescribing the terms of service, the qualifications necessary for promotion, and the rate of compensation. He required the petitioners, however, to waive rule 12 of the Brotherhood, by which it is provided that members shall refuse to handle the cars or roads with which the Brotherhood are at variance, since such rule is illegal, and a compliance with it would compel the engineers to violate the interstate commerce law.

[13] Higgins, In re, 27 Fed. 443. There is said to be no appeal from the judgment of the court in such a case.

[14] Doolittle, In re, 23 Fed. 544.

[15] Doolittle, In re, 23 Fed. 544, and United States v. Kane, 23 Fed. 748.

ference with such property.[16] It is no defense to a proceeding for contempt in interfering with the receiver's possession of property placed in his hands by the court, to show that the order appointing him was erroneously or improvidently made.[17] An order of the court which is not void cannot be assailed in a collateral proceeding,[18] and the court will not in a proceeding to punish a contempt review the questions which were passed upon when the receiver was appointed.[19] The fact that railroad companies are in some sense public agents presents an additional reason why judicial control should be extended as far as possible to prevent an interference with them in the exercise of their public functions.[20] An injunction will be granted, in a proper case, restraining unlawful interference by strikers or others, and its violation is punishable as a contempt of court. This matter, however, will be fully considered hereafter.

§ 659 (576). **Liability of receivers—Generally.**—A receiver is the mere officer of the court by which he was appointed and cannot question any order made by the court with reference to the control of the receivership property, but must, ordinarily at least, implicitly obey all such orders.[21] It follows from this that the only personal liability which can ordinarily attach to a receiver in the operation of a railroad is for some wrongful or unauthorized act of his own. His liability for acts done in the discharge of his duties is official only, and such acts bind only the trust estate.[22] It accords with sound principle and

[16] United States v. Kane, 23 Fed. 748.

[17] Cape May &c. R. Co. v. Johnson, 35 N. J. Eq. 422; Harris v. Clark, 10 How. Pr. 415; Day v. Bergen, 53 N. Y. 404.

[18] Cook v. Citizens' National Bank, 73 Ind. 256.

[19] Richards v. People, 81 Ill. 551; Howard v. Palmer, Walk. (Mich.) 391; People v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536; Russell v. East Anglian R. Co., 3 M. & G. 104.

[20] Delaware &c. R. Co. v. Erie R. Co., 21 N. J. Eq. 298. See also Union Trust Co. v. Curtis, 182 Ind. 6, 105 N. E. 562, L. R. A. 1915A, 699, 705 (citing this section).

[21] Herrick v. Miller, 123 Ind. 304, 24 N. E. 111.

[22] See Texas &c. R. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; McNulta v. Lockridge,

reason that a receiver exercising the franchise of a railroad company shall be held amenable, in his official capacity, to substantially the same rules of liability that are applicable to the company while it exercises the same powers of operating the road.[23] And this is the rule established by the great weight of modern authority.[24] As has been seen, there is a conflict of authority as to whether this liability can be enforced by suit, or must be asserted by petition in the court by which the receiver was appointed, but the cases are practically unanimous in holding that a receiver who assumes to exercise the rights

141 U. S. 327, 12 Sup. Ct. 11, 35 L. ed. 796. A receiver is not personally liable for the torts of his employes. Kain v. Smith, 80 N. Y. 458; Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Klein v. Jewett, 26 N. J. Eq. 474; Meara v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Mersey Docks v. Gibbs, 11 H. L. Cas. 686. Nor on contracts properly made in his official capacity. Walsh v. Raymond, 58 Conn. 251, 20 Atl. 464, 18 Am. St. 264; Livingston v. Pettigrew, 7 Lans. (N. Y.) 405. See also Schmidt v. Gayner, 59 Minn. 303, 62 N. W. 265; Platt v. New York &c. R. Co., 170 N. Y. 451, 63 N. E. 532; Stannard v. Reid, 195 N. Y. 530, 88 N. E. 1132. Nor for costs in actions which he prosecutes by direction of court. Columbian Ins. Co. v. Stevens, 37 N. Y. 536; Devendorf v. Dickinson, 21 How. Prac. (N. Y.) 275. But a receiver is personally liable upon unauthorized contracts entered into by him. Ryan v. Rand, 20 Abb. N. Cas. (N. Y.) 313. See also Peoria &c. v. Hickey, 110 Iowa 276, 81 N. W. 473, 80 Am. St. 296; Cake v. Mohum, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. ed. 447. In re Kalb &c. Mfg. Co., 165 Fed. 895. And for wrongful and negligent acts on his part by which loss is occasioned. Ricks v. Broyles, 78 Ga. 610, 3 S. E. 772, 6 Am. St. 280; Carr v. Morris, 85 Va. 21, 6 S. E. 613; Brooks v. Miller, 29 W. Va. 499. See also Kirker v. Owings, 98 Fed. 499; State &c. Bank v. Farming &c. Co., 118 Iowa 698, 92 N. W. 712; Kain v. Smith, 80 N. Y. 458; Erwin v. Davenport, 9 Heisk. (Tenn.) 44. He is also liable like any other trustee for profits which he makes out of a use of the money or property belonging to the trust estate. Ryan v. Morrill, 83 Ky. 352; Schwartz v. Keystone Oil Co., 153 Pa. St. 283, 25 Atl. 1018.

[23] Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445; Sprague v. Smith, 29 Vt. 421, 70 Am. Dec. 424.

[24] Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; Farlow v. Kelly, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. ed. 726; Toledo &c. R. Co. v. Beggs, 85 Ill. 80, 28

and powers of a common carrier becomes answerable in his official capacity for all injuries and losses sustained by persons dealing with him in that capacity to the same extent in general that the corporation would have been liable.[25]

§ 660 (577). **Liability for torts.**—Upon the principle referred to in the preceding section receivers are held liable for damages for personal injuries sustained by passengers[26] and employes,[27]

Am. Rep. 613; Sloan v. Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Paige v. Smith, 99 Mass. 395; Heath v. Missouri &c. R. Co., 83 Mo. 617; Klein v. Jewett, 26 N. J. Eq. 474; Brown, Ex parte, 15 S. Car. 518; Blumenthal v. Brainard, 38 Vt. 402, 91 Am. St. 349; Melendy v. Barbour, 78 Va. 544; Newell v. Smith, 49 Vt. 255; Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346; Kinney v. Crocker, 18 Wis. 74. See also Central Trust Co. v. East Tenn. &c. R. Co., 69 Fed. 353; Wall v. Platt, 169 Mass. 398, 48 N. E. 270; Burke v. Ellis, 105 Tenn. 702, 58 S. W. 855.

[25] McNulta v. Lochridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362; Ohio &c. R. Co. v. Anderson, 10 Ill. App. 313; Sloan v. Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Klein v. Jewett, 26 N. J. Eq. 474; Meara v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Brown, Ex parte, 15 S. Car. 518; Rogers v. Mobile &c. R. Co. (Tenn.), 12 Am. & Eng. R. Cas. 442; Melendy v. Barbour, 78 Va. 544; note to Neglee v. Alexandria &c. R. Co., 83 Va. 707, 3 S. E. 369, 5 Am. St. 308, 315; Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346. As to whether the receiver is liable for torts committed before his appointment, see note to Emory v. Faith (113 Md. 253, 77 Atl. 386), in Ann. Cas. 1912A, 586, 589, reviewing the cases on both sides; also Bush v. Stephens, 131 Ark. 133, 197 S. W. 1157; and note in L. R. A. 1916F, 1020.

[26] Mobile &c. R. Co. v. Davis, 62 Miss. 271; Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587, 42 Am. St. 516; Little v. Dusenberry, 40 N. J. L. 614, 50 Am. Rep. 445; Bartlett v. Keim, 50 N. J. L. 260, 13 Atl. 7; Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. 753; Newell v. Smith, 49 Vt. 255. But see Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533.

[27] Sloan v. Central Iowa R. Co., 62 Iowa 728, 16 N. W. 331; Durkin v. Sharp, 88 N. Y. 225; Meara v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633; Brown, Ex parte, 15 S. Car. 518; Rogers v. Mobile &c. R. Co., 12 Am. & Eng. R. Cas. 442. The receiver of a railroad company, who is operating the road, can not escape liability for injuries to his employes owing to the insufficient number of trackmen employed to keep the track

by reason of defects in the road or equipment,[28] or the negligence or misconduct of the receiver's servants.[29] Receivers as such have also been held liable for damage or loss of goods entrusted to them for carriage,[30] for injuries inflicted upon travelers,[31] for injuries to stock arising from a failure to fence the road,[32] and, in general, for all damages for torts for which the

in good repair, on the ground that the lack of sufficient trackmen was due to the want of funds in his hands, as the road was not paying running expenses. Graham v. Chapman, 58 Hun 602, 11 N. Y. S. 318. It is held in Texas that the receiver is not liable for the death of an employe under a statute giving a right of action against the "proprietor, owner, charter, or hirer" of a railroad for injuries resulting in death caused by his negligence or that of his employes. Yoakum v. Selph, 83 Tex. 607, 19 S. W. 145; Texas Pac. R. Co. v. Collins, 84 Tex. 121, 19 S. W. 365; Houston &c. R. Co. v. Roberts (Tex Sup.), 19 S. W. 512. In a joint action against a railroad company and its receiver for the death of a servant, caused by the negligence of the receiver, a recovery can not be had against the company, where the receiver was not primarily liable. Texas Pac. R. Co. v. Collins, 84 Tex. 121, 19 S. W. 365.

[28] The fact that the defect existed when the receiver took possession does not relieve him from liability for an injury, caused thereby while he is operating the road. A receiver is as much bound to remedy existing defects which render the operation of the road unsafe, as he is to discover and repair new defects as they arise. Texas &c. R. Co. v. Geiger, 79 Tex. 13; Bonner v. Mayfield, 82 Tex. 234, 18 S. W. 305. See also Sheat v. Lusk, 98 Kans. 614, 159 Pac. 407; Robinson v. Miller, 25 Mont. 391, 65 Pac. 114. But compare Lusk v. Eddington (Okla.), 159 Pac. 491.

[29] A receiver, like any other common carrier, is liable for the damages occasioned by the malicious assault upon a passenger by the conductor in charge of a train, acting within the scope of his employment. Dillingham v. Russell, 73 Tex. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. 753. See also Hunt v. Conner, 26 Ind. App. 41, 59 N. E. 50.

[30] Kansas Pacific R. Co. v. Searle, 11 Colo. 1, 16 Pac. 328; Paige v. Smith, 99 Mass. 395; Melendy v. Barbour, 78 Va. 544; Newell v. Smith, 49 Vt. 255; Kinney v. Crocker, 18 Wis. 74. See Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; Mobile &c. R. Co. v. Davis, 62 Miss. 271.

[31] McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 456, 31 Am. St. 362; Lehigh Coal &c. Co. v. Central R. Co., 42 N. J. Eq. 591, 8 Atl. 648.

[32] Central Trust Co. v. Wabash &c. R. Co., 26 Fed. 12. See also Brockert v. Central Iowa R. Co., 82 Iowa 369, 47 N. W. 1026; Far-

corporation itself would be liable under similar circumstances.[33] Where the liability of a railroad company is merely statu-

rell v. Union Trust Co., 77 Mo. 475, 13 Am. & Eng. R. Cas. 552. It was held by the Supreme Court of Missouri in the case of Combs v. Smith, 78 Mo. 32, that an action may be maintained against the receiver of a corporation for a tort committed by the corporation or its servants before his appointment. And Judge Caldwell, in Dow v. Memphis &c. R. Co., 20 Fed. 260, held that where the bill for foreclosure was filed more than a year after default in the payment of the mortgage debt, the receiver should be required to pay out of the earnings of the road all debts due from the railroad company for operating expenses, including damages for injuries to persons or property, for a period of six months prior to the appointment of the receiver. See Miltenberger v. Logansport R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117. And some states have statutes prohibiting any railway company from creating mortgage liens which shall be superior to judgments for injuries to persons or property. But the weight of authority hold that, in the absence of statutory provisions on the subject, the owner of a judgment in tort for injuries to person or property inflicted in the operation of the railroad before the receiver was appointed is merely a general creditor of the corporation, and, as such, is not entitled to any priority of payment over the mortgagees. Central Trust Co. v. East Tennessee &c. R. Co., 30 Fed. 895; Dexterville &c. Mfg. Co., In re, 4 Fed. 873; Farmers' Loan &c. Co. v. Green Bay &c. R. Co., 45 Fed. 664. See Frazier v. East Tennessee &c. R. Co., 88 Tenn. 138, 12 S. W. 537.

[33] In Klein v. Jewett, 26 N. J. Eq. 474, Van Fleet, V. C., speaking for the court, said: "A receiver operating a railroad under the order of a court of equity stands, in respect to duty and liability, just where the corporation would if it were operating the road. * * * Whether the receiver is regarded as the officer of the law or the representative of the proprietors of the corporation or its creditors, or as combining all these characters, he is entrusted with the powers of the corporation and must, therefore, necessarily be burdened with its duties and liabilities. There can be no such thing as an irresponsible power, exerting force or authority, without being subject to duty, under any system of laws framed to do justice. It is an inseparable condition of every grant of power by the state, whether expressed or not, that it shall be properly exercised, and that the grantee shall be liable for injuries resulting directly and exclusively from his negligence." But see as to torts committed before appointment, authorities cited at close of note 25, supra.

tory, however, it does not always follow that its receiver will also be liable to the same extent, for the statute may not embrace receivers within its terms or meaning. Thus, it has been held that a receiver is not a "proprietor, owner, charterer or hirer" of a railroad within the meaning of a statute giving a right of action for damages on account of injuries, resulting in death, caused by the negligence of any person of the class designated or his servants or agents.[34] So, it has been held that a statute providing that certain persons engaged in the service of any railway corporation shall be deemed vice-principals and that certain other persons engaged in such service shall be deemed fellow servants, does not apply to the employes of the receiver of such a corporation.[35] But, on the other hand, it has been held that a statute making railroad companies liable for injuries to an employe, caused by the negligence of co-employes of a certain class, applies to a receiver of such a company and his employes.[36] No general rule can be laid down upon this subject, but we think that, ordinarily, such a statute applying to railroad companies would also apply to their receivers engaged in the operation of the road. The question can only be determined, however, by a reference to the terms and

[34] Allen v. Dillingham, 60 Fed. 176; Burke v. Dillingham, 60 Fed. 729; Turner v. Cross, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262; Dillingham v. Blake (Tex.), 32 S. W. 77. But see Murphy v. Holbrook, 20 Ohio St. 137, 5 Am. Rep. 633.

[35] Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878, 59 Am. & Eng. R. Cas. 482, distinguishing Church of Holy Trinity v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. ed. 227.

[36] Hornsby v. Eddy, 56 Fed. 461; Peirce v. Van Dusen, 78 Fed. 693, 69 L. R. A. 705; Union Trust Co. v. Thomason, 25 Kans. 1; Rouse v. Harry, 55 Kans. 589, 40 Pac. 1007. See also Eddy v. Lafayette, 163 U. S. 456, 16 Sup. Ct. 1082, 41 L. ed. 225. But see Beeson v. Busenbark, 44 Kans. 669, 25 Pac. 48, 10 L. R. A. 839; Henderson v. Walker, 55 Ga. 481; Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. 878. A statute of limitations in favor of the company has also been held applicable in an action against the receiver. Bartlett v. Keim, 50 N. J. L. 260, 13 Atl. 7. And a receiver operating a railroad has been held a common carrier within the "Hours of Labor Law." United States v. Ramsey, 197 Fed. 144.

purpose of the particular statute under consideration in each case.[37]

§ 661 (578). Receiver is bound to perform duties to public—Mandamus.—A receiver is also bound, in general, to perform the public duties imposed by law upon the corporation whose franchises he is exercising. It has been held that he may be compelled, by mandamus, to construct a crossing which the railroad company has neglected or refused to build;[38] but the general rule is that a receiver will not be compelled to operate the road or perform a similar public duty by mandamus, both because the court which appointed him may order and compel him to do so, and mandamus usually lies only when there is no other adequate and simple remedy, and because another court will not interfere with the court which appointed him.[39] The court which appointed him may compel him to perform such duty, and it has been held that the failure of the court to provide funds with which to perform it is not a good excuse for failing to obey the order of the court.[40] There may be public duties, however, not connected with the operation of the road, which the company rather than the receiver, is still obliged to perform, and where the duties are statutory the terms of the statute may be such as not to include receivers, although they will generally be required to perform such public duties connected with the operation of the road as the company was obliged to perform. The fact that the receiver is empowered by statute to operate the railroad for the use of the public does not make him a public officer, so as to destroy this liability.[41] The duty of operating the road imposed on the receiver by such a statute is the same duty to the public which is imposed upon every railroad corporation acting under statutory authority. Its object is to secure the continued operation of the road as a common carrier with the same rights and subject to the same

[37] See post, § 1932.

[38] Fort Dodge v. Minneapolis &c. R. Co., 87 Iowa 389, 54 N. W. 243, 55 Am. & Eng. R. Cas. 58.

[39] State v. Marietta &c. R. Co., 35 Ohio St. 154.

[40] Peckham v. Dutchess &c. R. Co., 145 N. Y. 385, 40 N. E. 15.

[41] Little v. Dusenberry, 46 N. J. L. 614, 50 Am. Rep. 445, 25 Am. & Eng. R. Cas. 632. But see Hopkins v. Connel, 2 Tenn. Ch. 323.

liabilities as before the railroad corporation became insolvent. But it seems that where a road cannot be operated except at a loss, and the franchise has become forfeited, the receiver may be permitted by the court to dismantle it and sell the rails, after repeated attempts and failure to sell the road and that a purchaser who held receivers' certificates is not bound to reconstruct and operate it.[42]

§ 662 (579). **Liability on contracts.**—The receiver, as a general rule, cannot be compelled to perform a contract of the corporation, where no lien was created in favor of the other contracting party.[43] Where, however, a receiver continued to use a right of way, which had been obtained by the company in consideration of an agreement by it to pay the owner a certain sum each month for the use of water from a spring upon his land, it was held that the receiver was bound to perform the contract so long as he used the right of way.[44] And he may become liable as receiver by adopting advantageous contracts.[45] It is improper for a receiver to contract for supplies

[42] Northern Pac. R. v. Washington Ter., 142 U. S. 492, 12 Sup. Ct. 283, 35 L. ed. 1092; State v. Jack, 145 Fed. 281; Royal Trust Co. v. Washburn &c. R. Co., 113 Fed. 531. See also Union Trust Co. v. Curtis, 182 Ind. 61, 105 N. E. 562, L. R. A, 1915A, 699, 706 (citing text).

[43] Express Co. v. Railroad Co., 99 U. S. 191, 25 L. ed. 319. See also U. S. Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. ed. 1087; Central Trust Co. v. East Tenn. &c. Co., 79 Fed. 19; General Electric Co. v. Whitney, 74 Fed. 664; Union Trust Co. v. Curtis, 182 Ind. 61, 105 N. E. 562, L. R. A. 1915A, 699, 705 (citing text); Southern Iron Car Line v. East Tenn. &c. R. Co., (Tenn. Ch.) 42 S. W. 529. The receiver of a railroad company is not liable for removing a switch, which the company had agreed to maintain, where he has not adopted the company's contract as his own, for his appointment and acts in managing the property, as an officer of the court, do not absolve the company from liability for consequent breaches of its contracts. Brown v. Warner, 78 Tex. 543, 14 S. W. 1032, 11 L. R. A. 394, 22 Am. St. 67.

[44] Howe v. Harding, 76 Tex. 17, 13 S. W. 41, 1 Lewis Am. R. & Corp. R. 502.

[45] St. Joseph &c. R. Co. v. Humphreys, 145 U. S. 105, 12 Sup. Ct. 795, 36 L. ed. 640; Whightsel v. Felton, 95 Fed. 923; Mercantile Trust &c. Co. v. Southern &c. Co., 113 Ala. 543, 21 So. 373; De Wolf v. Royal Trust Co., 173 Ill. 435, 50

with a company composed of the superintendent and other officers of the railroad company for which he is the receiver, but it has been held that he may give an unusually low rate of freight in order to introduce into general use a cheap and valuable article, which, if brought into general demand, would add greatly to the freight receipts of the road.[46] The liability of a receiver, as such, upon contracts made by him in the course of the receivership, depends, of course, very largely upon the nature and terms of the contract and his authority to make it, although there are cases in which the court will afford relief to one who has contracted with a receiver who had no authority to enter into the contract.[47] The receiver is not personally liable, under ordinary circumstances, to one who contracts with him as receiver in regard to matters connected with his trust.[48]

§ 663 (580). Liability on claims arising from operation of the road.—The official liability of the receiver for claims arising from the operation of the road ceases with his final discharge.[49] But provision is usually made in the order discharg-

N. E. 1049; Woodruff v. Erie R. Co., 93 N. Y. 609; Wells v. Higgins, 132 N. Y. 459, 30 N. E. 861.

[46] Clarke v. Central R. &c. Co., 66 Fed. 16. But this might be otherwise under the present interstate commerce law.

[47] See ante, § 650.

[48] Girard Ins. &c. Co. v. Cooper, 162 U. S. 529, 16 Sup. Ct. 879, 40 L. ed. 1062; Ellis v. Little, 27 Kans. 707, 41 Am. Rep. 434; Livingston v. Pettigrew, 7 Lansing (N. Y. Sup. Ct.) 405; Newman v. Davenport, 9 Baxter (Tenn.) 538. See generally as to contracts receiver may make, and the liability thereon, ante, § 650; also Farmers' Loan & T. Co. v. Northern Pac. R. Co., 120 Fed. 873, and Gay v. Hudson River &c. Co., 173 Fed. 1003, with which compare Monsarrat v. Mercantile Trust Co., 109 Fed. 230.

[49] Farmers' Loan &c. Co. v. Central R. Co., 7 Fed. 537; Davis v. Duncan, 19 Fed. 477; Archambeau v. Platt, 173 Mass. 249, 53 N. E. 816; Mobile &c. R. Co. v. Davis, 62 Miss. 271; Ryan v. Hays, 62 Tex. 42. An order of a federal court discharging the receiver, restoring the property to the company without foreclosure, and requiring that all claims against the receiver shall be presented to the court before a given date, in default whereof they shall be barred, does not, in view of the judiciary act of 1887-88, making receivers liable to suit in any

ing him, for the payment of such claims either by the railroad company or by the purchasers of the property.[50] The expenses attending the operation of the road by the receiver may properly constitute a first claim upon all moneys received from such operation, superior to the lien of mortgage creditors.[51] Claims for damages to persons or property arising from the operation of the road are classed as operating expenses, and are entitled as such to priority of payment over mortgage bonds.[52] So, also, are rents accruing during the receivership upon rolling stock held by the corporation under a conditional sale[53]

competent court without leave of the appointing court, prevent the subsequent recovery in a state court of a judgment in personam for personal injuries, or its enforcement by the same court. Texas &c. R. Co. v. Johnson, 151 U. S. 81, 14 Sup. Ct. 250, 38 L. ed. 81.

[50] See Farmers' Loan &c. Co. v. Central R. Co., 7 Fed. 537; Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56.

[51] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Clark v. Central R. &c. Co., 66 Fed. 803; Mobile &c. R. Co. v. Davis, 62 Miss. 271; Brown, Ex parte, 15 S. Car. 518; Texas &c. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60; Eastern and Midland R. Co., In re, L. R. 45 Ch. D. 367, 45 Am. & Eng. R. Cas. 71. See also Finance Co. v. Trenton &c. R. Co., 189 Fed. 282; Hulings v. Jones, 63 W. Va. 60, 60 S. E. 874.

[52] Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; South Carolina &c. R. Co. v. Carolina &c. R. Co., 93 Fed. 543; Pennsylvania Steel Co. v. New York City R. Co., 208 Fed. 168; Guaranty Trust Co. v. Metropolitan St. R. Co., 180 Fed. 637; Green v. Coast Line &c. R. Co., 97 Ga. 15, 24 S. E. 814, 54 Am. St. 379, and note; Mobile &c. R. Co. v. Davis, 62 Miss. 271; Klein v. Jewett, 26 N. J. Eq. 474; Brown, Ex parte, 15 S. Car. 518. But see Atlantic &c. Co. v. Dana, 128 Fed. 209; St. Louis Union Trust Co. v. Texas &c. R. Co., 59 Tex. Civ. App. 157, 126 S. W. 296; Meyer Rubber Co. v. Georgetown &c. R. Co., 174 Fed. 731. Such claims must be paid, in the first instance, out of the income of the property. But if that prove insufficient, payment may be made out of the proceeds arising from a sale of the road. Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963.

[53] Kneeland v. American L. & T. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L. ed. 379; Woodruff v. Erie R. Co., 93 N. Y. 609; Eastern and Midland R. Co., In re, L. R. 45 Ch. D. 367, 45 Am. & Eng. R. Cas. 71; Beach Receivers, § 372. As to prior accrued instalments due upon such rolling stock at the time the receiver was appointed,

together with the cost of necessary supplies[54] and the wages of employes.[55] Where the receiver undertakes the operation of another road than that over which he was appointed, under a lease, he assumes the same liability as any other lessee; and the fact that the contract of lease was entered into with the permission of the court does not remove such liability, where the act of the receiver in making it was purely voluntary.[56]

§ 664. Operating expenses—Priority of claims.—The practice of allowing preferred claims for labor, supplies and the like arising within a limited time before the receivership or sale has already been considered.[57] Such claims are frequently called "operating expenses," and are generally held not to include claims for damages.[58] But claims for damages arising during the re-

the vendors are simply general creditors. Fidelity Ins. Co. v. Shenandoah Valley R. Co., 86 Va. 1, 9 S. E. 759, 19 Am. St. 858; Kneeland v. American L. & T. Co., 136 U. S. 89, 34 L. ed. 379; Thomas v. Peoria &c. R. Co., 36 Fed. 808.

[54] Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. ed. 596; Kneeland v. Bass Foundry &c. Works, 140 U. S. 592, 11 Sup. Ct. 857, 35 L. ed. 543; Poland v. Lamoille Valley R. Co., 52 Vt. 144; Williamson v. Washington City &c. R. Co., 33 Grat. (Va.) 624. See also Citizens Trust Co. v. National Equipment &c. Co., 178 Ind. 167, 98 N. E. 865, 41 L. R. A. (N. S.) 695; post, § 677.

[55] Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706; Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 506, Fed. Cas. No. 13296; Meyer v. Johnston, 53 Ala. 237; McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748; Hoover v. Montclair &c. R. Co., 29 N. J. Eq. 4; Langdon v. Vermont &c. R. Co., 54 Vt. 593.

[56] Kain v. Smith, 80 N. Y. 458.

[57] Ante, § 606. See also Citizens' Trust Co. v. National Equipment &c. Co., 178 Ind. 167, 98 N. E. 865, 41 L. R. A. (N. S.) 695 n; Missouri &c. R. Co. v. City Trust Co., 209 Fed. 45.

[58] Easton v. Houston &c. R. Co., 38 Fed. 12; Farmers' Loan &c. Co. v. Green Bay &c. R. Co., 45 Fed. 664; St. Loius Trust Co. v. Riley, 70 Fed. 32, 30 L. R. A. 456; Ames v. Union Pac. R. Co., 74 Fed. 335; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 74 Fed. 431; Fordyce v. Kansas City &c. R. Co., 145 Fed. 566 (damages for taking without condemnation); Pennsylvania Steel Co. v. New York &c.

ceivership may be considered as operating expenses and given a priority over a mortgage lien in a proper case, as where there has been a diversion of income to betterments.[59] Claims for labor and supplies furnished to the receiver for the operation of the road are generally so considered and allowed;[60] and a few other claims arising during the receivership have been so classed and given priority.[61]

§ 665 (581). Liability of corporation.—The corporation itself is not ordinarily, under the authorities, held liable either civilly[62]

R. Co., 165 Fed. 457; Guaranty Trust Co. v. Metropolitan St. R. Co., 180 Fed. 637. Where a right of way is taken a judgment for damages therefor is held to have preference and so has a claim for damages in the nature of a continuing equitable lien where the company took abutting property without proceedings to condemn. Central Trust Co. v. Thurman, 94 Ga. 735, 20 S. E. 141 (judgment for damages for condemnation). Contra, Green v. Coast Line R. Co., 97 Ga. 15, 24 S. E. 814, 33 L. R. A. 806, 54 Am. St. 379.

[59] Meyer Rubber Co. v. Georgetown &c. R. Co., 174 Fed. 731; Mobile &c. R. Co. v. Davis, 62 Miss. 271; Klein v. Jewett, 26 N. J. Eq. 474; Robinson v. New York &c. Elec. R. Co., 90 App. Div. 509, 91 N. Y. S. 153; Ex parte Brown, 15 S. Car. 518; Texas &c. R. Co. v. Overheiser, 76 Tex. 437, 13 S. W. 468; St. Louis &c. Trust Co. v. Texas Southern R. Co., 59 Tex. Civ. App. 157, 126 S. W. 296. See also Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950; Pennsylvania Steel Co. v. New York City R. Co., 208 Fed. 168.

[60] Kneeland v. Bass Foundry &c. Co., 140 U. S. 592, 11 Sup. Ct. 857, 35 L. ed. 543; Ames v. Union Pac. R. Co., 74 Fed. 335; Mercantile Trust Co. v. Farmers' &c. Co., 81 Fed. 254; Pennsylvania Steel Co. v. New York City R. Co., 190 Fed. 609; McLane v. Placerville &c. R. Co., 66 Cal. 606, 6 Pac. 748. But compare Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. ed. 718; Finance Co. v. Trenton &c. R. Co., 189 Fed. 282; Farmers' Loan &c. Co. v. Oregon &c. R. Co., 31 Ore. 237, 48 Pac. 706, 38 L. R. A. 424, 65 Am. St. 822; Hand v. Savannah &c. R. Co., 17 S. Car. 219.

[61] This whole subject is thoroughly considered in the note to First Nat. Bank v. Cook (12 Wyo. 492, 76 Pac. 674, 78 Pac. 1083) in 2 L. R. A. (N. S.) 1012, and the note to Citizens' Trust Co. v. National Equipment &c. Co. (Ind.), in 41 L. R. A. (N. S.) 695, where the authorities are reviewed and considered both with reference to the general rule and the specific facts and distinguishing features of each case.

[62] Davis v. Duncan, 19 Fed. 477;

or criminally[63] for any acts or upon any contracts of a receiver who has full possession of its property and entire charge of its affairs. Where, however, the receiver has used money which should have been applied to the payment of plaintiff's claim in the purchase of property which is afterward surrendered to the corporation upon the receiver's discharge, it seems that a court of equity will hold the corporation liable for such claim to the extent of the property so received by it.[64] The corporation, it

Memphis &c. R. Co. v. Hoechner, 67 Fed. 456; Memphis &c. R. Co. v. Stringfellow, 44 Ark. 322, 51 Am. Rep. 598; Kansas Pac. R. Co. v. Searle, 11 Colo. 1, 16 Pac. 328; Thurman v. Cherokee R. Co., 56 Ga. 376; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561; McNulta v. Lockridge, 137 Ill. 270, 27 N. E. 452, 31 Am. St. 362; Ohio &c. R. Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477; Godfrey v. Ohio &c. R. Co., 116 Ind. 30, 37 Am. & Eng. R. Cas. 8; Kansas Pac. R. Co. v. Wood, 24 Kans. 619; Turner v. Hannibal &c. R. Co., 74 Mo. 602; Stevens v. Atchison &c. R. Co., 87 Mo. App. 26; Metz v. Buffalo &c. R. Co., 58 N. Y. 61, 17 Am. Rep. 201; Erwin v. Davenport, 9 Heisk. (Tenn.) 44; Kansas &c. R. Co. v. Dorough, 72 Tex. 108, 10 S. W. 711. See also Chamberlain v. New York &c. R. Co., 71 Fed. 636; Archambeau v. New York &c. R. Co., 170 Mass. 272, 49 N. E. 435 (citing text); Missouri &c. R. Co. v. Wood (Tex. Civ. App.), 52 S. W. 93; and Sibson v. Hamilton &c. Co., 21 Wash. 362, 58 Pac. 219. But the possession of the receiver must usually be exclusive in order to exonerate the company, and it should not hold itself out to the public as operating the road. Railroad Co. v. Brown, 17 Wall. (U. S.) 445, 21 L. ed. 675. And there are other cases in which the company has been held liable, as where the receiver was collusively appointed or the profits were invested in betterments. See Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Houston &c. R. Co. v. McFadden, 91 Tex. 194, 40 S. W. 216, 42 S. W. 593; Holman v. Galveston &c. R. Co., 14 Tex. Civ. App. 499, 37 S. W. 464; and compare Stewart v. Railroad Co., 8 Ohio N. P. 179. The entire subject is considered and many authorities are reviewed in the note to Carlson v. Mid-Continent Development Co. (103 Kans. 464, 173 Pac. 910) in L. R. A. 1918F, 318.

[63] State v. Wabash &c. R. Co., 115 Ind. 466, 17 N. E. 909, 1 L. R. A. 179, and see note in 26 L. R. A. (N. S.) 710.

[64] The net earnings of the road in the hands of the receiver are chargeable with the expenses of operating the road, including injuries to persons and property. And where such earnings have been diverted to the purchase of property and permanent improve-

has been held, continues liable for taxes imposed upon its property or business while managed by a receiver.[65] And where the duty of a railroad corporation to erect fences along its line is made absolute by statute, the corporation may be held liable for damages resulting from a failure to maintain such fences while

ments equity will follow them. Mobile &c. R. Co. v. Davis, 62 Miss. 271; Texas &c. R. Co. v. Bloom, 60 Fed. 979; Texas &c. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60, and note; Texas &c. R. Co. v. White, 82 Tex. 543, 18 S. W. 478; Houston &c. R. Co. v. Crawford, 88 Tex. 277, 31 S. W. 176, 28 L. R. A. 761, 53 Am. St. 572; Garrison v. Texas &c. R. Co., 10 Tex. Civ. App. 136, 30 S. W. 725; Kansas City &c. R. Co. v. Russell (Tex. Civ. App.), 184 S. W. 299. See also Texas &c. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 60 Am. & Eng. R. Cas. 496, and note; Texas &c. R. Co. v. Bloom, 164 U. S. 636, 17 Sup. Ct. 216, 41 L. ed. 580; Brunner &c. Co. v. Central &c. Co., 18 Ind. App. 174, 47 N. E. 686. Where there is no evidence that earnings have been diverted to the betterment of the road, an instruction that the company is not liable has been held proper. Texas &c. R. Co. v. Hoffman, 83 Tex. 286, 18 S. W. 741. Rights of other parties may sometimes prevent the application of the doctrine stated in the text, and it is one not to be carelessly applied. It is possible that the court went too far in some cases cited, but we believe the doctrine is just and equitable. A corporation may also be liable where it gets the property back, or the like, under an order of court so providing and discharging the receiver. Vandalia R. Co. v. Keys, 46 Ind. App. 353, 91 N. E. 173; Baltimore &c. R. Co. v. Burris, 111 Fed. 882.

[65]Philadelphia &c. R. Co. v. Commonwealth, 104 Pa. St. 80. In this case, the court held the defendant liable for a tax upon the gross receipts coming into the hands of the receiver. The court said: "If the owner of this property was not to bear the burden of the public charges against it, we are at a loss to determine upon whom they should fall. The receivers, the appointees of the United States Circuit Court, were owners neither of these receipts nor of the property whence they were derived, and they were not personally accountable for the taxes upon them. The decree of the circuit court made no change in the title to this property. * * * The commonwealth was entitled to her taxes, and that the owner of the property taxed should be made to pay the charges upon it is a conclusion that is but just and reasonable." In New York, where the property of an insolvent corporation has been sequestrated, and is in the hands of a receiver appointed in a foreclosure proceeding who has in his hands money derived from its

a receiver is in charge of its property.[66] The appointment of a receiver does not relieve the corporation from the consequences of any neglect of duty on its part in the original construction or subsequent maintenance of its road, and it may be held liable in a proper case for damages directly traceable to its fault, even though they accrue during the receivership. Thus, a corporation has been held liable for damages resulting from the flooding of land caused by the negligent construction of one of its culverts, although the overflow occurred while the road was in the hands of a receiver.[67]

§ 666 (582). **Receivers of leased lines.**—A receiver may, with the consent of the lessors, continue in possession of leased lines operated by the insolvent corporation, but his appointment as receiver does not necessarily make him an assignee of the leases so as to give the rentals priority over the mortgages.[68] And

gross earnings sufficient to pay the taxes,—a direct application for an order on him for payment may be made to the court in the foreclosure proceeding, by the attorney-general by petition, making the corporation and the receiver parties. Central Trust Co. v. New York City &c. R. Co., 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260, 13 Cent. 404, 18 N. Y. S. 30, 4 R. & Corp. L. J. 462. Taxes have often been allowed as preferred claims. See, in addition to authorities above cited, Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Perrin &c. Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337.

[66] Ohio &c. R. Co. v. Fitch, 20 Ind. 498; Louisville &c. R. Co. v. Cauble, 46 Ind. 277; Kansas &c. R. Co. v. Wood, 24 Kans. 619; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561. It seems to us, however, that where the receiver has possession and entire and exclusive control of the road and all its assets, the receiver rather than the corporation should be sued when the injury is caused by his own failure to fence, unless the terms of the statute are such as to require a different rule.

[67] Union Trust Co. v. Cuppy, 26 Kans. 754; Kansas Pacific R. Co. v. Wood, 24 Kans. 619. But the receiver was also held liable for maintaining the nuisance erected by the corporation. Union Trust Co. v. Cuppy, 26 Kans. 754. See also ante, § 660. But compare Bush v. Stephens, 131 Ark. 133, 197 S. W. 1157, L. R. A. 1918A, 1131.

[68] Central Trust Co. v. Wabash &c. R. Co., 34 Fed. 259; ante, § 650.

where the road is operated under an order of court directing separate accounts to be kept with the leased lines, and expressly recognizing the right of the lessors to take possession of the leased lines for non-payment of rent upon making proper application therefor, the lessors cannot assert such a lien against the earnings of the general system.[69] The fact that the leased line was held subject to resumption of control by the lessors at any time negatives the claim that the rental was a necessary expense originating in the course of the receiver's administration.[70] And where it appears that the earnings of the road did not suffice to pay for necessary labor and supplies used in operating the road, no equity can arise for the payment of rental on the theory of diverted earnings.[71] On the other hand, where the court appoints receivers for a company, for the benefit of that company and its creditors, it has been held that no part of the expenses of the receivership are chargeable against the property of another road, leased by the insolvent company, the receivership not being for

Rent accrued under a railroad lease prior to the appointment of receivers for the lessee is an unsecured liability entitled to no priority. New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268. See also Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. ed. 663; Louisville &c. R. Co. v. Central Trust Co., 87 Fed. 500; Lockport Felt Co. v. United Box &c. Co., 182 Fed. 328; note in 2 L. R. A. (N. S.) 1030. But there may be a liability for rentals by adoption. Central Trust Co. v. Continental &c. Co., 86 Fed. 517; Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117. See also Thomas v. Western Car Co., 149 U. S. 95, 60 Am. & Eng. R. Cas. 443.

[69] Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. ed. 632. A railroad receiver even though appointed on the petition of the company itself, and for the express purpose of preventing the disintegration of the system, does not become liable for rentals upon leased lines, eo instanti, by the mere act of taking possession, but is entitled to a reasonable time to ascertain the situation of affairs and determine what to do. United States Trust Co. v. Wabash W. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. ed. 1085, 60 Am. & Eng. R. Cas. 480; Seney v. Wabash W. R. Co., 150 U. S. 310, 14 Sup. Ct. 94, 37 L. ed. 1092; ante, § 650. See also Johnson v. Lehigh &c. Co., 130 Fed. 932.

[70] Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. ed. 632.

[71] Quincy &c. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. St. 787, 36 L. ed. 632; Park v. New York &c.

the benefit of the lessor or its creditors.[72] In proceedings to compel a receiver in a foreclosure suit to pay rent for use of tracks and terminal facilities, where the amount of rent was left uncertain, a contract between other parties, oppressive in its terms, is not a test of the amount of rent which the receiver should pay; and it not being shown that the sum paid by the receiver was insufficient, the dismissal of the proceedings was proper.[73] It has been held, however, that receivers who take possession of cars held by an insolvent railroad company under a lease, with full authority to do so, and operate the cars with full knowledge of the lease and the burdens assumed by the company, are bound by the lease as assignees of the company.[74] It has also been held that the court has power, on consulting the receivers, and without notice to the mortgagees, to order the lease of another road which is found necessary to the profitable management of the mortgaged property, and to undertake the payment of rent for its use.[75]

§ 667 (583). **Receiver's accounts.**—Since a receiver is only the ministerial officer of the court by which he was appointed, deriving his authority from its orders,[76] he is required to render

R. Co., 57 Fed. 799. See also Cox v. Terre Haute &c. R. Co., 133 Fed. 371.

[72] Brown v. Toledo &c. R. Co., 35 Fed. 444. This case has, however, been criticized in some respects. See Central Trust Co. v. Wabash &c. R. Co., 46 Fed. 32; New York &c. R. Co. v. New York &c. R. Co., 58 Fed. 268.

[73] Peoria &c. R. Co. v. Chicago &c. R. Co., 127 U. S. 200, 8 Sup. Ct. 1125, 32 L. ed. 110.

[74] Easton v. Houston &c. R. Co., 38 Fed. 784; Woodruff v. Erie R. Co., 93 N. Y. 609. See also Sparhawk v. Yerkes, 142 U. S. 1, 13, 12 Sup. Ct. 104, 35 L. ed. 915; Otis, In re, 101 N. Y. 580, 585, 5 N. E. 571. But, ordinarily, where the receiver simply uses the property for a reasonable time in which to elect, and refuse to adopt the lease, he is not liable on the lease and obliged to keep the property, although he may be required to pay rental while he uses it. See Farmers Loan & T. Co. v. Chicago &c. R. Co., 42 Fed. 6.

[75] Mercantile Trust Co. v. Missouri &c. R. Co., 41 Fed. 8, 43 Am. & Eng. R. Cas. 469. See United States Trust Co. v. Wabash &c. R. Co., 150 U. S. 287, 14 Sup. Ct. 86, 37 L. ed. 1085, 60 Am. & Eng. R. Cas. 480.

[76] A receiver cannot question the order of the court in reference to the trust property in his hands. Her-

to the court a strict account of his management of the trust.[77] These accounts must be made at such times as the court may direct,[78] and a failure to render an account when required may be cause for the removal of the receiver.[79] The court, at the instance of a party interested, will compel the receiver to render an account at the appointed time.[80] The receiver's accounts are usually referred to a master, whose action in passing them is held to be judicial rather than ministerial,[82] and may render the accounts so passed proof against collateral attack.[83] The books, contracts and accounts of a receiver are in the custody of the law, and bondholders, stockholders or creditors are entitled, upon reasonable application, to the privilege of inspecting them.[84] Al-

rick v. Miller, 123 Ind. 304, 24 N. E. 111.

[77] Akers v. Veal, 66 Ga. 302; Hooper v. Winston, 24 Ill. 353. See also as to when an account should be approved. Heffron v. Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. 271.

[78] Mabry v. Harrison, 44 Tex. 286. See also Adams v. Woods, 8 Cal. 306; De Winton v. Brecon, 28 Beav. 200.

[79] Bertie v. Lord Abingdon, 8 Beav. 53. So declared by statute in New York; Birdseye C. & G. Consol. Laws of N. Y., Vol. 3, 2nd. ed. § 107, P. 3143, Art. 6.

[80] Adams v. Woods, 8 Cal. 306; Lowe v. Lowe, 1 Tenn. Ch. 515. An action at law for default of a receiver cannot be maintained against his sureties before an accounting. French v. Dauchy, 134 N. Y. 543, 31 N. E. 1041.

[82] Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293, affirmed in Galveston R. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

[83] Farmers' Loan &c. Co. v. Central R. Co., 1 McCrary (U. S.) 352, 2 Fed. 751. Unless exceptions to the receiver's account are first taken before the master, and the receiver is given an opportunity to sustain his report by any additional evidence at his command the federal courts will decline to consider them when taken before the court. Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293, affirmed in Galveston R. v. Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199. It has been held, however, that the receiver of a corporation to which lands were fraudlently conveyed may be compelled, in an action for fraud, to account for rents and profits received by him from such lands, after his accounts as receiver have been approved in court, and he has been discharged. Pondir v. New York &c. R. Co., 72 Hun 384, 25 N. Y. S. 560, 31 Abb. N. Cas. 29. See as to right of court to surcharge account in absence of objection or upon objection of amicus curiae, note in 18 L. R. A. (N. S.) 284.

[84] Jones Corporate Bonds & Mort-

though no appeal ordinarily lies in favor of a receiver from an order of court made with reference to trust property in the receiver's hands,[85] he may appeal from a judgment of the court erroneously fixing the amount of property in his hands, and directing him to turn over more than he has in his custody, or from a final decree ascertaining the balance for which he is liable.[86]

§ 668 (584). **Compensation of receiver.**—Receivers are allowed compensation for services rendered in the proper discharge of their duties as officers of the court, and it has been said that an order should not be made directing the receiver to pay over the entire fund in his hands without in some way providing for the payment of his commissions.[87] The receiver's compensation is usually payable out of the assets in his hands,[88] and it has been held that a receiver who has been legally and properly appointed can not be compelled to accept a judgment against the person

gages, § 531, citing Fowler's Petition, 9 Abb. N. Cas. (N. Y.) 268; Lafayette Co. v. Neely, 21 Fed. 738. In New York the statute provides that the receiver's accounts, statements, and all books and papers of the corporation in the hands of such receiver, shall, at all reasonable times, be open for the inspection of all persons having an interest therein. Birdseye C. & G. Consol. Laws of N. Y., Vol. 3, 2nd. ed. § 107, P. 3143, Art. 6.

[85] Herrick v. Miller, 123 Ind. 304, 24 N. E. 111.

[86] Hinckley v. Gilman &c. R. Co., 94 U. S. 467, 24 L. ed. 166; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. ed. 888; How v. Jones, 60 Iowa 70, 14 N. W. 193; Adair County v. Ownby, 75 Mo. 282.

[87] Weston v. Watts, 45 Hun (N. Y.) 219.

[88] Ferguson v. Dent, 46 Fed. 88; Beckwith v. Carroll, 56 Ala. 12; Seligman v. Laussy, 60 Ga. 20; Jaffray v. Raab, 72 Iowa 335, 33 N. W. 337; Hayes v. Ferguson, 83 Tenn. 1, 54 Am. Rep. 398; Izard, Ex parte, L. R. 23 Ch. Div. 75. See also Elk Fork Oil &c. Co. v. Foster, 99 Fed. 495; and other cases cited in note in 25 L. R. A. (N. S.) 416. But most of the authorities hold that this rule does not apply where the appointment is void or wrongfully made. See Bellany v. Washita Val. Tel. Co., 25 Okla. 18, 105 Pac. 340, 25 L. R. A. (N. S.) 412, and note reviewing authorities on both sides and on the question as to which party, if either, is liable. See also Wagner v. Philadelphia &c. St. R. Co., 233 Pa. 114, 81 Atl. 944, Ann. Cas. 1913B, 536 (holding that the person improperly procuring the appointment should pay the costs, including expenses of receivership).

procuring his appointment in payment for his services.[89] Where the funds in court are not sufficient to adequately compensate the receiver, the person procuring his appointment may be compelled to pay him in a proper case.[90] The rate of compensation is fixed by statutes applying to certain classes of receiverships in some of the states, and where it is so fixed that rate must be allowed, regardless of the value of the services rendered.[92] But the rule in England [93] and in the United States, in all cases in which the

[89] Radford v. Folsom, 55 Iowa 276, 7 N. W. 604. In Hoppensack v. Hoppensack, 61 How. Prac. (N. Y.) 498, it was held that the receiver, being an officer of the court must be compensated out of the funds in the hands of the court, and that the owner thereof, in case they were wrongfully taken, must look to the person who procured the appointment of the receiver for redress. But the weight of authority favors the rule that a receiver who is improperly appointed and whose appointment is set aside, must generally look only to the plaintiff for remuneration. Weston v. Watts, 45 Hun (N. Y.) 219; French v. Gifford, 31 Iowa 428; Moyers v. Coiner, 22 Fla. 422. See also note in 25 L. R. A. (N. S.) 412 Periodic allowances or payments before the termination of the receivership are frequently made. See Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293; Wilkinson v. Washington &c. Co., 102 Fed. 28; Henry v. Henry, 103 Ala. 582, 15 So. 916; Battery &c. Bank v. Western &c. Bank, 126 N. Car. 531, 36 S. E. 39; Martin v. Martin, 14 Ore. 165, 12 Pac. 234; Neave v. Douglas, 26 L. J. Ch. 756. In many jurisdictions the courts seem to have a large discretion in determining whether to assess the costs of the receivership against the fund, or against the applicant or unsuccessful party or to apportion them among the parties, as the justice and equities of the particular case may demand. Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435; Sullivan &c. Co. v. Black, 159 Ala. 570, 48 So. 870; note in 25 L. R. A. (N. S.) 418, and cases there cited.

[90] Chapman v. Atlantic &c. Co., 119 Fed. 257; Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177; Hendrie &c. Co. v. Parry, 37 Colo. 359, 86 Pac. 113; Frick v. Fritz, 124 Iowa 529, 100 N. W. 513; Tome v. King, 64 Md. 166, 21 Atl. 279; Farmers' Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142. But compare Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. ed. 528.

[92] Price v. White, 1 Bailey Eq. (S. Car.) 240. A court cannot allow a greater compensation than the per cent. upon funds passing through the receiver's hands, which the statute fixes as his compensation. Orient Mut. Ins Co., In re, 66 Hun. 633, 21 N. Y. S. 237.

[93] Potts v. Leigaton, 15 Ves. Jr. 276; Courand v. Hanmer, 9 Beav. 3;

compensation is not definitely fixed by law,[94] is that the amount of compensation to be allowed is a matter within the sound discretion of the court by whom the receiver was appointed, and is to be governed by the particular circumstances of the case.[95] Where the duties of the receiver are very slight,[96] or where one of the parties in interest serves as receiver to protect his own interests,[97] the court may be justified in allowing him little or no compensation. And in case the duties of a receiver prove more arduous than he or the court expected he may be allowed compensation in addition to that fixed by the order under which he was appointed.[98] If the receiver's duties are imperfectly performed because of his negligence or misconduct, the court may

Malcolm v. O'Callyhan, 3 Neyle. & C. 52.

[94] United States Trust Co. v. New York &c. R. Co., 101 N. Y. 478, 5 N. E. 316.

[95] Cowdrey v Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293; Northern Ala. R. Co. v. Hopkins, 87 Fed 505; Sherley v. Mattingly, 21 Ky. L. 289, 51 S. W. 189; Jones v. Keen, 115 Mass. 170; Geyser Min. Co. v. Salt Lake Bank, 16 Utah 163, 51 Pac. 151; Crumlish's Admr. v. Shenandoah &c. R. Co., 40 W. Va. 627, 22 S. E. 90; Day v. Croft, 2 Beav. 488. Sometimes he is given the same compensation as the president of the road, and his duties and responsibilities may be such as to entitle him to even greater compensation. Central Trust Co. v. Wabash &c. R. Co., 32 Fed. 187, 188. Receivers of railroads are frequently allowed as much as $10,000 a year.

[96] Marr v. Littlewood, 2 M. & Craig (Eng.) 454. A railroad receiver, residing at a distance from the property, who entrusts the active management to others, will not be allowed the full compensation usually paid to railroad presidents and receivers who are the active executive heads of going railroads. Central Trust Co. of New York v. Cincinnati &c. R. Co., 58 Fed. 500. See also Boston &c. Co. v Chamberlain, 66 Fed. 847.

[97] Steel v. Holladay, 19 Ore. 517, 25 Pac. 77; Berry v. Jones, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; Blakeney v. Dufaur, 15 Beav. 40. As a general rule, perhaps, the receiver should not employ the counsel of either party. Speiser v. Merchant's Exch. Bank, 110 Wis. 506, 86 N. W. 243. See also Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1197, and cases cited in note to the effect that he is generally entitled to no compensation.

[98] Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. ed. 568; Farmers' Loan &c. Co. v. Central R. Co., 8 Fed. 60; Adams v. Haskell, 6 Cal. 475. In Farmers' Loan &c. Co. v. Central R. Co., 8 Fed. 60, the opinion was expressed that a receiver should be allowed compensa-

reduce the amount of his compensation,[99] and, in a proper case, may even refuse him any compensation whatever.[1] It is the practice in most jurisdictions to fix the amount in a general order or to make allowances to the receiver for his own compensation and necessary counsel fees on his ex parte application, but it is said in a recent case that, in the absence of any well-settled rule of practice or general order, motions to fix the compensation of receivers or their counsel should not be heard ex parte, and that notice should be given to all parties in interest.[2] In case the compensation allowed is too large or too small, it has been held that an appeal may be taken from the order.[3] But an appellate court will not interfere to correct the allowance made by the court appointing the receiver unless it has clearly abused the

tion in case he performs duties in addition to those ordinarily required of a receiver, and he was allowed a fee for services as counsel. But in other cases where claims have been made by receivers for compensation for legal services rendered while acting as such, the claims have been disallowed and the opinion expressed that a receiver acting also in other capacities should be paid for his services in the capacity of receiver only. This rule is based upon the public policy which forbids receivers and other trustees from entering into contracts by which they may make a personal profit from the management of the trust estate. It is said that the temptation to earn fees as counsel would be liable to warp the receiver's judgment as to what suits are proper and necessary. State v. Butler, 15 Lea (Tenn.) 113; Battaile v. Fisher, 36 Miss. 321. See as to the general rule that a receiver cannot employ himself to perform services in addition to his duties as a receiver. Bank of Niagara, In re, 6 Paige (N. Y.) 213; Easton v. Houston &c. R. Co., 40 Fed. 189; Holcombe v. Holcombe, 13 N. J. Eq. 413, 417; Martin v. Martin, 14 Ore. 165, 12 Pac. 234. In Kimmerle v. Dowagiac &c. Co., 105 Mich. 640, 63 N. W. 529, it is held that a corporation appointed as a receiver is not entitled to additional compensation for its agent who performed the duties of the office.

[99] Appeal of Reeves, 3 Walk. (Pa.) 199; Stretch v. Gowdey, 3 Tenn. Ch. 565.

[1] Clapp v. Clapp, 49 Hun (N. Y.) 195. See also Sheets Lumber Co., In re, 52 La. Ann. 1337, 27 So. 809; Harrison v. Boydell, 6 Sim. 211.

[2] Merchants' Bank v. Crysler, 67 Fed. 388, citing Daniel Ch. Pl. & Pr. 1592, 1593.

[3] Magee v. Cowperthwaite, 10 Ala. 966; Herndon v. Hurter, 19 Fla. 397; Russell v. First Nat. Bank, 65 Iowa 242, 21 N. W. 585; Thompson v. Huron &c. Co., 5 Wash. 527, 32 Pac. 536.

discretion with which it is vested.[4] And if the facts upon which the allowance was based are not before the appellate court, it will refuse to consider the question as to whether such allowance was excessive.[5]

§ 669 (585). Attorney's fees.—The receiver is entitled to the benefit of legal counsel, and the court may upon application appoint one of the attorneys practicing before it to serve as his legal adviser.[6] The fees of such counsel for necessary services in connection with the management of the trust will be allowed by the court and paid out of the trust property.[7] The amount must depend largely upon the circumstances of the particular case, and in fixing it, as in fixing the compensation of the receiver, the court is invested with a wide discretion.[8] Indeed, the receiver

[4] Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. ed. 568; Morgan v. Hardee, 71 Ga. 736; Heffron v. Rice, 149 Ill. 216, 36 N. E. 562, 41 Am. St. 271; Greeley v. Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

[5] Jones v. Keen, 115 Mass. 170; Greeley v. Provident Sav. Bank, 103 Mo. 212, 15 S. W. 429.

[6] Blair v. St. Louis &c. R. Co., 20 Fed. 348. As a general rule, perhaps, the receiver should not employ the counsel of either party. Speiser v. Merchant's Exch. Bank, 110 Wis. 506, 86 N. W. 243. But there are instances in which it may be advisable that the court appoint or approve the employment of counsel who had represented one of the parties and the attorney for the party securing the appointment of the receiver has often been employed. So where the duties are in no way conflicting and there is no good reason for not employing such counsel, the court will approve his employment and a reasonable bill for services of the receiver. Bartlett v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912 A, 1195.

[7] Cowdrey v. Railroad Co., 1 Woods (U. S.) 331, Fed. Cas. No. 3293; Howes v. Davis, 4 Abb. Prac. (N. Y.) 71. As to allowance to receiver for fees paid counsel, see Phinizy v. Augusta &c. R. Co., 98 Fed. 776. Where there are no surplus earnings, an attorney who recovers for a railroad, in the hands of a receiver, engines formerly leased by it to another road, and rent for their use, which recovery inures to the benefit of the security holders, is entitled to a reasonable compensation, to be paid out of the corpus of the property. Louisville &c. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. ed. 1023. See also Hulings v. Jones, 63 W. Va. 696, 60 S. E. 874.

[8] Crumlish's Admr. v. Shenan-

usually pays the counsel and the court makes the allowance to the receiver.[9] Not only the fees of the receiver's counsel but also those of counsel for complainant in the suit for the appointment of a receiver have been ordered paid out of the proceeds of a sale of the property. Such an allowance, if made with moderation and a jealous regard for the rights of those interested in the fund, is not only admissible but agreeable to the principles of equity and justice.[10] Where a receiver is appointed with the consent of all interested parties, and to the advantage of all, the services rendered by the complainant's attorneys, being for the common benefit, should be paid for from the assets of the company.[11] And even though the creditors do not all consent, if the litigation result in favor of the plaintiff and the fund be administered for the benefit of all the creditors, it is only fair that all should bear their ratable proportion of the expense of procuring the receiver's appointment. In many cases the claims of complainant's counsel have been allowed in whole or in part[12] before the litigation was ended, and while it still remained a matter of doubt whether the party who employed the attorney had any interest in the fund. But this practice is to be discouraged. The better course is to defer making any allowance to

doah &c. R. Co., 40 W. Va. 625, 22 S. E. 90. But see Dalliba v. Winschell, 11 Idaho 364, 82 Pac. 107, 114 Am. St. 267; Kronenthal v. Rosenthal, 144 N. Y. S. 830.

[9] Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. ed. 568. See also Phinizy v. Augusta &c. R. Co., 98 Fed. 776.

[10] Trustees v. Greenough, 105 U. S. 527, 536, 26 L. ed. 1157, per Mr. Justice Bradley. Compare also Louisville &c. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. ed. 1023; Petersburg &c. Co. v. Dellatone, 70 Fed. 643.

[11] Bound v. South Carolina R. Co., 43 Fed. 404.

[12] In Central Trust Co. v. Wabash &c. R. Co., 23 Fed. 675, it was held that a partial allowance would be made for the fees of complainant's counsel upon application, leaving the balance to stand until the litigation should be disposed of, and it should become apparent whether the property in the receiver's hands were sufficient to pay all expenses. Though a receiver may, under certain circumstances, employ counsel to advise him with regard to the property in his charge, the necessity must be apparent, or a claim for attorney's fees will be disallowed. Terry v. Martin, 7 N. Mex. 54, 32 Pac. 157.

plaintiff's counsel until it shall have been demonstrated that his employment was necessary to protect the interests of the creditors.[13] If an opposite course is pursued, it may be found that the entire fund in the possession of the court has been consumed by expenses, and that nothing remains for the creditors in whose interest the litigation purported to have begun.[14]

[13] In a dissenting opinion delivered in the case of Trustees v. Greenough, 105 U. S. 527, 538, 26 L. ed. 1157, Mr. Justice Miller said: "While I agree to the decree of the court in this case, I do not agree to the opinion, so far as it is an argument in favor of a principle on which is founded the grossest judicial abuse of the present day, namely, the absorption of a property or a fund which comes into control of a court, by making allowances for attorney's fees and other expenses, pending the litigation, payable out of the common funds, when it may be finally decided that the party who employed the attorney, or incurred the cost, never had any interest in the property or fund in litigation. This system of paying out of a man's property some one else engaged in the effort to wrest that property from him can never receive my approval."

[14] In Trustees v. Greenough, 105 U. S. 527, 536, 26 L. ed. 1157, Mr. Justice Bradley, speaking for the court, said: "Sometimes, no doubt, these allowances have been excessive and perhaps illegal; and we would be very far from expressing our approval of such large allowances to trustees, receivers, and counsel, as have sometimes been made, and which have justly excited severe criticism." In Cowdrey v. Galveston &c. R. Co., 93 U. S. 352, 23 L. ed. 950, the supreme court upheld an allowance of five thousand dollars in favor of counsel employed by certain bondholders to foreclose a mortgage, after the civil war had caused the discontinuance of a former suit in which the trustees agreed with their solicitor to pay him that sum for procuring a foreclosure. See as to distinction between allowing fees to the receiver's counsel and refusing to allow them to counsel for the trustees or for the corporation for former services, Pennsylvania Ins. &c. Co. v. Jacksonville &c. R. Co., 93 Fed. 60; Finance &c. Co. v. Charleston &c. R. Co., 52 Fed. 526; Petersburg &c. Ins. Co. v. Dellatorre, 70 Fed. 643; Grigg v. Mercantile Trust Co., 109 Fed. 220; Central Trust Co. v. Thurman, 94 Ga. 735, 20 S. E. 141; Chesapeake &c. R. Co. v. Atlantic &c. Co., 62 N. J. Eq. 751, 48 Atl. 997; Mauran v. Brown &c. Co., 23 R. I. 324, 50 Atl. 331. See also Baxter v. Lowe, 93 Fed. 358.

§ 670 (586). **Removal and discharge.**—The court appointing a receiver[15] has power to remove him at any time upon cause shown, and fill his place with some one who will discharge its duties in a satisfactory manner. This power of removal is held to be a necessary incident of the power to appoint a receiver and to control his actions,[16] and its exercise rests in the sound discretion of the court.[17] A receiver may be removed and superseded for a failure to give bond with sufficient sureties,[18] if he becomes insolvent,[19] for physical or mental disability by which he is rendered incapable of discharging the duties of his office,[20] or for any misconduct[21] or negligence by which the interests of the trust estate are menaced or endangered.[22] Such a personal

[15] Another court to which the cause has been removed by the process of law has the same power in this respect as the court by which the receiver was appointed, and receivers appointed by a state court are as completely under the control of a federal court, to which the cause is afterward removed, as if originally appointed by the federal court. Texas &c. R. Co. v. Rust, 17 Fed. 275; Hinckley v. Gilman &c. R. Co., 100 U. S. 153, 25 L. ed. 591; Dillon Removal of Causes, § 80, p. 99. See Atkins v. Wabash &c. R. Co., 29 Fed. 161. But see Young v. Montgomery &c. R. Co., 2 Woods (U. S.) 606, Fed. Cas. No. 18166.

[16] Walters v. Anglo-American &c. Co., 50 Fed. 316; Crawford v. Ross, 39 Ga. 44; Colvin, In re, 3 Md. Ch. 278, 300; McCullough v. Merchants' &c. Co., 29 N. J. Eq. 217.

[17] See Milwaukee &c. R. Co. v. Souter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Young v. Rollins, 90 N. Car. 125; Cincinnati &c. R. Co. v. Sloan, 31 Ohio St. 1.

[18] Where the bond becomes insufficient a receiver may be required to find additional sureties, and, upon his failure to do so, may be removed. Schakelford v. Schakelford, 32 Grat. (Va.) 481.

[19] Crawford v. Ross, 39 Ga. 44; Monroe v. Schermerhorn, 1 Clarke Ch. (N. Y.) 366.

[20] Richardson v. Ward, 6 Mad. 266.

[21] An unlawful and unjust discrimination by the receiver of a railroad in favor of one shipper and against rival shippers is sufficient ground for his removal. Beers v. Wabash &c. R. Co., 29 Fed. 161; Handy v. Cleveland &c. R. Co., 31 Fed. 689. See Keeler v. Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y.) 166. See generally Fowler v. Jarvis &c. Co., 63 Fed. 888, 66 Fed. 14; Clarke v. Central R. &c. Co., 66 Fed. 16; St. George's Estate, In re, 19 L. R. Ir. 566.

[22] St. George's Estate, In re, 19 L. R. Ir. 566.

interest in the conduct of the business as might lead the receiver to sacrifice the interests of other claimants may also be cause for his removal.[23] And where it is shown that the receiver was appointed at the instance of the principal stockholder who has controlled the corporation, and who procured his appointment for a fraudulent purpose, the receiver will be removed and a new receiver appointed.[24] But a receiver whose management has been efficient and impartial will not be removed at the request of a controlling stockholder and his associates, when the litigation is not for the purpose of foreclosing a mortgage, but is instituted by a minority stockholder on the ground that the indebtedness of the corporation was being wrongfully increased for the benefit of the controlling stockholders.[25] When the object for which the receiver was appointed has been attained[26] or the litigation in aid of which he was appointed has terminated by abatement or otherwise,[27] the receivership should be terminated and the receiver finally discharged.[28] And where it appears that the appointment of a receiver for the property of a railroad corporation was procured by collusion between the corporation

[23] Beers v. Wabash &c. R. Co., 29 Fed. 161; Etowah &c. Co. v. Wills &c. Co., 106 Ala. 492, 17 So. 522; Williamson v. Wilson, 1 Bland (Md.) 418; Keeler v. Brooklyn El. R. Co., 9 Abb. N. Cas. (N. Y.) 166; Fripp v. Chard R. Co., 22 L. J. Ch. 1084, 11 Hare 241. Where two receivers, appointed to represent rival interests, are unable to agree as to the conduct of the business, the court should remove them and appoint a single disinterested person to act in their stead. Meier v. Kansas Pac. R. Co., 5 Dill. (U. S.) 476, Fed. Cas. No. 9395.

[24] Phinizy v. Augusta &c. R. Co., 56 Fed. 273.

[25] Street v. Maryland Cent. R. Co., 58 Fed. 47.

[26] Sewell v. Cape May &c. R. Co., (N. J.) 30 Am. & Eng. R. Cas. 155. Upon payment of the plaintiff's claim, and the receiver's lawful charges, the court is bound to discharge the receiver, even though some of the defendants desire that he be retained. Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Davis v. Duke of Marlborough, 2 Swanst. * p. 167, per Lord Eldon.

[27] Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 17 L. ed. 900; Field v. Jones, 11 Ga. 413; National &c. Assn. v. Mariposa Co., 60 Barb. (N. Y.) 423; Whiteside v. Prendergast, 2 Barb. Ch. (N. Y.) 472.

[28] But the discontinuance or abatement of the action does not

and a creditor, for the purpose of putting the property beyond the reach of judicial process and without any intention of applying it in satisfaction of the petitioning creditor's claim, the court will discharge the receiver of its own motion.[29] A court of equity will not conduct the business of the corporation through a receiver unless the interests of the parties unmistakably require it.[30] It has been held that a receiver continues to be subject to the duties and possessed of the privileges annexed to his office until discharged by a formal order of court, notwithstanding the litigation has ended, or other conditions have arisen which make it the duty of the court to discharge him.[31]

§ 671 (587). **Effect of removal or discharge.**—The removal of a receiver does not necessarily terminate the receivership. Since the receiver is a mere officer of the court, he may be superseded without affecting the trust which he is called upon to administer. The removal of a receiver to make way for a successor appointed by the court does not affect claims against the property arising from the operation of the railroad by the first receiver. The management of the court is one even if it becomes necessary to change receiver more than once.[32] After the receiver has been discharged by the court he is no longer liable to an action either for the debts of the corporation or for any debts or liabilities incurred during his receivership.[33] Nor is the corpo-

of itself terminate the receivership. State v. Gibson, 21 Ark. 140; McCosker v. Brady, 1 Barb. Ch. (N. Y.) 329; Newman v. Mills, 1 Hog. (Irish Rolls) 291.

[29] Sage v. Memphis &c. R. Co., 18 Fed. 571; Wood v. Oregon &c. Co., 55 Fed. 901; Wilson v. Barney, 5 Hun (N. Y.) 257. The receiver will be discharged in any case where it is shown to the court that the order appointing a receiver was improvidently or wrongfully made. McHenry v. New York &c. R. Co., 25 Fed. 114; Milwaukee &c. R. Co. v. Soutter, 2 Wall. (U. S.) 510, 523, 17 L. ed. 900; Copper Hill &c. Co. v. Spencer, 25 Cal. 11, 16.

[30] Overton v. Memphis &c. R. Co., 10 Fed. 866; Sage v. Memphis &c. R. Co., 18 Fed. 571; Ferry v. Bank, 15 How. Prac. (N. Y.) 445.

[31] State v. Gibson, 21 Ark. 140. See also Fountain v. Mills, 111 Ga. 122, 36 S. E. 428; Baker v. Baker, 36 App. Div. 485, 55 N. Y. S. 824.

[32] Bond v. State, 68 Miss. 648, 9 So. 353; Gibbes v. Greenville &c. R. Co., 15 S. Car. 304.

[33] Farmers' Loan &c. Co. v.

ration, as a general rule, personally liable for the latter.[34] The corporation may, however, be held liable for the acts and defaults of the receiver's servants to the extent that earnings of the road have been used in the purchase of property surrendered to the corporation by the receiver upon his final discharge.[35] But after the discharge of the receiver and the restoration of the property to the corporation, the jurisdiction of the court over the receivership is ended, and it has even been held that a provision in the decree relieving the property from liability for claims not filed within a specified time, in the suit in which the receiver was appointed, is void.[36]

Central R. Co., 7 Fed. 537; Lehman v. McQuown, 31 Fed. 138; Bond v. State, 68 Miss. 648, 9 So. 353; New York &c. Tel. Co. v. Jewett, 115 N. Y. 166, 21 N. E. 1036; Ryan v. Hays, 62 Tex. 42; Texas &c. R. Co. v. Adams, 78 Tex. 372, 14 S. W. 666, 22 Am. St. 56. A judgment against an ancillary receiver after his discharge is not binding, even though the court did not know of his discharge. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464.

[34] Davis v. Duncan, 19 Fed. 477, 17 Am. & Eng. R. Cas. 295; Godfrey v. Ohio &c. R. Co., 116 Ind. 30, 18 N. E. 61; Texas &c. R. Co. v. Watson (Tex. Civ. App.), 24 S. W. 952. But it has been held that the company is liable for injuries caused by the negligence of a receiver appointed through collusion, whether the court had jurisdiction to appoint or not. Texas &c. R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52. The court regarded the receiver as the agent of the company.

[35] Mobile &c. R. Co. v. Davis, 62 Miss. 271; Texas &c. R. Co. v. Johnston, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60. See Texas &c. R. Co. v. Griffin, 76 Tex. 441, 13 S. W. 471.

[36] Missouri &c. R. Co. v. Chilton, 7 Tex. Civ. App. 183, 27 S. W. 272; Texas &c. R. Co. v. Watts (Tex.), 18 S. W. 312, following Texas &c. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. 463, 18 Am. St. 60. But see Ohio Coal Co. v. Whitcomb, 123 Fed. 359; Denver &c. R. Co. v. Gunning, 33 Colo. 280, 80 Pac. 727, and compare Henry v. Claffey (Ind.), 127 N. E. 193.

CHAPTER XXIII.

RECEIVER'S CERTIFICATES.

Sec.
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§ 675 (588). **Definition and nature of receiver's certificates.**—A receiver's certificate has been defined as "a non-negotiable evidence of debt, or debenture, issued by authority of a court of chancery as a first lien upon the property of a debtor corporation in the hands of a receiver."[1] It frequently becomes necessary that a receiver of a railroad should borrow money in order to keep the road in repair and operate it for the good of the public, to prevent the loss of business and good will, and to preserve it as a "going concern" for the benefit of all parties interested. Unless good security can be given it would be impossible to borrow the money, and it is to the interest, both of the public and of the parties, that some just means of obtaining the money and giving security should be devised. This is accomplished by the issue of certificates of indebtedness, negotiable in form, for the payment of which, out of the proceeds of the property in its hands, the faith of the court is pledged.[2]

§ 676 (589). **Power of courts to authorize.**—Since the best and cheapest mode of conserving a railroad is by operating trains

[1] See also Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 114, notes in 54 Am. St. 431, 71 Am. St. 377, 379, 381, 83 Am. St. 72 et seq; Ann. Cas. 1913C, 40.

[2] Taylor v. Philadelphia &c. R. Co.,

thereon, and keeping it in repair for their use, and since this is the only way in which the public duties and obligations of the railroad can be discharged and a forfeiture of its charter prevented, power to raise money for the repair and operation of the road necessarily accompanies the power to assume control of it for the benefit of the corporate creditors.[3] This power is a part of the jurisdiction, exercised by a court of equity, by which it undertakes to protect and preserve the trust funds in its hands.[4] It may be stated as a general rule, therefore, that where it is

14 Phila. (Pa.) 451, 461. "The certificates are not debts of the company, but of the receivers, backed by the pledged faith of the court, that the property, on the proceeds of which they are charged, is in its possession, subject to be, and that it will be, disposed of by it for the payment of them. This results from the fact that they are but a substitute for common methods by which money is raised for the use of a receiver in a particular case, a mode of appropriating, in advance, a portion of the value of the property, in order to enable the court to save a greater value thereof from destruction." Meyer v. Johnston, 53 Ala. 237. See also as to the reasons justifying the issuance of such certificates giving priority in the case of railroad companies. International Trust Co. v. Decker Bros., 152 Fed. 78, 11 L. R. A. (N. S.) 152, 156, and cases cited in the opinion.

[3] Meyer v. Johnston, 53 Ala. 237.

[4] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895. In some states the issue of receiver's certificates in certain cases is authorized by statute. In announcing the opinion of the court in the case of Meyer v. Johnston, 53 Ala. 237, Judge Manning said: "It was not necessary that the question of the power of a court to authorize the issue of first lien certificates of indebtedness to enable a receiver to raise money he might need, should be decided before the introduction of railroads. But these properties, with their appurtenances, vast in extent and value, yet very perishable if unused and neglected, existing as the estates of private individuals associated into corporations, but essentially public works, in whose operations the public at large and the state are concerned, when drawn into litigation, must be dealt with by the courts according to the nature and circumstances of the subject. And any one can understand that the best and cheapest mode of conserving a railroad may be by operating trains thereon and keeping it in repair for their use. To preserve its value, it must generally be continued in operation, and be sold as a going concern." The court also said that if the road were permitted to become a useless wreck, "the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit to parties who are powerless to take care of themselves, of pre-

necessary that a receiver should expend money for the repair of a railroad in his hands, in order to keep it in operation, the court by which he was appointed has power to authorize him to borrow money necessary to make such repairs, and to make the indebtedness so incurred a first lien upon the property in its hands. And it is equally well settled that the court may authorize the receiver to issue receiver's certificates as evidence of such indebtedness.[5] But, as will be further shown in the next section, the power is one that is to be cautiously and somewhat sparingly exercised.[6]

§ 677 (590). Purposes for which receiver's certificates may be issued—Extent of power.—Where a portion of the road has been built in a hasty manner with materials which answer only a temporary use,[7] or where valuable property rights will be lost by a failure to complete unfinished portions of the road within a limited time,[8] it may be necessary for the receiver to borrow money with which to build such parts of the road, and the court

venting the rapid diminution of value, and derangement and disorganization that would otherwise result, seem to require—not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one—but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose, if it can not otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued, constituting a first lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court."

[5] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Meyer v. Johnston, 53 Ala. 237; Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144. See also Central Trust &c. Co. v. Chester Co. Elec. Co., 9 Del. Ch. 247, 88 Atl. 801; Vandalia v. St. Louis R. &c. Co., 209 Ill. 73, 70 N. E. 662; Knickerbocker Trust Co. v. Oneonta &c. R. Co., 201 N. Y. 379, 94 N. E. 871; Greenwood v. Algeciras R. Co., (1894) 2 Ch. 205, 63 L. J. Ch. 670.

[6] See Shaw v. Little Rock &c. R. Co., 100 U. S. 605, 25 L. ed. 757; Newbold v. Peoria &c. R. Co., 5 Ill. App. 367; Davis v. Alton &c. R. Co., 180 Ill. App. 1; Rochester Trust Co. v. Rochester &c. R. Co., 29 Misc. 222, 60 N. Y. S. 409; State v. Edgefield &c. R. Co, 6 Lea (Tenn.) 353.

[7] Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 506, Fed. Cas. No. 13296.

[8] Kennedy v. St. Paul &c. R. Co.,

may authorize him to issue certificates therefor.[9] But this jurisdiction to authorize expenditures and certificates for improvements and repairs must not be exercised to the extent of improving the owners and lienholders out of their property. The whole power of the court, when exercised to its fullest extent, without the consent of the lienholders express or implied, is usually confined in ordinary cases to making necessary repairs and protecting the property as it is.[10] The propriety of the expenditure is to be judged by the necessity of making it in order to preserve the value of the trust estate.[11] This power is exercised, as a general rule, only in the case of such expenditures as are necessary for

2 Dill (U. S.) 448, Fed, Cas. No. 7706, 5 Dill. (U. S.) 519, Fed Cas. No. 7707. The receiver can not bind the company by an oral contract to give a landowner an annual pass during life in consideration of a grant of necessary land for a right of way. Martin v. New York &c. R. Co., 36 N. J. Eq. 109, 12 Am. & Eng. R. Cas. 448.

[9] Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136. In this case the United States had made a large grant of land to a company engaged in digging a canal, conditioned upon the completion of the canal within a certain time. The receiver was authorized to borrow the money necessary for its completion by the issue of receiver's certificates, and, upon appeal, the supreme court approved their issue. See also Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706; Houston First Nat. Bank v. Ewing, 103 Fed. 168; Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518.

[10] Credit Co. v. Arkansas Cent. R. Co., 5 McCrary (U. S.) 23, 15 Fed. 46; Taylor v. Philadelphia &c. R. Co., 9 Fed, 1; citing Snow v. Winslow, 54 Iowa 200, 6 N. W. 191; Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co., 103 N. Y. 245, 8 N. E. 488, per Danforth, J. Jones Corporate Bonds and Mortgages, § 543. See also American Brake Shoe &c. Co. v. Pere Marquette R. Co., 205 Fed. 14.

[11] Shaw v. Railroad Co., 100 U. S. 605, 25 L. ed. 757. "Aside from any consideration of the mortgagor and others having the right to redeem, against whom a court of equity has power analogous to that of a mortgagee in possession to incur charges for the preservation and repair of the property it has taken possession of through its receiver, a court of equity has no power to impair the obligation of a mortgage contract, by creating a superior lien without the mortgagee's consent, unless it be in the exercise of a like equitable power of preserving and protecting the property. The law does not permit the obligation of contracts to be impaired. The constitution of the United States inhibits even a state from doing an act which shall

the protection of the property.[12] And the court will not, ordinarily, authorize expenditures for the completion of a road unless it is morally certain that the property in consequence will sell for a higher price.[13] A receiver should not be permitted to expend money or incur obligations to secure mere speculative advantages.

have that effect. And, certainly, a court, which is a portion of the government of the state, cannot have a power which is denied to the state in convention assembled. If, therefore, the action of a chancellor in this cause goes to the extent of taking the property of the defendant corporation into its hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end raising money, by charging the railroad and its appurtenances with liens which are to supersede older ones, without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion no such power is vested or resides in any judicial tribunal." Jones Corporate Bonds and Mortgages, § 551, quoting from the opinion of Manning, J., in Meyer v. Johnston, 53 Ala. 237, 345.

[12] Metropolitan Trust Co. v. Tonawanda Valley &c. R. Co., 103 N. Y. 245, 249, 8 N. E. 488, per Danforth, J; Jones Corporate Bonds and Mortgages, § 559, citing Hand v. Savannah &c. R. Co., 17 S. Car. 219, 270, per McGowan. The certificates of a receiver of an insolvent railroad company, issued under an order of court to obtain money to operate the road, are paramount liens. Central Trust Co. v. Tappan, 53 Hun 638, 6 N. Y. S. 918. But see as to mechanic's lien, Stewart &c. Co. v. Missouri Pac. R. Co., 28 Nebr. 39, 44 N. W. 47. And see as to right of way claim. Crosby v. Morristown &c. R. Co. (Tenn.), 42 S. W. 507.

[13] Investment Co. v. Ohio &c. R. Co., 36 Fed. 48; Jones Corporate Bonds and Mortgages, § 545, citing Investment Co. v. Ohio &c. R. Co., 36 Fed. 48. In this case the circumstances were as follows: The petition of a receiver of an insolvent railroad for authority to borrow a large sum of money and issue his certificates therefor, showed that part of the amount was to be used in completing a portion of the road and widening its gauge; $35,000 for purchasing and laying track over another portion already graded and bridged at an expense of $49,000; $47,243.18 to pay claims for material furnished, which were not a lien on the road; $20,000 to reimburse bondholders for advances to meet arrearages of wages and avert a strike; $100,000 to purchase leased rolling stock for which the company paid an annual rental of $28,000, the lessors cancelling a claim for $7,000 unpaid rent, if the purchase was made; $4,000 to relay a line of track on a

§ 678. Purposes and circumstances justifying issuance.—A greater latitude is permitted to receivers of railroads than to receivers of other corporations in the matter of incurring debts for management and operation, because of the public rights which are involved and of the consequences of a failure on the part of the railroad to discharge its public duties.[14] Accordingly the courts have in some cases authorized the issue of certificates to construct the unfinished portions of an incomplete railroad, and to purchase the necessary rolling stock, machinery and supplies for its operation,[15] and even to pay debts of the company for labor, and materials due prior to the appointment of the

connecting road, and thus cancel a debt of $8,000 due that road, and secure enough additional business to pay the cost in three months, and $29,430 to make final payment on valuable real estate. A majority of the holders of both the first and second mortgage bonds consented to the certificates being issued; the remaining holders of first and second mortgage bonds not consenting, and a number of them, together with other lienholders, objecting. The court held that, as it was doubtful whether the improvements would add to the selling price of the road, the petition should be denied absolutely as to the items of $35,000 and $20,000, and as to the item of $47,243.18, unless all lienholders consented; but that certificates should be issued for the other items, if desired by the consenting bondholders, with leave thereafter to petition to have them made a charge on the non-consenting bondholders. See also Street v. Maryland Cent. R. Co., 59 Fed. 25; Bibber-White Co. v. White River Elec. R. Co., 115 Fed. 786; Rochester &c. Co. v. Rochester &c. R. Co., 29 Misc. 222, 60 N. Y. S. 409; Rutherford v. Pennsylvania R. Co., 178 Pa. St. 38, 35 Atl. 926; Hand v. Savannah &c. R. Co., 10 S. Car. 406.

[14] Jones Corporate Bonds and Mortgages, § 555. See also Wood v. Guarantee Trust Co., 128 U. S. 416, 9 Sup. Ct. 131, 32 L. ed. 472; Morgan's &c. Co. v. Texas &c. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. ed. 625; Farmers' Loan &c. Co. v. Grape Creek &c. Co., 50 Fed. 481, 16 L. R. A. 603, and note; Fidelity &c. Co. v. Roanoke &c. Co., 68 Fed. 623; Snively v. Loomis Coal Co., 11 Nat. Corp. Rep. 207.

[15] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Smith v. McCullough, 104 U. S. 25, 26 L. ed. 637; Miltenberger v. Logansport R. Co., 106 U. S. 286, 27 L. ed. 117; Swan v. Clark, 110 U. S. 602, 4 Sup. Ct. 241, 28 L. ed. 256; Bank of Montreal v. Thayer, 7 Fed. 622; Mercantile Trust Co. v. Kanawha &c. R. Co., 50 Fed. 874; Meyer v. Johnston, 53 Ala. 237; Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144; Bank of Montreal v. Chicago &c. R.

receiver.[16] So, a receiver may be authorized to borrow money to pay taxes and to issue certificates therefor when he has no funds with which to pay them.[17] And such certificates are often authorized and issued to pay current operating expenses of a railroad under the receiver, including those for ordinary repairs.[18]

§ 679. Purpose or circumstances not justifying issuance.— But it was held in a comparatively recent case that where a receiver is appointed at the suit of a stockholder and not upon the application of a bondholder, and no earnings have been diverted to pay interest on the bonds, there is no lien or equity requiring the issuance of receiver's certificates for money to pay labor or material claims, existing before the appointment of the receiver, out of the corpus of the property.[19] And the power to issue receiver's certificates is one which should be sparingly exercised.[20] It is liable to great abuse; and while it is usually re-

Co., 48 Iowa 518; Gilbert v. Washington City &c. R. Co., 33 Grat. (Va.) 586.

[16] Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Taylor v. Philadelphia &c. R. Co., 7 Fed. 377; Humphreys v. Allen, 101 Ill. 490; Langdon v. Vermont &c. R. Co., 53 Vt. 228. See also McKittrick v. Arkansas Cent. R. Co., 152 U. S. 473, 14 Sup. Ct. 661, 38 L. ed. 518; Miltenberger v. Logansport &c. R. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. ed. 117; Mercantile Trust Co. v. Baltimore &c. R. Co., 82 Fed. 360; First Nat. Bank v. Ewing, 103 Fed. 168; Hubbell v. Texas Southern R. Co., 59 Tex. Civ. App. 185, 126 S. W. 313.

[17] Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 461, 6 Sup. Ct. 809, 29 L. ed. 963; Bernard v. Union Trust Co., 159 Fed. 620, 16 L. R. A. (N. S.) 1118; Knickerbocker Trust Co. v. Oneonta &c. R. Co., 201 N. Y. 379, 94 N. E. 871 (but not to pay interest on the bonds). This, indeed, is not fixing a new and additional lien on the property or displacing a prior lien, but is simply changing the form of the lien for taxes.

[18] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; First Nat. Bank v. Ewing, 103 Fed. 168; Bibber-White Co. v. White River Valley Elec. R. Co., 115 Fed. 786; Hoover v. Montclair &c. R. Co., 29 N. J. Eq. 4. See generally on this subject the elaborate note to Hewitt v. Walters, 21 Idaho 1, 119 Pac. 705, in Ann. Cas. 1913C, 35.

[19] Street v. Maryland &c. R. Co., 59 Fed. 25. See also Cutting v. Tavares &c. R. Co., 61 Fed. 150; Farmers' Loan &c. Co. v. Northern Pac. R. Co., 68 Fed. 36. But compare Farmers' Loan &c Co. v. Kansas City &c. R. Co., 53 Fed. 182, and note. See generally § 605, ante.

[20] Kneeland v. American &c. Co., 136 U. S. 89, 10 Sup. Ct. 950, 34 L.

sorted to under the pretext that it will enhance the security of the bondholders, it not infrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court.[21] Such certificates will not be authorized for construction work that practically amounts to rebuilding an entire street railway system.[22]

§ 680 (591). Order giving authority to issue.—Certificates can only be issued in strict conformity to the order of court authoriz-

ed. 379; Credit Co. v. Arkansas Cent. R. Co., 5 McCrary (U. S.) 23, 15 Fed. 46; Investment Co. v. Ohio &c. R. Co., 36 Fed. 48; 8 Thomp. Corp., § 6405.

[21] Caldwell, J., in Credit Co. v. Arkansas Cent. R. Co., 5 McCrary (U. S.) 23, 15 Fed. 46. He adds: "The history of Wallace v. Loomis, 97 U. S. 146, 162, 24 L. ed. 895, 2 Woods 506, Fed. Cas. No. 13296, under the title of Stanton v. Alabama &c. R. Co., furnishes an instructive lesson on this subject." Mr. Jones, in his work on Corporate Bonds and Mortgages, § 541, says: "Complaint as to the management of railroad receivers has generally come, not from the stockholders, because it is seldom they care to redeem, but from mortgage bondholders; and as often, perhaps, from those at whose solicitation the receiver was appointed as from others who may hold under junior mortgages, and who, therefore, have a right to redeem. The history of such management in this country shows that the bondholders chiefly interested have sometimes found themselves improved out of their interest in the property." And, in a note which he appends, he adds: "Judge Baxter is reported to have expressed himself strongly, in a recent case before the Circuit Court of the United States, against the practice of placing railroads in the hands of receivers. He cited the case of a railroad in Georgia which cost $15,000,000. The receiver, who was in charge for three years, issued certificates to the value of $1,500,000, and when the road was sold the proceeds were not sufficient to pay the certificates. In another case, in Detroit, a road cost over $8,000,000. When the road came to be sold eminent counsel requested the judge to fix the minimum price for the sale, suggesting that such price should be a sum sufficient to cover the charges of the receiver and his counsel. 11 Chicago Legal News 8."

[22] Merchants L. & T. Co. v. Chicago R. Co., 158 Fed. 923. And, in another case, a decree authorizing certificates to the amount of $150,000 to complete the construction of a line of railroad 22 miles, 6 miles being completed, was reversed where there were intervening petitioners having mechanic's liens to the amount of $80,000 which would have to be postponed thereunder. Davis v. Alton &c. R. Co., 180 Ill. App. 679.

ing them,[23] and may be issued only for the purposes mentioned in such order,[24] and upon valid consideration.[25] Notice should usually be required to be given to the parties in interest before an order should be made authorizing the receiver to issue certificates.[26] But a full opportunity to be heard as to the propriety

[23] Newbold v. Peoria &c. R. Co., 5 Ill. App. 367; State v. Edgefield &c. R. Co., 6 Lea (Tenn.) 353. See also Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518; St. Louis Trust Co. v. Texas & R. Co., 59 Tex. Civ. App. 157, 126 S. W. 296.

[24] Fidelity Ins. Co. v. Shenandoah &c. Co., 42 Fed. 372; Newbold v. Peoria &c. R. Co., 5 Ill. App. 367.

[25] Certificates issued without consideration are held absolutely void. Union Trust Co. v. Chicago &c. R. Co., 7 Fed. 513; Turner v. Peoria, &c. R. Co., 95 Ill. 134. In Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518, the court says: "The receiver, being an officer of the court, has no implied powers other than those derived from the order of the court. Such being true, we think it clear he could not issue certificates which would constitute a first lien on the road except for money borrowed, material furnished, or labor performed. When the material was furnished or labor performed, he was authorized to issue the certificates therefor, and not until then. And if he made a contract for the construction of the road, he might issue certificates as the material was furnished or the labor performed, and on the completion of the road he could issue his certificates in final payment. But the power is not conferred to issue certificates in payment for material not furnished or labor not performed. On the contrary, we are of the opinion, it fairly appears he was prohibited from so doing. If the necessity existed for enlarged powers, they should have been applied for. * * * As the certificates on their face state they were 'issued under and by virtue of certain provisions of an order duly entered by the district court of Clinton county, Iowa, on July 27, 1876,' the plaintiff is chargeable with notice of all such order contains. Whether under the order the receiver had the power to issue negotiable securities or for property agreed to be delivered at a future day, were legal questions which the plaintiff was bound to determine at his peril. The receiver's authority was bounded and limited by the order. He had no general powers, except such as could be derived therefrom. It is true he had power to issue certificates, but this was not unlimited. It was only in certain cases he could do so. And being an officer of the court and vested with the care of property in his charge as such officer, we think the plaintiff was bound to know whether these certificates were issued in accordance with the terms and contingencies contemplated by the order."

[26] Mitchell, Ex parte, 12 S. Car. 83. The lienholders over whose liens they are given a priority should have notice and an opportunity to be

of the expenditures and the right to make them a first lien has been held equivalent to prior notice,[27] and, as a matter of fact, such orders are frequently made without prior notice. This however, may render the situation of the holders of the certificates somewhat precarious. When it is desirable to incur expenses in building or repairing the railroad, beyond what is essential for its preservation, the consent, express or implied, of those whose rights of property will be affected, should be had.[28] It has been held that when a receiver contracts debts under a consent order, such debts are not binding upon bondholders who refused their consent, but they may insist upon the enforcement against the property of such liens as they held prior to the granting of the order.[29] Cases in which the right of the court to authorize the issue of certificates constituting a lien upon the property superior to that of mortgage bondholders has been called in question, have not often arisen, since the consent, express or implied, of those interested in the fund has usually been obtained.[30] Prior lien-

heard. Bibber-White Co. v. White River Valley Elec. R. Co., 115 Fed. 786; Illinois Steel Co. v. Ramsey, 176 Fed. 853; Knickerbocker Trust Co. v. Tarrytown &c. R. Co., 133 App. Div. 285, 117 N. Y. S. 871. See also notes in 71 Am. St. 379; 128 Am. St. 95, 111; and Ann. Cas. 1913C, 46.

[27] Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963, 25 Am. & Eng. R. Cas. 560.

[28] Jones Corporate Bonds and Mortgages, § 559. But consent is not always required. Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963. If it were, such certificates could seldom be issued, at least where the debts exceed the value of the property.

[29] Hand v. Savannah &c. R. Co., 17 S. Car. 219. The court may, in a proper case, authorize the issue of certificates constituting a lien upon the interest of such of the bondholders as have asked for them, leaving the interests of the non-consenting bondholders unaffected by the order. Investment Co. v. Ohio &c. R. Co., 36 Fed. 48.

[30] Kennedy v. St. Paul &c. R. Co., 2 Dill. (U. S.) 448, Fed. Cas. No. 7706, 5 Dill. (U. S.) 519, Fed. Cas. No. 7707; Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 506, Fed. Cas. No. 13296; Hoover v. Montclair &c. R. Co., 29 N. J. Eq. 4; Vermont &c. R. Co. v. Vermont Central R. Co., 50 Vt. 500; Jones Corporate Bonds and Mortgages, § 551, citing Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. 575, 32 L. ed. 985.

holders who have not consented and who were not parties to the suit in which the issue of receiver's certificates was authorized and were not notified are entitled to come into court to dispute the necessity of the expenditures which the certificates were issued to meet, and to assert the superiority of their liens.[31] Joining with the receiver in a petition for authority to borrow money on the credit of the property, or acquiescing without opposition in an order conferring such authority, is sufficient consent to bind a party to the suit in which the order was made.[32]

[31] While the court, under some circumstances, and for some purposes, and in advance of the prior lienholders being made parties, may have jurisdiction to charge the property with the amount of receiver's certificates issued by its authority, it can not, it is said, without giving such parties their day in court, deprive them of their priority of lien. When such prior lienholders are brought before the court they become entitled, upon the plainest principles of justice and equity, to contest the necessity, validity, effect and amount of all such certificates, as fully as if such questions were then for the first time presented for determination. If it appears that they ought not to have been made a charge upon the property superior to the lien created by the mortgages, then the contract rights of the prior lienholders must be protected. On the other hand, if it appears that the court did what ought to have been done, even had the trustees and the bondholders been before it at the time the certificates were authorized to be issued, the property should not be relieved from the charge made upon it for its protection and preservation. Hervey v. Illinois Midland R. Co., 28 Fed. 169, 176, affirmed in Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963. See also Metropolitan Trust Co. v. Lake Cities Elec. R. Co., 100 Fed. 897; Lamar Land &c. Co. v. Belknap Sav. Bank, 28 Colo. 344, 64 Pac. 210. An appeal lies from an order authorizing receiver's certificates. Farmers' Loan &c. Co., In re, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. ed. 656. "The lien of receiver's certificates continues as long as the order authorizing their issuance remains in force, though such order was made without notice to parties interested; and the fact that a reference is had to determine all claims against the receiver, and a report is confirmed which makes no allusion to the certificates, is not an adjudication against them, when it appears that they were not presented or considered, and that their holder had no notice of the reference." Mercantile Trust Co. v. Kanawha &c. R. Co., 50 Fed. 874.

[32] Metropolitan Trust Co. v.

§ 681 (592). Lien created by receiver's certificates.—Receiver's certificates are usually made a first lien upon the income and entire property in the hands of the receiver. The nature or extent of the lien, in the absence of any statute upon the subject depends upon the terms of the order of the court authorizing the certificates to be issued. It is not to be understood by this, however, that the lien will hold good if the order is improperly made and unauthorized, nor that the lien can be made superior to that of the state for taxes or the like. But certificates issued to raise money for the repair and preservation of the road may be made a superior lien upon the property in the hands of the court to that of the first mortgage, although issued at the suit of junior mortgagees and without the consent of the holders of a senior mortgage.[33] Parties who have acquiesced with knowledge that the receivers have obtained loans upon the credit of the property may be estopped to deny that such loans constitute a prior and first lien upon such property.[34] The court may order the property in its hands to be sold subject to the lien of the

Tonawanda Valley &c. R. Co., 103 N. Y. 245, 8 N. E. 488, reversing 40 Hun (N. Y.) 80; Jones Corporate Bonds and Mortgages, § 552, citing Humphreys v. Allen, 101 Ill. 490. See also Central Trust Co. v. Marietta &c. R. Co., 75 Fed. 193, 209. Receiver's certificates issued under an order made after a decree of foreclosure and sale of property, containing a provision authorized by the order making them a lien on the property, will constitute a first lien thereon, if the order is not appealed from. Farmers' Loan &c. Co., In re, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. ed. 656.

[33] Wallace v. Loomis, 97 U. S. 146, 24 L. ed. 895; Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Meyer v. Johnston, 53 Ala. 237, 348. See also Central Trust Co. v. Marietta &c. R. Co., 75 Fed. 193. It has even happened that the entire estate has been consumed in the payment of debts and receiver's certificates. See Royal Trust Co. v. Washburn &c. R., 120 Fed. 11; Kent v. Lake Superior &c. Co., 144 U. S. 75, 12 Sup. Ct. 650, 36 L. ed. 352. See as to judgments and attachments having priority. 8 Thomp. Corp., § 6405.

[34] Jones Corp. Bonds and Mortg., § 553. Claims of attorneys for the complainant having a lien on the fund in court going to their client, and of attorneys who procured the certificates to be issued have been postponed to the lien of the certificates. Peters-

certificates which have been issued by its receiver,[35] or the lien may be transferred to the proceeds of the sale.[36] If the property is sold subject to the lien of the certificates, it seems that such lien may be enforced by the holder in an independent suit.[37] It has also been held that one class of receiver's certificates may have priority over another according to their terms,[38] and that where the mortgage has been foreclosed and the time for redemption has expired, receiver's certificates issued thereafter on a creditors' bill filed by stockholders could not be given a preference over the mortgage where the corporation was a mining company and the court had power merely to wind up the corporation.[39]

§ 682 (593). **Statutory provisions as to lien.**—In some of the states statutory provisions are found which authorize receivers to borrow money and create liens upon the mortgaged property in certain cases. Such statutes, in the main, simply declare the

burg Sav. &c. Co. v. Dellatone, 70 Fed. 643; Wilcox v. Southern Nat. Bank, 211 Fed. 968.

[35] Mercantile Trust Co. v. Kanawha &c. R. Co., 50 Fed. 874.

[36] Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6, 60 Am. & Eng. R. Cas. 513. See also Illinois Trust &c. Bank v. Pacific R. Co., 115 Cal. 285, 47 Pac. 60.

[37] Swann v. Clark, 110 U. S. 602, 4 Sup. Ct. 241, 28 L. ed. 256; Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6, 60 Am. & Eng. R. Cas. 513, 526. But see Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

[38] Bibber-White Co. v. White River &c. R. Co., 115 Fed. 786; Bank of Commerce v. Central &c. Co., 115 Fed. 878.

[39] Standley v. Henrie &c. Co., 27 Colo. 331, 61 Pac. 600. So it has been held that certificates issued by a state court to a judgment creditor in a suit in which the mortgagee was not made a party will not bind a federal court on decree for foreclosure. Metropolitan Trust Co. v. Lake Cities &c. R. Co., 101 Fed. 897. See also Pool v. Farmers' &c. Co., 7 Tex. Civ. App. 334, 27 S. W. 744. Questions of priority depend largely upon the circumstances of each case and the terms of the order and certificates. See generally American Trust Co. v. Metropolitan S. S. Co., 190 Fed. 113; Bibber-White Co v. White River Valley Elec. R. Co., 175 Fed. 470; Lewis v. Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606 (rank equally with other debts contracted by receiver under authority of court unless otherwise ordered); St.

rule followed by chancery courts, and especially by the federal courts, which we have already stated. Sometimes, however, they extend that rule to private business corporations and authorize liens to be created for money borrowed for some purposes other than those generally authorized by the courts in the absence of such a statute. It may be that the legislature has no power to impair the obligation of existing contracts in this way, but, as the public statutory law enters into every contract, such legislation is doubtless constitutional as to future contracts. The authority of the court to create superior liens by receiver's certificates may, doubtless, be limited as well as extended by such statutes, but whether this is the effect in any particular instance must depend largely upon the particular statute in question. It may also be a matter of doubt as to how far, if at all, such statutes can bind the federal courts.[41]

§ 683 (594). Negotiability of receiver's certificates.—It is sometimes said that receiver's certificates are negotiable, and it is true that they are usually negotiable in form, that is, they are made payable to order or bearer, and may be transferred from hand to hand by assignment or delivery. But they are not negotiable, in the strict sense of that term, like bills of exchange or promissory notes. In other words, receiver's certificates are not commercial paper, whatever the form that may be given to them, and a second or subsequent holder can assert no greater rights than were acquired by the first taker.[42] An assignee, there-

Louis Union Trust Co. v. Texas Southern R. Co., 59 Tex. Civ. App. 157, 126 S. W. 296 (same).

[41] A Texas statute classifying claims against funds in the hands of a receiver, and giving a lien on the earnings, has been held not to prevent a court from authorizing receiver's certificates and making them a first lien on the property. Kampmann v. Sullivan, 26 Tex. Civ. App. 308, 63 S. W. 173.

[42] Union Trust Co. v. Chicago &c. R. Co., 7 Fed. 513; Central Nat. Bank v. Hazard, 30 Fed. 484; Stanton v. Alabama &c. R. Co., 31 Fed. 585; Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144; note in Ann. Cas. 1913C, 58; 8 Thomp. Corp., § 6407. A receiver's certificate has none of the elements of a negotiable instrument; it is the mere acknowledgment that a debt is due the payee, payable out of a specific fund. There

fore, can only recover to the extent that the original payee or holder could have recovered.[43] The transfer of such a certificate by written indorsement does not render the transferer liable as an indorser of commercial paper, or as a guarantor, nor does such an indorsement imply a warranty that the certificate is collectible and will be paid.[44]

§ 684 (595). Rights of holders of receiver's certificates.—Receiver's certificates are usually drawn upon an uncertain fund and do not create against any one an absolute and unconditional liability.[45] As a general rule, the fund alone is liable for their payment, and their validity depends upon the order of court, and such order can be sustained only when the certificates are issued for certain limited purposes and may sometimes be modified, in effect at least, by further action adjusting the rights of parties who have not had their day in court. It may readily be seen, therefore, that the rights of the holders of such certificates are somewhat precarious, and that even a bona fide purchaser from the original holder occupies a very different position from the bona fide holder of commercial paper under the law merchant. Holders of such certificates must take notice of the terms of the order under which they were issued and are bound to know whether they were issued in accordance with such terms and

is entire harmony upon this point in the adjudged cases. All agree in holding that such certificates are not promissory notes or bills of exchange. McCurdy v. Bowes, 88 Ind. 583, citing above cases, and Baird v. Underwood, 74 Ill. 176; Newbold v. Peoria &c. R. Co., 5 Bradwell (Ill.) 367; Mechanics' Bank v. New York &c. R. Co., 13 N. Y. 599, 623; Dawkes v. Lord De Lorane, 3 Wils. 207. "A receiver's certificates, which are ordered to be paid out of the income of the road from time to time, are in the nature of a call loan, and the holder has a right to presume that the receiver will notify him when the loan is to be called or the money paid." Mercantile Trust Co. v. Kanawha & O. R. Co., 50 Fed. 874.

[43] Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

[44] McCurdy v. Bowes, 88 Ind. 583. Such certificates are assignable but are not negotiable instruments within the law merchant. McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750, 128 Am. St. 95, 29 L. R. A. (N. S.) 252, and other cases cited in notes.

[45] Credit Co. v. Arkansas &c. R. Co., 15 Fed. 46.

for an authorized purpose.[46] Certificates issued in excess of the receiver's authority are void even in the hands of a bona fide holder for value,[47] and, where the certificates were disposed of by the receivers at much less than their face value, the holders have been permitted to claim only the sum actually advanced with interest upon surrendering the certificates.[48] Where, however, the court authorizes them to be sold at a certain discount, and they are sold within the limit fixed by the court, it has been held that the purchasers thereof are entitled to their face value, as established by the order of the court.[49] If the certificates are issued without consideration they are invalid, even in the hands of an innocent holder for value.[50] Certificates may be exchanged

[46] Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6, 60 Am. & Eng. R. Cas. 513; Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518; Knickerbocker Trust Co. v. Oneonta &c. R. Co., 201 N. Y. 379, 94 N. E. 871; Lewis v. Linden Steel Co., 183 Pa. St. 248, 38 Atl. 606; St. Louis Union Trust Co. v. Texas Southern R. Co., 59 Tex. Civ. App. 157, 126 S. W. 296.

[47] Newbold v. Peoria &c. R. Co., 5 Ill. App. 367. See also Knickerbocker Trust Co. v. Oneonta &c. R. Co., 201 N. Y. 379, 94 N. E. 871. But the fact that the court erred in some ruling or that the bill on which the receiver was appointed was subject to demurrer does not necessarily make the certificates void. Farmers' Loan &c. Co. v. Centralia &c. R. Co., 96 Fed. 636.

[48] Stanton v. Alabama &c. R. Co., 2 Woods (U. S.) 506, Fed. Cas. No. 13296. See also Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963; Central Nat. Bank v. Hazard, 30 Fed. 484. But the purchaser of receiver's certificates is not bound to oversee the application of the money which he advances. Where a purchaser of receiver's certificates has paid their par value to the receiver, without notice of any facts to put him upon inquiry, his lien is not affected by the fact that the receiver appropriates the money to his own use. Mercantile Trust Co. v. Kanawha &c. R. Co., 50 Fed. 874. See also Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434, 461, 6 Sup. Ct. 809, 29 L. ed. 963.

[49] Union Trust Co. v. Illinois &c. R. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. ed. 963.

[50] Union Trust Co. v. Chicago &c. R. Co., 7 Fed. 513; Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518; Hubbell v. Texas Southern R. Co., 59 Tex. Civ. App. 185, 126 S. W. 313; Jones Corp. Bonds and Mortg., § 566, citing Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144. If the certificates are issued for an in-

directly for material furnished or labor performed if the exchange is made for an adequate consideration.[51] But they are valid only to the extent of the consideration actually received.[52]

§ 685 (596). Who may question validity of receiver's certificates.—Although receiver's certificates are not negotiable instruments under the law merchant, yet, when they are regularly issued under the order of court, bondholders and purchasers of the property at foreclosure sale may be estopped from questioning their validity and priority of lien after they have been sold to good faith purchasers. As we have already seen, prior lienholders and bondholders, where no notice has been given to them or their trustees and no hearing has been afforded them as to the propriety of the expenditures and the right to make the certificates a prior lien, will generally be allowed to question their validity or right to priority, at least before they are issued to bona fide purchasers.[53] But those who consent or are given due notice and an opportunity to be heard cannot afterwards question their validity or priority.[54] Nor can bondholders who, with knowledge of the facts, permit certificates to be issued

adequate consideration, a subsequent bona fide holder for value will be protected only to the amount actually advanced by the first purchaser. Central Nat. Bank v. Hazard, 30 Fed. 484.

[51] People v. Erie R. Co., 54 How. Prac. (N. Y.) 59; Jones Corporate Bonds and Mortgages, § 550, citing Taylor v. Philadelphia &c. R. Co., 14 Phila. (Pa.) 451, 461. See Coe v. New Jersey &c. R. Co., 27 N. J. Eq. 37.

[52] Bank of Montreal v. Chicago &c. R. Co., 48 Iowa 518.

[53] Hervey v. Illinois Midland R. Co., 28 Fed. 169; Coe v. New Jersey &c. R. Co., 27 N. J. Eq. 37; United States Rolling Stock Co., In re, 55 How. Prac. (N. Y.) 286; See Mitchell, Ex parte, 12 S. Car. 83; Hand v. Savannah &c. R., Co., 17 S. Car. 219; article in 12 Am. L. Rev. 660, and 13 Am. L. Rev. 40; note in Ann. Cas. 1913C, 58. In Snow v. Winslow, 54 Iowa 200, 6 N. W. 191, it was held that where the road was sold to satisfy the certificates it must be regarded as sold subject to a mechanic's lien, to enforce which suit had been instituted before the receiver was appointed, and that such lien was not divested or affected as the holder thereof was not made a party and did not consent to the appointment of the receiver or the order or decree of the court.

[54] Ante, § 680.

without objection under the order of the court, question their validity or priority of lien after they have been issued and sold to bona fide purchasers.[55] Especially is this true where the bondholders appoint a committee of their own number to represent them all and such committee consents to the issuance of the certificates.[56] So, where the road is sold under a decree of foreclosure which makes it subject to the lien of the receiver's certificates, the purchaser at the foreclosure sale is estopped from questioning the validity of the lien.[57] The receiver who obtained the order and issued the certificates thereunder cannot, it is obvious, object to their priority of lien nor can the mortgagor nor his assignee in bankruptcy.[58] And a property owner along

[55] Humphreys v. Allen, 101 Ill. 490, 4 Am. & Eng. R. Cas. 14; Langdon v. Vermont &c. R. Co., 53 Vt. 228, 4 Am. & Eng. R. Cas. 33. See also Union Gold Mining Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648; Hewitt v. Great Western Beet Sugar Co., 20 Idaho 235, 118 Pac. 296; Lovett v. German Reformed Church, 12 Barb. (N. Y.) 67. In the Vermont case cited in this note it was held that although the purpose for which the receiver was appointed had been accomplished so that he might have been discharged, yet if he continued to act as receiver and issued obligations as such, with the knowledge and assent of all parties interested, they were estopped to deny, as against bona fide holders, that the obligations were what they purported to be, namely, receiver's obligations entitled to priority of payment out of the assets of the trust.

[56] Langdon v. Vermont &c. R. Co., 53 Vt. 228, 4 Am. & Eng. R. Cas. 33.

[57] Swann v. Clark, 110 U. S. 602, 4 Sup. Ct. 241, 28 L. ed. 256; Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6, 60 Am. & Eng. R. Cas. 513, 526. See also Central Trust Co. v. Sheffield &c. R. Co., 44 Fed. 526. In this last case it appeared that, by consent of all parties, the receiver of a railroad company, though not engaged in operating the road, was authorized by order of court to issue certificates which should constitute a lien on the company's property superior to certain prior mortgages, and that the money obtained on such certificates was used in preserving and improving the property. It was held that the purchasers of the property, who purchased with the understanding that the receiver's certificates, under the order of the court, constituted a prior lien on the property, which they were to pay, at a subsequent sale to foreclose such mortgages, were estopped from denying the validity of the certificates.

[58] Jerome v. McCarter, 94 U. S.

the line of the road cannot restrain the completion of the road by questioning the validity of the receiver's certificates.[59]

§ 686 (597). Payment and redemption of certificates.—As we have seen, receiver's certificates are not promises to pay money absolutely, creating a personal liability, but are rather to be considered as acknowledgments of indebtedness for the payment of which out of some specific fund usually to be ascertained thereafter the faith of the court is said to be pledged. As a general rule, therefore, an independent action will not lie to enforce them, but the application for their payment or redemption should be made to the court which authorized them to be issued.[60] The court may, doubtless, in a proper case, order them to be paid out of the fund in the hands of the receiver, but as the income or assets in the hands of the receiver will seldom be found sufficient to redeem the certificates and pay necessary expenses, and as the courts cannot often tell in advance just what will be the condition of the trust or what questions may arise, certificates are seldom redeemed in advance of the foreclosure sale, and it is customary, therefore, to provide in the order authorizing their issue that they shall be a lien on the proceeds of the sale and payable out of the purchase-money.[61] Instead of this, however, the court may order that the lien shall remain upon the property which the purchaser shall take subject to such lien.[62] In such a case, as elsewhere stated, it has been held that the lien may be enforced against the property in the

734, 24 L. ed. 136. See also Central Trust Co. v. Seasongood, 130 U. S. 482, 9 Sup. Ct. 575, 32 L. ed. 985; Vilas v. Page, 106 N. Y. 439, 452, 13 N. E. 743.

[59] Moran v. Lydecker, 11 Abb. N. Cas. (N. Y.) 298. See also as to others not entitled to object to priority. Rutherford v. Penna Midland R. Co., 178 Pa. St. 38, 35 Atl. 926; Nisbet v. Great Northern Clay Co., 41 Wash. 107, 83 Pac. 15.

[60] Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144. For cases in which an independent suit may be brought, see ante, § 681.

[61] See Knickerbocker T. Co. v. O. C. & R. S. R. Co., 201 N. Y. 379; American Brake Shoe &c. v. Pere Marquette R. Co., 205 Fed. 19

[62] Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6; ante, § 681.

hands of the purchaser or his grantees in an independent action.[63] It has also been held that, although the order authorizing the certificates provided that they should be a first and paramount lien upon the property, a final decree vesting in the purchaser of the property a title free from all liens operated pro tanto to set the order aside and transferred the lien, if any, to the proceeds of the sale.[64] It was further held, in the same case, that the holder of the receiver's certificates who was guilty of laches in not acting before the final decree, could not follow the proceeds of the sale into the hands of bondholders who received the same on distribution by final decree, notwithstanding the fact that the court had failed to redeem its pledge to make the certificates a paramount lien by providing on distribution for their payment. If the fund or property is insufficient to redeem or pay all the certificates in full, the holders must usually share pro rata in the proceeds.[65] But this is not always the case, as certificates are sometimes issued in different series or the like with provision for a difference in priority, and the rights of the holders of a portion of the certificates may, of course, be waived or made subordinate to those of others by agreement, and if the proceeds are insufficient to pay the latter, the former may get nothing.[66]

[63] Ante, § 681.

[64] Mercantile Trust Co. v. Kanawha &c. R. Co., 58 Fed. 6, distinguishing Vilas v. Page, 106 N. Y. 439, 13 N. E. 743.

[65] Turner v. Peoria &c. R. Co., 95 Ill. 134, 35 Am. Rep. 144.

[66] Fletcher v. Waring, 137 Ind. 159, 36 N. E. 896. Under the agreement in this case it was held that the party in whose favor the waiver was made and whose certificates were not paid in full, might even recover from the other party the amount paid for a right of way for which the certificates were issued to the latter. See also ante, § 681.

CHAPTER XXIV.

INSOLVENCY AND DISSOLUTION.

Sec.
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705. Disposition of property on dissolution.
706. Rights of creditors upon dissolution.

§ 690 (598). **Scope of the chapter.**—We have already considered in a general way the subject of the dissolution of a corporation by forfeiture or repeal of its charter and by expiration of the time to which its charter life is limited. But we have not considered what becomes of the property after dissolution, nor have we treated specifically of insolvency and the relations and rights of the various parties when a corporation becomes insolvent, except as incidentally connected with the subjects of foreclosure sales and receivers. In this chapter we shall treat briefly of these matters, including assignments and preferences, although some of the questions considered can seldom arise in railroad cases and the general rules upon the subject may not be applicable, in some instances, to such cases.

§ 691 (599). **Railroad company subject to state insolvency law.**—Domestic railroad corporations, like all other corporations, are usually subject, to a certain extent at least, to the insolvency laws of the states wherein they are respectively incorporated

and may be proceeded against under those laws.[1] But such laws, as a general rule at least, have no extraterritorial effect,[2] and they have been largely superseded as to some kinds of corporations by the national bankruptcy law. A voluntary assignment of personal property, however, if valid where it is made, will usually be treated as valid everywhere and may operate to transfer personal property of the assignor wherever it is found,[3] unless, perhaps, where it is contrary to good morals or repugnant to the policy or positive institutions of the state in which it is found.[4] But this rule does not apply to the same extent to assignments of real estate.[5] The effect of state insolvency laws upon consolidated corporations will be discussed elsewhere.

§ 692 (600). **Trust fund doctrine.**—When a company becomes insolvent its capital stock with all its other property is said to become assets or to constitute a trust fund for the payment of its debts.[6] This is the well-known "trust fund" doctrine to

[1] Platt v. New York &c. R. Co., 26 Conn. 544; Central Nat. Bank v. Worcester Horse R. Co., 13 Allen (Mass.) 105. The Maryland Act of 1888 providing for the payment of wages and salaries due employes of insolvent employers does not subject corporations to the insolvent laws of the state. Ellicott Machine Co. v. Speed & Co., 72 Md. 72, 18 Atl. 863.

[2] Warren v. First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Franzen v. Hutchinson, 94 Iowa 95, 62 N. W. 698; Glenn v. Clabaugh, 65 Md. 65, 3 Atl. 902. But see as to the effect of insolvent laws on non-residents, Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. ed. 773; Macdonald v. First Nat. Bank, 47 Minn. 67, 49 N. W. 395, 13 L. R. A. 462, 28 Am. St. 328.

[3] Caskie v. Webster, 2 Wall. Jr. (U. S.) 131, Fed. Cas. No. 2500; Baltimore &c R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688. We are not now considering the question as affected, if at all, by a national bankruptcy law. Many courts refuse to enforce foreign assignments to the prejudice of the citizens of their own state, holding that the rule of comity does not require them to do so in such a case.

[4] Hervey v. Rhode Island &c. Works, 93 U. S. 664, 23 L. ed. 1003; Blake v. Williams, 23 Mass. 286, 17 Am. Dec. 372; Dickinson, Ex parte, 29 S. Car. 453, 7 S. E. 593, 1 L. R. A. 685, 13 Am. St. 749; Weider v. Maddox, 66 Tex. 372, 1 S. W. 168, 59 Am. Rep. 617.

[5] Osborn v. Adams, 18 Pick. (Mass.) 245.

[6] Graham v. LaCrosse &c. R. Co., 102 U. S. 148, 161, 26 L. ed.

which we have elsewhere referred. It is usually stated substantially as we have stated it, but the statement, perhaps, needs explanation. It does not mean that there is any direct trust lien upon the property of the corporation in favor of creditors, nor that the corporation may not manage or dispose of it in the usual course of business while the corporation is "a going concern" with a reasonable prospect of continuing and there is no intention of suspending, although it may be insolvent in the sense that its liabilities are greater than its assets, or in the sense that it may not be able to fully meet its obligations as they become due. It simply means, according to recent decisions, that when the corporation is insolvent and a court of equity has possession of its assets for administration, they must be appropriated to the payment of its debts before any distribution to the stockholders.[7] In such a case equity will compel the payment of a balance due on unpaid stock.[8] The history of the evolution of the "trust fund" doctrine is an interesting one, but it would not be profitable to pursue it here. Some of the courts have undoubtedly misapplied and unduly extended it, but it may well be ques-

106; Wabash &c. R. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. ed. 239; In re Fechheimer &c. Co., 212 Fed. 357. See also note in 69 L. R. A. 134.

[7] Fogg v. Blair, 133 U. S. 534, 541, 10 Sup. Ct. 338, 33 L. ed. 721; Hollins v. Brierfield &c. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. ed. 1113; Chattanooga &c. R. Co. v. Evans, 66 Fed. 809; O'Bear &c. Co v. Volfer, 100 Ala. 205, 17 So. 525, 54 Am. St. 311; Worthen v. Griffith, 59 Ark. 562, 28 S. W. 286, 43 Am. St. 50; First Nat. Bank v. Dovetail &c. Co., 143 Ind. 550, 40 N. E. 810, 52 Am. St. 435; Henderson v. Indiana Trust Co., 143 Ind. 561, 40 N. E. 516; Fear v. Bartlett, 81 Md. 435, 32 Atl. 322, 33 L. R. A. 721, and note; Alberger v. National Bank, 123 Mo. 313, 27 S. W. 657; Thomson-Houston &c. Co. v. Henderson &c. Co., 116 N. Car. 112, 21 S. E. 951. See also McDonald v. Williams, 174 U. S. 397, 19 Sup. Ct. 743, 43 L. ed. 1022; American Exchange Nat. Bank v. Ward, 111 Fed. 782, 52 L. R. A. 356; Wilson v. Baker &c. Co., 25 Idaho 378, 137 Pac. 896; Niles v. Olszak, 87 Ohio St. 229, 100 N. E. 820, L. R. A. 1918E, 238, and note; Sabin v. Columbia &c. Co., 25 Ore. 15, 34 Pac. 692, 42 Am. St. 756, and note; Harle-Haas Drug Co. v. Rogers Drug Co., 19 Wyo. 35, 113 Pac. 791, Ann. Cas. 1913E, 181, and note.

[8] Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 32 L. ed. 516; Barcalow v. Totten, 53 N. J. Eq.

tioned if others, in the present reaction, are not inclined to unduly limit it. We have stated the doctrine as explained in the latest decisions of the Supreme Court of the United States, but it may be somewhat difficult to reconcile the rule thus stated with other statements of the rule made by the federal, as well as the state, courts, although we are inclined to think there is no real conflict. Thus, it is said that "when a corporation is dissolved or becomes insolvent and determines to discontinue the prosecution of business its property is thereafter affected by an equitable lien or trust for the benefit of creditors," and that the directors then hold a fiduciary relation to creditors and cannot prefer themselves in view of expected suspension on account of insolvency, although the corporation might, while still "a going concern," secure them for advancements made to carry on the business with the reasonable expectation of successfully overcoming financial embarrassment.[9] This is a much more reasonable doctrine than that which forbids any preference after the company has become insolvent even though it is "a going concern" acting in good faith and has reasonable expectation of overcoming its financial embarrassment, and the only question is as to whether the "trust fund" doctrine should have been applied at all so long as the corporation had not quit business or its property had not been taken charge of by the court. The capital stock and properties of a corporation, however, constitute a trust fund for the payment of its debts in such a sense that when there is a misappropriation of the funds of a corporation, equity, on behalf of the creditors of such corporation, will follow

573, 32 Atl. 2; Morgan v. New York &c. R. Co., 10 Paige Ch. (N. Y.) 290, 40 Am. Dec. 244. But, in the absence of a statute authorizing it, an unsecured creditor cannot maintain an action at law upon an unpaid subscription. City of Montesano v. Carr, 80 Wash. 384, 141 Pac. 894, 7 A. L. R. 95, and note on page 100.

[9] Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496; Sabin v. Columbia Fuel Co., 25 Ore. 15, 34 Pac. 692, 42 Am. St. 756. But compare Sanford Fork &c. Co. v. Howe &c. Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. ed. 713. See further on this subject, §§ 695, 696; also Re Lake Chelan Land Co. v. Tyler, 257 Fed. 497, 5 A. L. R. 557, and note on page 561, et seq.

the fund so diverted,[10] unless it has passed into the hands of a bona fide purchaser.[11]

§ 693 (601). When a corporation is deemed insolvent—Effect of insolvency.—It is extremely difficult to formulate any general rule for determining just when a corporation is to be deemed insolvent. It has been said that a corporation is insolvent when it is not able to pay its debts, as they become due in the usual course of business,[12] or when it has not property or assets sufficient to pay its debts.[13] But it frequently happens that a corporation or an individual may not be able to pay all debts as they mature, and may yet have assets far in excess of the liabilities. So, a corporation or an individual may not at some particular time have assets equal to the liabilities and yet may be able to meet all debts as they fall due or make such arrange-

[10] Railroad Co. v. Howard, 7 Wall. (U. S.) 392, 409, 19 L. ed. 117; Wabash &c. R. Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. ed. 235; Chicago &c. R. Co. v. Chicago &c. Third Nat. Bank, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. ed. 900; Chattanooga &c. R. Co. v. Evans, 66 Fed. 809; Bish v. Bradford, 17 Ind. 490; Chicago &c. Bridge Co. v. Fowler, 55 Kans. 17, 39 Pac. 727; Rorke v. Thomas, 56 N. Y. 559; Hastings v. Drew, 76 N. Y. 9. See also Moffat v. Smith, 101 Fed. 771. When one corporation transfers all its assets to another corporation without having paid its debts, the latter takes the property as a trustee subject to a lien in favor of the creditors of the old company. National Bank of Jefferson v. Texas Invest. Co., 74 Tex. 421, 12 S. W. 101; Montgomery &c. Co. v. Dienelt, 133 Pa. St. 585, 19 Atl. 428, 19 Am. St. 663. It has also been held that when a corporation has sold all its property, franchises, etc., and thus in effect has been dissolved, its creditors may enforce their demands in a court of equity against the former stockholders, the proceeds of the property being considered assets in the hands of stockholders for the payment of debts. But no action can be maintained against the purchasing company if the purchase was made in good faith. Chesapeake &c. R. Co. v. Griest, 85 Ky. 619, 4 S. W. 323.

[11] Sanger v. Upton, 91 U. S. 56, 60, 23 L. ed. 220; Fisk v. Union Pac. R. Co., 10 Blatchf. (U. S.) 518, Fed. Cas. No. 4830.

[12] Atwater v. American &c. Bank, 152 Ill. 605, 38 N. E. 1017; Mish v. Main, 81 Md. 36, 31 Atl. 799; People v. Excelsior &c. Co., 3 How. Prac. (N. S.) (N. Y.) 137.

[13] See Toof v. Martin, 13 Wall. (U. S.) 40, 20 L. ed. 481; Chicago Life Ins. Co. v. Auditor, 101 Ill.

ments as will prevent financial embarrassment. It seems to us, therefore, that a corporation should not be deemed insolvent merely because its assets are insufficient to meet all its liabilities at any particular time, if it is still prosecuting business with the prospect and expectation of continuing to do so successfully. It is certainly not insolvent in such a sense as to justify the application of the "trust fund" doctrine, even if that can be applied in any case of mere insolvency, although it may, perhaps, be insolvent within the meaning of some statute. The mere insolvency of a corporation, however, does not per se work its dissolution, although it may be cause for a judgment dissolving it.[14] A corporation may exist without property,[15] and mere insolvency or impairment of capital, without surrender or forfeiture of the charter, does not prevent the members of the corporation from furnishing "renewed capital, and then proceeding to use the corporate powers."[16] So long, at least, as the corporation proceeds in good faith, with the reasonable expectation of paying its debts and successfully carrying on its business, it would seem that it is not insolvent in such a sense as to prevent the corporation from continuing the management of its assets in the regular course of business or to authorize creditors to interfere.[17]

§ 694 (602). Assignments by corporations.—At common law, and under the statutes of most of the states, an insolvent cor-

82; European &c. Society, In re, L. R. 9 Eq. 122.

[14] Leonard v. Hartzler, 90 Kans. 386, 133 Pac. 570, 50 L. R. A. (N. S.) 383, and other cases there cited in note; Moseby v. Burrow, 52 Tex. 396; Shenandoah Valley R. Co. v. Griffith, 76 Va. 913. See also Fields v. United States, 27 App. (D. C.) 433.

[15] Bruffet v. Great Western R. Co., 25 Ill. 353; Boston Glass Mfg. Co. v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. See also Fields v. United States, 27 App. (D. C.) 433; State v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897.

[16] Coburn v. Boston &c. Co., 10 Gray (Mass.) 243.

[17] Warren v. First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; Baker v. Louisiana &c. R. Co., 34 La. Ann. 754; Pond v. Framingham &c. R. Co., 130 Mass. 194; Paulding v. Chrome Steel Co., 94 N. Y. 334, 338. See also Sabin v. Columbia &c. Co., 25 Ore.

poration may make a general assignment in trust for the benefit of its creditors.[18] In the absence of any provision to the contrary, the assignment may be made by the directors without any action upon the part of the stockholders,[19] and it has also been held that this power may be exercised by a quorum of the board of directors at a regularly called meeting at which a bare quorum is present.[20] The president of the corporation, however, has no implied authority to do so by virtue of his office.[21] Such an assignment does not carry with it the prerogative franchises, such as that of being a corporation, and does not operate as a

15, 34 Pac. 692, 42 Am. St. 756, and note; Harle-Haas Drug Co. v. Rogers Drug Co., 19 Wyo. 35, 113 Pac. 79, Ann. Cas. 1913E, 181, and note.

[18] McCallie & Jones v. Walton, 37 Ga. 611, 95 Am. Dec. 369; State v. Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Tripp v. Northwestern Nat. Bank, 41 Minn. 400, 43 N. W. 60; Shockley v. Fisher, 75 Mo. 498; Wilkinson v. Bauerle, 41 N. J. Eq. 635, 7 Atl. 514; Vanderpoel v. Gorman, 140 N. Y. 563, 35 N. E. 932, 24 L. R. A. 548, 37 Am. St. 601; De Ruyter v. Trustees, 3 Barb. Ch. (N. Y.) 119, citing authorities from many states; Warner v. Mower, 11 Vt. 385; Lamb v. Cecil, 25 W. Va. 288; 5 Thomp. Corp. (2nd ed.), §§ 6135, 6136. See also United States &c. Co. v. American &c. Co., 181 U. S. 434, 21 Sup. Ct. 670, 45 L. ed. 938; Smith v. Wells &c. Co., 148 Ind. 333, 46 N. E. 1000; Grand &c. Co. v. Rude &c. Co., 60 Kans. 196, 55 Pac. 848; Louisville &c. Co. v. Etheridge &c. Co., 19 Ky. Law 908, 43 S. W. 169; Birmingham &c. Co. v. Freeman, 15 Tex. Civ. App. 451, 39 S. W. 626; 8 Thomp. Corp., §§ 6135, 6157. But see Meloy v. Central Nat. Bank, 17 Wash. L. R. 68.

[19] Dodge v. Kenwood Ice Co., 204 Fed. 577; De Camp v. Alward, 52 Ind. 468; Descombes v. Wood, 91 Mo. 196, 4 N. W. 82, 60 Am. Rep. 239; Hutchinson v. Green, 91 Mo. 367, 1 S. W. 853; Calumet Paper Co. v. Haskell &c. Co., 144 Mo. 331, 45 S. W. 1115, 66 Am. St. 425; Ardesco Oil Co. v. North American &c. Co., 66 Pa. St. 375, 382; Wright v. Lee, 2 S. Dak. 596, 51 N. W. 706, 4 S. Dak. 237, 55 N. W. 931; 5 Tohmp. Corp. (2nd ed.), § 6138. Compare Chew v. Ellingwood, 86 Mo. 260, 273, 56 Am. Rep. 429, and Eppright v. Nickerson, 78 Mo. 482.

[20] Simon v. Sevier Assn., 54 Ark. 58, 14 S. W. 1101; Chase v. Tuttle, 55 Conn. 455, 12 Atl. 874, 3 Am. St. 64; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516.

[21] Richardson v. Rogers, 45 Mich. 591, 8 N. W. 526. See also Chamberlain v. Bromberg, 83 Ala. 576, 3 So. 434. And an assignment to himself is void. Rogers v. Pell, 89 Hun (N. Y.) 159, 35 N. Y. 17.

dissolution.[22] Owing to the peculiar nature of a railroad company, however, it may be that the rules applicable to assignments and preferences by ordinary business corporations do not all apply with full force, if at all, to railroad companies, and there are very few cases in which a voluntary general assignment by such companies has been made.

§ 695 (603). Preferences by corporations.—As a general rule, in the absence of any charter or statutory provision to the contrary, a corporation may exercise the right to make an assignment to the same extent and in the same manner as a natural person. Preferences in general assignments are prohibited in many of the states, but where they are permitted they may be made, in the absence of any provision to the contrary, by corporations as well as by individuals.[23] And even where preferences in general assignments are forbidden, they may usually be made by mortgage, securing particular creditors, or by transfer of

[22] State v. Bank, 6 Gill. & J. (Md.) 205, 26 Am. Dec. 561; Town v. Bank, 2 Doug. (Mich.) 530; Arthur v. Commercial &c. Bank, 9 Sm. & M. (Miss.) 394, 48 Am. Dec. 719; Parsons v. Eureka Powder Works, 48 N. H. 66; Hurlbut v. Carter, 21 Barb. (N. Y.) 221; Germantown Pass. R. Co. v. Fitler, 60 Pa. St. 124, 100 Am. Dec. 546, and note: Shryock v. Basehore, 82 Pa. St. 159; Ohio L. &c. Co. v. Merchants' &c. Co., 30 Tenn. 1, 53 Am. Dec. 742. But see State v. Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109; Smith v. New York &c. Co., 18 Abb. Prac. (N. Y.) 419, and dissenting opinion of Story, J., in Beaston v. Farmers' Bank, 12 Pet. (U. S.) 102, 138, 9 L ed. 1017.

[23] Gould v. Little Rock &c. R. Co., 52 Fed. 680; Ringo v. Biscoe, 13 Ark. 563; Catlin v. Eagle Bank, 6 Conn. 233; Knoxville Iron Co. v. Wilkins &c. Co., 74 Ga. 493; Rollins v. Shaver &c. Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. 427; Bissell v. Besson, 47 N. J. Eq. 580, 22 Atl. 1077; Coats v. Donnell, 94 N. Y. 168; note to Lyons-Thomas Hardware Co. v. Perry Stove Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802; Bier v. Gorrell, 30 W. Va. 95, 3 S. E. 30, 8 Am. St. 17. See also 5 Thomp. Corp. (2nd ed.) §§ 6169, 6170, citing numerour cases, and approving this doctrine; 8 Thomp. Corp. §§ 6196, 6170. Contra, Rouse v. Merchants' Nat. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. 644, followed, as the law of Ohio, in Smith &c. Purifier Co. v. McGrotary, 136 U. S. 237, 10 Sup. St. 1017, 34 L. ed. 346; Lyons-Thomas Hardware Co. v. Perry Stove Co., 86 Tex. 143, 24 S. W. 16, 22 L. R. A. 802; Kankakee Woolen Mill Co. v. Kampe, 38 Mo. App. 229. See also 5 Thomp. Corp.

property to them in good faith before a general assignment is made.[24]

§ 696 (604). **Preference of stockholders and officers.**—It is generally held that stockholders, who are also creditors, may be preferred in good faith as such creditors.[25] It is also held, in some jurisdictions, that directors and officers may likewise be preferred,[26] but there are other authorities to the effect that, after a corporation has become clearly insolvent, directors and officers cannot take advantage of their position to obtain a preference for unsecured debts which there was no agreement to secure while the corporation was solvent or at the time the debts were

(2nd ed.), § 6168, citing additional cases.

[24] Ragland v. McFall, 137 Ill. 81, 27 N. E. 75; Henderson v. Indiana Trust Co., 143 Ind. 561, 40 N. E. 516, and authorities cited in last note, supra; Rollins v. Shaver &c. Co., 80 Iowa 380, 45 N. W. 1037, 20 Am. St. 427; Warner v. Littlefield, 89 Mich. 329, 50 N. W. 721; Bank of Montreal v. Potts &c. Co., 90 Mich. 345, 51 N. W. 890.

[25] Reichwald v. Commercial Hotel Co., 106 Ill. 439; Garrett v. Burlington &c. Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Warfield &c. Co. v. Marshall &c. Co., 72 Iowa 666, 34 N. W. 467, 2 Am. St. 263; Lexington &c. Co. v. Page, 17 B. Mon. (Ky.) 412, 66 Am. Dec. 165; Burr v. McDonald, 3 Grat. (Va.) 215; notes in 43 L. R. A. (N. S.) 874, and Ann. Cas. 1914B, 1261. Contra, Swepson v. Exchange &c. Bank, 9 Lea (Tenn.) 713. And see Howell v. Crawford, 77 Ark. 12, 89 S. W. 1046.

[26] Gould v. Little Rock &c. R. Co., 52 Fed. 680; Brown v. Grand Rapids &c. Co., 58 Fed. 286, 22 L. R. A. 817; Smith v. Skeary, 47 Conn. 47; Buell v. Buckingham, 16 Iowa 284, 85 Am. Dec. 516; Garrett v. Burlington &c. Co., 70 Iowa 697, 29 N. W. 395, 59 Am. Rep. 461; Bank of Montreal v. Potts &c. Co., 90 Mich. 345, 51 N. W. 512; Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. 637; Schufeldt v. Smith, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. 628; Duncomb v. New York &c. R. Co., 84 N. Y. 190; Blaloch v. Kernersville &c. Co., 110 N. Car. 99, 14 S. E. 501; Planters' Bank v. Whittle, 78 Va. 737; Nappanee Canning Co. v. Reid, Murdock &c. Co., 159 Ind. 614, 64 N. E. 870, 1115, 59 L. R. A. 199, citing, in the majority, and dissenting opinions, most of the authorities on both sides. In a later case the Appellate Court of Indiana recommended to the Supreme Court that the Indiana case last above cited be overruled, but the supreme court reaffirmed the doctrine. City Nat. Bank v. Goshen &c. Co., 163 Ind. 214, 71 N. E. 652. See also for additional authorities

created.[27] A corporation may, however, in good faith, and while solvent, borrow money from a director, or officer, for use in its business, and give a mortgage to him to secure its payment, and the fact that the corporation afterwards becomes insolvent does not impair the validity of his security.[28] Indeed, according to what seems to be the better reason and many of the later authorities a corporation may, in good faith, secure its directors who have lent their credit to it, "to induce a continuance of the loan of the credit, and obtain renewals of maturing paper at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending

upholding such a preference, 5 Thomp. Corp. (2nd ed.) § 6191; Fricke v. Angenmeier, 53 Ind. App. 140, 101 N. E. 329.

[27] Adams v. Kehlor &c. Co., 35 Fed. 433; Howe &c. Co. v. Sanford &c. Co., 44 Fed. 231; (reversed in Sanford Fork &c. Co. v. Howe, &c. Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. ed. 713); Consolidated Tank Line Co. v. Kansas City &c. Co., 45 Fed. 7; Farmers' Loan &c. Co. v. San Diego &c. R. Co., 45 Fed. 518; Bosworth v. Jacksonville &c. Bank, 64 Fed. 615; Bradley v. Farwell, 1 Holmes (U. S.) 433, Fed. Cas. No. 1779; Corey v. Wadsworth, 99 Ala. 68, 11 So. 350, 23 L. R. A. 618, 42 Am. St. 29; (overruled in O'Bear &c. Co. v. Volfer, 106 Ala. 205, 17 So. 525, 54 Am. St. 31); Beach v. Miller, 130 Ill. 162, 22 N. E. 464, 17 Am. St. 291, and note; Roseboom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Ingwersen v. Edgecombe, 42 Nebr. 740, 60 N. W. 1032; Smith v. Putnam, 61 N. H. 632; Stratton v. Allen, 16 N. J. Eq. 229; Montgomery v. Phillips, 53 N. J. Eq. 203, 31 Atl. 622; Hill v. Pioneer Lumber Co., 113 N. Car. 173, 18 S. E. 107, 21 L. R. A. 560, 37 Am. St. 621; Sicardi v. Keystone Oil Co., 149 Pa. St. 148, 24 Atl. 163; Olney v. Conanicut &c. Co., 16 R. I. 597, 18 Atl. 181, 5 L. R. A. 361, 27 Am. St. 767, and note; Portland &c. Co. v. Rossiter, 16 S. Dak. 633, 94 N. W. 702, 102 Am. St. 726, and note; Sweeney v. Grape Sugar Co., 30 W. Va. 443, 4 S. E. 431, 8 Am. St. 88; Haywood v. Lincoln Lumber Co., 64 Wis. 639, 26 N. W. 184; Gaslight &c. Co. v. Terrell, L. R. 10 Eq. 168. See also Sawyer v. Hoag, 17 Wall. (U. S.) 610, 21 L. ed. 731. This view is apparently in accord with the weight of authority. 5 Thomp. Corp. (2nd ed.) § 6190, and additional cases there cited. See also 8 Thomp. Corp., § 6207.

[28] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. ed. 328; Hotel Co. v. Wade, 97 U. S. 13, 24 L. ed. 917; American Exchange Nat. Bank v. Ward, 111 Fed. 782, 52 L. R. A. 356; O'Connor &c. Co. v. Coosa &c. Co., 95 Ala. 614, 10 So. 290, 36 Am. St. 251; Mullanphy Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. 401; Saltmarsh v. Spaulding, 147

and expecting to continue its business."[29] And where advancements are made by directors under an agreement, made at the time, that they are to have securities, it has been held that the mere fact that such securities are not given to them until after the corporation becomes insolvent will not affect their validity where the entire transaction is in good faith.[30] Such transactions will, however, be closely scrutinized,[31] and the rule announced in the later decisions of the federal courts would not, perhaps, be extended by them to cases in which a general assignment is made or a mortgage executed to secure a director after

Mass. 224, 17 N. E. 316; Paulding v. Chrome Steel Co., 94 N. Y. 334; Neal's Appeal, 129 Pa. St. 64, 18 Atl. 564; Pyle Works, Re, 63 L. T. R. 628.

[29] Per Brewer, J., in Sanford Fork &c. Co. v. Howe, Browne & Co., 157 U. S. 312, 15 Sup. Ct. 620, 39 L. ed. 713. See also County Court v. Baltimore &c. R. Co., 35 Fed. 161; Gould v. Little Rock &c. R. Co., 52 Fed. 680; Hopson v. Aetna &c. Co., 50 Conn. 597; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 41 N. E. 185, 31 L. R. A. 265, 47 Am. St. 245; Henderson v. Indiana Trust Co., 143 Ind. 561, 40 N. E. 516; Holt v. Bennett, 146 Mass. 437, 16 N. E. 5; Sahin v. Columbia Fuel Co., 25 Ore. 15, 35 Pac. 692, 42 Am. St. 756; Hill v. Standard &c. Co., 198 Pa. St. 446, 48 Atl. 432. "So a mortgage executed by a corporation whose debts exceed its assets, to secure a liability incurred by it or on its behalf, will be sustained, if it appears to have been given in good faith to keep the corporation upon its feet and enable it to continue the prosecution of its business. A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty, when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created. In such a crisis in its affairs, and to those ends, it may accept financial assistance from one of its directors, and by a mortgage upon its property secure the payment of money then loaned or advanced by him, or in that mode protect him against liability then incurred in its behalf by him." Per Harlan, J., in Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 501. Compare Wyman v. Bowman, 127 Fed. 257.

[30] See Stout v. Yaeger Mill Co., 13 Fed. 802; Baker v. Harpster, 42 Kans. 511, 22 Pac. 415. See also Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911.

[31] Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 588, 23 L. ed. 328; Richardson v. Green, 133 U. S. 30, 43, 10 Sup. Ct. 280, 33 L. ed. 516. See

the corporation has become hopelessly insolvent and has no intention of continuing business. Under such circumstances "entirely different considerations come into view," said Justice Harlan in a comparatively recent case,[32] from which we have already quoted. "In our judgment, when a corporation becomes insolvent and intends not to prosecute its business, or does not expect to make further effort to accomplish the object of its creation, its managing officers or directors come under a duty to distribute its property or its proceeds ratably among all creditor, having regard, of course, to valid liens or charges previously placed upon it. Their duty is 'to act up to the end or design' for which the corporation was created,[33] and when they can no longer do so their function is to hold or distribute the property in their hands for the equal benefit of those entitled to it. Because of the existence of this duty in respect to a common fund in their hands to be administered, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of other creditors."[34] It is not, however, altogether safe to predict that this decision will be followed in every jurisdiction without question.[35]

also Rickerson &c. Co. v. Farrell &c Co., 75 Fed. 554; James Clark Co. v. Colton, 91 Md. 195, 46 Atl. 386, 49 L. R. A. 698.

[32] Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 502. See also Bosworth v. Jacksonville Nat. Bank, 64 Fed. 615.

[33] 1 Bl. Comm. 480.

[34] Sutton Mfg. Co. v. Hutchinson, 63 Fed. 496, 502. The court cites Lippincott v. Shaw Carriage Co., 25 Fed. 577, and cases following it. The authority of that case and of some of the others cited is weakened, if not destroyed, by the decision in Sanford Fork &c. Co. v. Howe, Browre & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. ed. 713, but this does not necessarily impair the force of Judge Harlan's decision, for the Lippincott case was an extreme case and went much further than Judge Harlan did.

[35] The opinion of Justice Harlan, so far as it states that the corporation is not required by any duty to creditor to suspend operations the moment it becomes embarrassed and that it may accept financial aid from the directors in good faith to keep it going and secure them, is quoted with approval in Wyman v. Bowman, 127 Fed. 257, 275, 276, and cited and distinguished in Chick v. Fuller, 114 Fed. 22, 29. See also Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 288, 292, 47 L. ed. 452; Mof-

§ 697 (605). **Statutory preference of employes.**—Statutes exist in many of the states giving laborers and employes a lien or preference upon the insolvency or dissolution of a corporation. It is generally held that such statutes are to be liberally construed,[36] but different courts have not always reached the same conclusion as to what persons are entitled to the benefit of the statute, although the provisions of many of the statutes are very similar. An independent contractor is clearly not a laborer or an employe within the meaning of such a statute.[37] Nor are the regular officers of a corporation ordinarily included,[38] although it has been held that a head miller,[39] the superintendent of a gas company,[40] and the foreman or "boss" of a mine,[41] are entitled to the benefit of the statute.[42] An attorney, employed for a special purpose, is not entitled to a preference under a

fat v. Smith, 101 Fed. 771; Northwestern &c. Co. v. Cotton &c. Co., 70 Fed. 155, 160.

[36] Mining Co. v. Cullins, 104 U. S. 176, 26 L. ed. 704; Pendergast v. Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849, 3 Lewis Am. R. & Corp. 645; Bass v. Doerman, 112 Ind. 390, 14 N. E. 377. And it has been held that a court can give no preference to other classes than those to which preferences are confined by statute. Massey v. Camden &c. R. Co., 78 N. J. Eq. 539, 80 Atl. 557, Ann. Cas. 1912B, 1246.

[37] Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. ed. 310; Tod v. Kentucky Union R. Co., 52 Fed. 241, 18 L. R. A. 305; Delaware &c R. Co. v. Oxford Iron Co., 33 N. J. Eq. 192. Nor a sub-contractor, although he personally works with the men employed by him to work on part of a railroad, which he has contracted to construct at a fixed price. Rogers v. Dexter &c. R. Co., 85 Maine 372, 27 Atl. 257, 21 L. R. A. 528. See also Lehigh Coal &c. Co. v. Central R. Co., 29 N. J. Eq. 252.

[38] Black, Appeal of, 83 Mich. 513, 47 N. W. 342.

[39] Wells v. Southern &c. R. Co., 1 Fed. 270; England v. Beatty Organ &c. Co., 41 N. J. Eq. 470, 4 Atl. 307.

[40] Pendergast v. Yandes, 124 Ind. 159, 24 N. E. 724, 8 L. R. A. 849, 3 Lewis Am. R. & Corp. 645. It appeared, however, that he was not an officer or general manager, but merely superintended the digging of trenches and laying of pipes.

[41] Mining Co. v. Cullins, 104 U. S. 176, 26 L. ed. 704; Capron v. Strout, 11 Nev. 304.

[42] But compare Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. 436; Missouri &c. R. Co. v. Baker, 14 Kans. 563; People v. Remington, 45 Hun (N. Y.) 329; Pennsylvania &c. R. Co. v. Leuffer, 84 Pa. St. 168, 24 Am. Rep. 189. See also notes to Pendergast v. Yandes, 3 Lewis Am. R. & Corp. Cas. 645, 650, and Tod v. Kentucky Union R. Co., 52 Fed. 241,

statute preferring "wages or salaries to clerks, servants or employees."[43]

§ 698 (606). What constitutes a dissolution.—As elsewhere stated, a dissolution may result from the expiration of the time to which the corporate life was limited, or by repeal of the charter under the reserved power of repeal; but, with these and one or two other exceptions, the general rule is that a corporation remains in esse until dissolved by judicial decree. Many acts and omissions may be cause for dissolution without operating of themselves to dissolve the corporation. Thus, as we have seen, insolvency does not work a dissolution,[44] nor does suspension of business,[45] omission to elect officers,[46] failure to exercise corporate powers,[47] lease or sale of all the corporate property,[48] the

18 L. R. A. 305, where the various statutes are referred to and the conflicting authorities collected. Ante, § 211.

[43] Louisville &c. R. Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. ed. 1023; Lewis v. Fisher, 80 Md. 139, 30 Atl. 608, 26 L. R. A. 278, 45 Am. St. 327. See also Manchester &c. Co., In re, L. R. (1893) 2 Ch. Div. 638, 60 Am. & Eng. R. Cas. 541. But compare Gurney v. Atlantic &c. R. Co., 58 N. Y. 358.

[44] Nor does a judicial decree of insolvency, together with an injunction against continuing business, and the appointment of a receiver. Second Nat. Bank v. New York &c. Co., 11 Fed. 532; Coburn v. Boston &c. Co., 10 Gray (Mass.) 243. See also Hirsch v. Independent Steel Co., 196 Fed. 104; Hasselman v. Japanese &c. Co., 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207.

[45] Valley Bank v. Ladies' &c. Sewing Society, 28 Kans. 423; Kansas City Hotel Co. v. Sauer, 65 Mo. 278; State v. Barron, 58 N. H. 370; Nimmons v. Tappan, 2 Sweeny (32 N. Y. Super.) 652; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103. See also Brookline &c. Co. v. Evans, 163 Mo. App. 564, 146 S. W. 828. But compare Stoltz v. Scott, 23 Idaho 104, 129 Pac. 340.

[46] Boston Glass Manufactory v. Langdon, 41 Mass. 49, 35 Am. Dec. 292; Packard v. Old Colony R. Co., 168 Mass. 92, 46 N. E. 433; Harris v. Mississippi Valley &c. R. Co., 51 Miss. 602; Allen v. New Jersey Southern R. Co., 49 How. Prac. (N. Y.) 14. See also Quitman Oil Co. v. Peacock, 14 Ga. App. 550, 81 S. E. 908.

[47] Swan Land &c. Co. v. Frank, 39 Fed. 456; Rollins v. Clay, 33 Maine 132; Russell v. McLellan, 14 Pick. (Mass.) 63; Slee v. Bloom, 5 Johns. Ch. (N. Y.) 366, reversed in Slee v. Bloom, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; Brandon Iron Co. v. Gleason, 24 Vt. 228.

[48] Swan Land &c. Co. v. Frank,

assignment of such property for the benefit of creditors,[49] or the appointment of a receiver.[50] The acquisition of all the stock by a single member does not necessarily work a dissolution;[51] nor does a consolidation necessarily operate as a complete dissolution of the old companies in all cases,[52] although it may do so.[53] The question is generally one of intent to be determined from

39 Fed. 456; Mabeu v. Gulf &c. Co., 173 Ala. 259, 55 So. 607, 35 L. R. A. (N. S.) 396; Bruffet v. Great Western &c. R. Co., 25 Ill. 353; People v. Union Gas &c. Co., 254 Ill. 395, 98 N. E. 768; Beidenkopf v. Des Moines &c. Ins. Co., 160 Iowa 629, 142 N. W. 434, 46 L. R. A. (N. S.) 290; State v. Western &c Co., 40 Kans 96, 19 Pac. 349, 10 Am. St. 166; Hill v. Fogg, 41 Mo. 563; Sewell v. East Cape &c. Co., 50 N. J. Eq. 717, 25 Atl. 929; Troy &c. R. Co. v. Kerr, 17 Barb. (N. Y.) 581; Commonwealth v. Central Pass. R. Co., 52 Pa. St. 506. But see Commonwealth v. Lumber City Water Co., 225 Pa. St. 317, 74 Atl. 238.

[49] DeCamp v. Alward, 52 Ind. 468; State v. Bank, 6 Gill & J. (Md.) 205, 26 Am. Dec. 561; Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292. Ante, § 694.

[50] National Bank v. Insurance Co., 104 U. S. 54, 26 L. ed. 693; Rosenblatt v. Johnston, 104 U. S. 462, 26 L. ed. 832; Ohio &c. R. Co. v. Russell, 115 Ill. 52, 3 N. E. 561; Heath v. Missouri &c. R Co., 83 Mo. 617; State v. Railroad Commissioners, 41 N. J. L. 235; Kincaid v. Dwinelle, 59 N. Y. 548; Jackson v. McInnis, 33 Ore. 529, 54 Pac. 884, 55 Pac. 535, 43 L. R. A. 128, 72 Am. St. 755; Moseby v. Burrow, 52 Tex. 396; Dewey v. St. Albans &c. Co., 56 Vt. 476, 48 Am. Rep. 803; Kirkpatrick v. State Board, 57 N. J. L. 53, 29 Atl. 442. See also Railroad Comrs. v. Great Southern R. Co., 185 Ala. 354, 64 So. 13, and notes in 2 L. R. A. (N. S.) 256, and 50 L. R. A. (N. S.) 383.

[51] Newton Mfg. Co. v. White, 42 Ga. 148; Louisville Banking Co. v. Eisenman, 94 Ky. 83, 21 S. W. 531 and 1049, 19 L. R. A. 684; Russell v. McLellan, 14 Pick. (Mass.) 63. See also Hopkins v. Roseclare &c. Co., 72 Ill. 373; Swift v. Smith, 65 Md. 428, 5 Atl. 534, 57 Am. Rep. 336; Wilde v. Jenkins, 4 Paige (N. Y.) 481; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; Button v. Hoffman, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131; Sharpe v. Dawes, 46 L. J. Q. B. 104. But see contra, Bellona Company's Case, 3 Bland (Md.) 442.

[52] Philadelphia &c. R. Co. v. Maryland, 10 How. (U. S.) 376, 13 L. ed. 461; Central R. &c. Co. v. Georgia, 92 U. S. 665, 23 L ed. 757; Lightner v. Boston & Albany R. Co., 1 Lowell (U. S.) 338, 340, Fed. Cas. No. 8343; Meyer v. Johnston, 64 Ala. 603; Boardman v. Lake Shore &c. R. Co., 84 N. Y. 157, 181.

[53] Clearwater v. Meredith, 1 Wall. (U. S.) 25, 40, 17 L. ed. 604; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357;

the statute and agreement of consolidation.[54] So, where the statute provides for a dissolution upon the failure to perform certain conditions or upon the happening of some contingency, it is largely a question of legislative intent as to whether the corporation is dissolved upon such failure or the happening of such contingency. As a general rule it is not dissolved by the mere failure to perform conditions subsequent,[55] nor by the happening of a contingency made by the statute a ground for forfeiture.[56]

§ 699 (607). **Judicial determination of dissolution.**—A judicial determination of the existence of such grounds in the particular instance and decree of forfeiture or dissolution is usually essential. But it is held that the legislature, in the charter or governing statute, may provide for a dissolution in certain cases of the kind specified without judicial decree.[57] This doctrine, however, should not be unduly extended, and, in order to justify its application in any case, it should clearly appear that the legislature intended that the matters specified should per se work a

Pullman Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 594, 6 Sup. Ct. 194, 29 L. ed. 499; Bishop v. Brainerd, 28 Conn. 289; McMahan v. Morrison, 16 Ind. 172, 79 Am. Dec. 418. See also Kansas &c. R. Co. v. Smith, 40 Kans. 192, 19 Pac. 636; Fee v. New Orleans &c. Co., 35 La. Ann. 413; Cheraw &c. R. Co. v. Commissioners, 88 N. Car. 519.

[54] Central R. &c. Co. v. Georgia, 92 U. S. 665, 670, 23 L. ed. 757; Wabash &c. R. Co. v. Ham, 114 U. S. 587, 595, 5 Sup. Ct. 1081, 29 L. ed. 235.

[55] Santa Rosa &c. R. Co. v. Central St. R. Co. (Cal.), 38 Pac. 986; State v. Fagan, 22 La. Ann. 545; Chesapeake &c. Co. v. Baltimore &c. R. Co., 4 G. & J. (Md.) 1, 121, 127; Briggs v. Cape Cod &c. Canal Co., 137 Mass. 71; New York Elevated R. Co., In re, 70 N. Y. 327, 338; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358. Compare, however, Mobile &c. Assn. v. Holmes, 189 Ala. 271, 65 So. 1020; Big 4 Advertising Co. v. Clingan, 15 Ariz. 34, 135 Pac. 713; Brandon v. Umpqua Lumber &c. Co., 166 Cal. 322, 136 Pac. 62; People v. Stilwell, 157 App. Div. 839, 142 N. Y. S. 881.

[56] La Grange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420. So, where the statute provides that a corporation shall be dissolved by a mortgage sale of its franchise and property, it is not dissolved by an illegal and fraudulent sale. White Mts. R. Co. v. White Mts. R. Co., 50 N. H. 50.

[57] Oakland R. Co. v. Oakland &c. R. Co., 45 Cal. 365, 13 Am. Rep. 181; Brooklyn W. &c. R. Co., Matter of, 75 N. Y. 335; Brooklyn Steam &c. Co. v. Brooklyn, 78 N. Y. 524. See review of cases in Bybee v. Oregon.

dissolution, and not merely that they should be sufficient for dissolution.[58]

§ 700 (608). Voluntary dissolution—Surrender of charter.—Ordinary business corporations, where the rights of the state or the public do not intervene, may cease to do business and surrender their charters by a unanimous vote of the stockholders,[59] although some authorities hold that the surrender of a charter must be accepted by the state.[60] But most of the cases holding that an acceptance on the part of the state is necessary were decided under special charters or under the old doctrine that the dissolution of a corporation extinguished all its debts. There seems to be no valid reason why a purely private corporation, incorporated under general laws and charged with no public duties, should not be allowed to voluntarily cease business and dissolve or surrender its charter without an express acceptance on the part of the state.[61] Nor is a unanimous vote of the stockholders always essential. A private business corporation should

&c. R. Co., 139 U. S. 663, 11 Sup. Ct. 641; also 8 Thomp. Corp. § 6474.

[58] Santa Rosa &c. R. Co. v. Central St. R. Co., 112 Cal. 436, 38 Pac. 986; Flint &c. Co. v. Woodhull, 25 Mich. 99, 12 Am. Rep. 233; People v. Manhattan Co., 9 Wend. (N. Y.) 351, 382; New York &c. Co. v. Smith, 148 N. Y. 540, 42 N. E. 1088; La Grange &c. R. Co. v. Rainey, 7 Coldw. (Tenn.) 420; Galveston &c. R. v. State, 81 Tex. 572, 17 S. W. 67; Vermont &c. R. Co. v. Vermont Cent. R. Co., 34 Vt. 1. See generally for discussion of this question and review of the above other authorities under various statutory provisions 5 Thomp. Corp. (2nd ed.), §§ 6474, 6475.

[59] Mumma v. Potomac Co., 8 Peters (U. S.) 281, 8 L. ed. 945; Mobile &c. R. Co. v. State, 29 Ala. 573; Read v. Frankfort Bank, 23 Maine 318; Webster v. Turner, 12 Hun (N. Y.) 264; Slee v. Bloom, 19 Johns (N. Y.) 456, 10 Am. Dec. 273; Bruce v. Platt, 80 N. Y. 379; Houston v. Jefferson College, 63 Pa. St. 428; 5 Thomp. Corp. (2nd ed.), § 6473. See also Freeo Valley R. Co. v. Hodges, 105 Ark. 314, 151 S. W. 281.

[60] Boston Glass Manufactory v. Langdon, 24 Pick. (Mass.) 49, 35 Am. Dec. 292; Town v. Bank, 2 Doug. (Mich.) 530; Kincaid v. Dwinelle, 59 N. Y. 448; Moseby v. Burrow, 52 Tex. 396.

[61] Merchants' and Planters' Line v. Waganer, 71 Ala. 581; Holmes &c. Co. v. Holmes &c. Co., 127 N. Y. 252, 27 N. E. 831, 24 Am. St. 448; 5 Thomp. Corp. (2nd. ed.), § 6473.

not be compelled to continue a losing business, which is certain to result in financial catastrophe or the failure of the object for which the company was incorporated, and, in such a case, a majority of the stockholders may surrender the charter and take steps to wind up the business.[62] And there are cases of this kind in which even the minority may compel the corporation to wind up its business.[63] But a charter cannot be voluntarily surrendered and the corporation dissolved in such a manner and under such circumstances as to escape liability for debts or preclude suits therefor.[64] For this purpose the corporation still has a qualified existence,[65] which is generally provided for by statute. Railroad companies, unlike strictly private corporations, owe a duty to the public, and they cannot, therefore, voluntarily cease to do business and dissolve without the consent of the state, no matter what may be the true rule in regard to strictly private corporations. No matter whether all the stockholders consent or not, the corporation cannot evade its duties to the public by a voluntary dissolution and surrender or transfer of its

[62] Hancock v. Holbrook, 9 Fed. 353; Price v. Holcomb, 89 Iowa 123, 56 N. W. 407; Trisconi v. Winship, 43 La. Ann. 45, 9 So. 29, 26 Am. St. 175; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Black v. Delaware &c. Co., 22 N. J. Eq. 130; Lauman v. Lebanon &c. R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; McCurdy v. Myers, 44 Pa. St. 535; O'Connor v. Knoxville Hotel Co., 93 Tenn. 708, 28 S. W. 308. See also Bowditch v. Jackson Co., 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366 and note. But see Polar Star Lodge v. Polar Star Lodge, 16 La. Ann. 53; Berry v. Broach, 65 Miss. 450, 4 So. 117.

[63] Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; Masters v. Electric &c. Co., 6 Daly (N. Y.) 455; Marr v. Bank, 4 Coldw. (Tenn.) 471; O'Connor v. Knoxville &c. Co., 93 Tenn. 708, 28 S. W. 308; Bristol &c. Bank, In re, L. R. 44 Ch. Div. 703. But not ordinarily, Denike v. New York &c. Co., 80 N. Y. 599; Pyrolusite &c. Co., Matter of, 29 Hun (N. Y.) 429; Hardon v. Newton, 14 Blatchf. (U. S.) 376, Fed. Cas. No. 6054; Curien v. Santini, 16 La. Ann. 27; Pratt v. Jewett, 9 Gray (Mass.) 34; Suburban Hotel Co., In re, L. R. 2 Ch. 737.

[64] Portland &c. Co. v. Portland, 12 B. Mon. (Ky.) 77; Baptist Meeting House v. Webb, 66 Maine 398; Kincaid v. Dwinelle, 59 N. Y. 548, 552; Directors of Binghampton &c. Co., In re, 143 N. Y. 261, 38 N. E. 297; 5 Thomp. Corp. (2nd ed.), § 6478; White's Supp. Thomp. Corp., § 6478.

[65] 5 Thomp. Corp. (2nd ed.), § 6478.

charter and franchises without the consent of the state,[66] except, perhaps, where it is clearly insolvent and incapable of performing such duties.[67] But it has been held that where a railroad company has lost all its property by judicial sale, has done no business for a great many years, and has neither elected new officers nor had any old officers within the state during such period, a surrender of its charter and acceptance of such surrender by the state will be presumed.[68]

§ 701 (609). Proceedings to dissolve.—The dissolution of a corporation will not be decreed in a foreign jurisdiction,[69] but a valid decree of dissolution in the state in which the charter was granted is generally binding everywhere.[70] Notwithstanding such a decree, however, it has been held that, for the protection of home creditors, the corporation may be treated in another state in which it does business and in which such creditors re-

[66] New Orleans &c. R. Co. v. State, 112 U. S. 12, 5 Sup. Ct. 19, 28 L. ed. 619; Central R. &c. Co. v. Collins, 40 Ga. 582; Treadwell v. Salisbury Mfg. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Lauman v. Lebanon Valley R. Co., 30 Pa. St. 42, 72 Am. Dec. 685; Wilson v. Central Bridge Co., 9 R. I. 590. See also State v. Western &c. R. Co., 95 N. Car. 602; Attorney-General v. Superior &c. R. Co., 93 Wis. 604, 67 N. W. 1138.

[67] Boston &c. R. Co. v. New York &c. R. Co., 13 R. I. 260. See also State v. Jack, 145 Fed. 281. And compare Southern R. Co. v. Hatchett, 174 Ky. 463, 192 S. W. 694; Enid &c. R. Co. v. State (Tex. Civ. App.), 181 S. W. 498.

[68] Combes v. Keyes, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. 839.

[69] Society v. New Haven, 8 Wheat. (U. S.) 464, 5 L. ed. 662; Harris &c. Lumber Co. v. Coffin, 179 Fed. 257; Importing &c. Co. v. Locke, 50 Ala. 332; Federal Un. Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 374; North &c. Co. v. People, 147 Ill. 234, 35 N. E. 608; Heitkamp v. American &c. Co., 158 Ill. App. 587; Miller v. Hawkeye &c. Co., 156 Iowa 557, 137 N. W. 507; Wilkins v. Thorne, 60 Md. 253; Folger v. Columbia &c. Co., 99 Mass. 267, 96 Am. Dec. 747, and note; Merrick v. Van Santvoord, 34 N. Y. 208; East Line &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690. A federal court, sitting as a court of equity, has no power, in the absence of any statute conferring it, to dissolve a foreign corporation and wind up its affairs. Republican &c. Mines v. Brown, 58 Fed. 644, 48 Am. & Eng. Corp. Cas. 28.

[70] Remington v. Samana Bay Co., 140 Mass. 494, 5 N. E. 292.

side, as still in existence in a certain sense for the purpose of enabling them to reach its effects in that state,[71] at least where an action has been commenced against it therein before the decree of dissolution in the state of its birth.[72] Statutes exist in most of the states providing more or less specifically the mode of dissolving and winding up a corporation, and keeping it alive for that purpose after it has surrendered its charter or is so far dissolved as to be unable to carry on its regular business.[73] In the absence of a statute giving courts of equity jurisdiction it is generally, although not uniformly, held that proceeding for the forfeiture of a charter must be had in a court of law, usually by quo warranto, at the suit of the state or its proper representatives.[74] But the right of the state to have the charter forfeited and the right of creditors and stockholders to the protection of a court of equity are two different things. On the one hand, it is true that there are many grounds or circumstances which would be cause for forfeiture at the suit of the state without giving the stockholders or creditors any right to interfere, no matter whether the state enforces the forfeiture or waives it. So, on the other hand, there may be circumstances under which creditors or stockholders may obtain relief even to the extent of winding up the affairs of the corporation and virtually dissolving it, although there might not be sufficient ground for forfeiture by the state; and insolvency, which may be cause for forfeiture, may also, under certain circumstances, as, for instance, where it is impossible to accomplish the purpose of the incorporation, be cause for winding up the corporate affairs at

[71] Life Assn. v. Fassett, 102 Ill. 315.

[72] Hunt v. Columbian, &c. Co., 55 Maine 290, 92 Am. Dec. 592; Henry v. Stuart, 14 Phila. (Pa.) 110.

[73] Tuscaloosa, &c. Assn. v. Green, 48 Ala. 346; St. Louis, &c. Coal Co. v. Sandoval Coal Co., 111 Ill. 32; Herron v. Vance, 17 Ind. 595; Mariners' Bank v. Sewall, 50 Maine 220; Folger v. Chase, 18 Pick. (Mass.) 63; Von Glahn v. De Rosset, 81 N. Car. 467; Stetson v. City Bank, 12 Ohio St. 577; Marstaller v. Mills, 143 N. Y. 398, 38 N. E. 370.

[74] See ante, §§ 64, 65; Republican M. S. Mines v. Brown, 58 Fed. 645, 24 L. R. A. 776; Wheeler v. Pullman, &c. Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; People v. Weigley, 155 Ill. 491, 40 N. E. 300; See also People v. Illinois Cent. R. Co. (143 Ill. App. 337); Folger v. Columbian, &c. Co., 99 Mass. 267, 96 Am. Dec.

the suit of creditors or shareholders, at least under the statutes of many of the states.[75]

§ 702 (610). **Dissolution in case of consolidated company.**— Where by the consolidation of corporations of several states a new corporation is formed, which exists under the laws of two or more states it has been held that each of the original companies remains liable to be proceeded against under the insolvent laws of the state by which it was created on account of its separate indebtedness.[76] In case it has maintained no distinct place of business and has chosen no new officers in the state, the original place of business of the defendant corporation will be regarded as continuing to be such for the purposes of the suit; and its former officers, for purposes of service and place of suit, will be regarded as the officers of the company.[77] It has also been held that the new corporation formed by such consolidation is liable to be proceeded against in bankruptcy in either of the states under whose laws it was formed,[78] and it may be wound

747, and note in which many authorities are cited; Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814, 11 L. R. A. 480; Strong v. McCagg, 55 Wis. 624, 13 N. W. 895; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21. In Conklin v. United States, 140 Fed. 219, it is held that a court of equity, without statutory authority, can not decree the dissolution of a corporation. See also late cases cited in White's Supp. (8 Thomp. Corp.) §§ 6510, 6520.

[75] Merchants' & Planters' Line v. Waganer, 71 Ala. 581; Baker v. Backus, 32 Ill. 79; Hunt v. Le Grand, &c. Co., 143 Ill. 118, 32 N. E. 525; Miner v. Belle Isle Ice Co., 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, 6 Lewis' Am. R. & Corp. 660; Newfoundland R. Co. v. Schack, 40 N. J. Eq. 222, 1 Atl. 23; Mickles v. Rochester, &c. Bank, 11 Paige (N. Y.) 118, 126, 42 Am. Dec. 103; Ward v. Sea Ins. Co., 7 Paige (N. Y.) 294; Hitch v. Hawley, 132 N. Y. 212, 30 N. E. 401; O'Connor v. Knoxville, &c. Co., 93 Tenn. 708, 28 S. W. 308; Hurst v. Coe, 30 W. Va. 158, 3 S. E. 564; Stevens v. Empire Casualty Co., 180 Fed. 283 (under W. Va. statute). In New York it seems that creditors must be judgment creditors before they can maintain such a suit. Cole v. Knickerbocker &c. Co., 23 Hun (N. Y.) 255. But see Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551; 2 Lewis' Am. R. & Corp. 727; White v. University Land Co., 49 Mo. App. 450.

[76] Platt v. New York, &c. R. Co., 26 Conn. 544.

[77] Platt v. New York, &c. R. Co., 26 Conn. 544.

[78] Boston, &c. R. Co., In re, 9 Blatch. (U. S.) 101, Fed. Cas. No. 1677.

up and dissolved in one state without its franchise in the other states being affected.[79] Each state usually retains jurisdiction over the portion of the road within its borders, but the effect of the consolidation upon the old companies depends, as we have elsewhere stated, very largely upon the statute and agreement of consolidation in the particular case.[81]

§ 703 (611). **Effect of dissolution.**—It was formerly held that, upon the dissolution of a corporation, its real estate reverted to the grantor and its personal property to the state or sovereign, and that the debts due to it and from it were forgiven and extinguished, but this is no longer the rule.[82] The modern doctrine is well stated by Justice Miller in a recent case.[83] Speaking of the effect of the repeal of a charter, he says: "In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state, is abrogated by repeal of the law which granted these special rights. Personal

[79] Hart v. Boston, &c. R. Co., 40 Conn. 524. See also East Line, &c. R. Co. v. State, 75 Tex. 434, 12 S. W. 690. Compare Graham v. Boston, &c. R. C., 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. ed. 196; Covington, &c. Bridge Co. v. Mayer, 31 Ohio St. 317.

[81] It usually ends the corporate existence or power of the old companies so far at least as to prevent them from continuing to do business and perform corporate acts and hold and exercise franchises. State v. Grant University, 115 Tenn. 238, 90 S. W. 294. See also Rochester R. Co. v. Rochester, 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784.

[82] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300, 336; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. 684, 717. Notes to State Bank v. State, 12 Am. Dec. 234, 239; 5 Thomp. Corp. (2nd ed.) §§ 6551, 6585 et seq. That it is not the rule at least as to other than public corporations, see Huber v. Martin, 127 Wis. 412, 105 N. W. 1031; Mormon Church v. United States, 136 U. S. 1, 17, 10 Sup. Ct. 792, 34 L. ed. 481; Higginson, In re (1899), 79 L. T. Rep. 673. Debts are not extinguished. Blake v. Portsmouth, &c. R. Co., 39 N. H. 435; Howe v. Robinson, 20 Fla. 352; McCoy v. Farmer, 65 Mo. 244. Nor are contract obligations generally. Mumma v. Potomac Co., 8 Peters (U. S.) 281, 8 L. ed. 945. Nor a covenant in a lease to pay rent. People v. National Trust Co., 82 N. Y. 283. But it is held that stock cannot be transferred after dissolution so as to pass the legal title. James v. Woodruff, 2 Denio (N. Y.) 574.

[83] Greenwood v. Freight Co., 105 U. S. 13, 18, 26 L. ed. 961.

and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired, and which do not, in their nature, depend upon the general powers conferred by the charter, are not destroyed by such repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights."[84]

§ 704 (612). Corporation may have a qualified existence after dissolution.—The corporation may be, and is, by statute in many of the states, kept alive in a qualified sense for a certain period in order to wind up its affairs, but it cannot carry on new business under its charter. Thus, where such a statute provided that it should continue to be a body corporate for three years for the purpose of closing up its business and disposing of its property, it was held that the minority stockholders were entitled to have the property sold and the proceeds, after paying debts, distributed as in case of the termination of a partnership; that the majority had no right to transfer the assets to a new corporation designed to continue the business of the old, at a valuation fixed by themselves, and to compel the minority to accept a pro rata amount of stock in the new company or a pro rata amount in cash at such valuation, and that the directors could be compelled to account to the stockholders for their acts and doings where they continued the business of the corporation for a year after

[84] See also Brown v. Schicier, 118 Fed. 981; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684; Miner v. New York, &c. R. Co., 123 N. Y. 242, 25 N. E. 339; People v. De Graw, 133 N. Y. 254, 30 N. E. 1006; International, &c. R. Co. v. State, 75 Tex. 356, 378, 12 S. W. 685; Ante, §§ 378, 385, 601. The general rule now is that the property vests in the stockholders, subject to the rights of creditors or corporate liabilities, 5 Thomp. Corp. (2nd ed.) § 6586; Whites' Supp. §§ 6585-6589; Muncie, &c. Trac. Co. v. Citizens Gas &c. Co., 179 Ind. 322, 100 N. E. 65; Sioux City etc. R. Co. v. Trust Co., 173 U. S. 99, 19 Sup. Ct. 341, 43 L. ed. 628; Brown v. Schleier, 118 Fed. 981; Geddis v. Northwestern Trust

its dissolution.[85] As a general rule, in the absence of any provision to the contrary, a corporation can neither sue nor be sued after its dissolution,[86] and suits already commenced against it are abated.[87] In many of the states, however, the statutes to which we have already referred keep the corporation alive for the purpose of suing and being sued in winding up its affairs.[88]

Co., 23 S. Dak. 531, 122 N. W. 587; Taylor v. Interstate Invest. Co., 75 Wash. 490, 135 Pac. 240.

[85] Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. ed. 524, 1 Lewis Am. R. & Corp. 227. See also to same effect, Frothingham v. Barney, 6 Hun (N. Y.) 366. But the court will not always appoint a receiver and order a sale, for, where the valuation is just, a company may, prior to its dissolution, transfer its assets to a new company to discharge its liabilities and carry on the business and give the stockholders the option of taking cash or stock in such new company, where there is no question of its ability to carry out the arrangement. Baltimore, &c. R. Co. v. Cannon, 72 Md. 493, 20 Atl. 123, 3 Lewis Am. R. & Corp. Cas. 202; Sawyer v. Dubuque, &c. Co., 77 Iowa 242, 42 N. W. 300; Treadwell v. Salisbury, &c. Co., 7 Gray (Mass.) 393, 66 Am. Dec. 490; Buford v. Keokuk Northern Line, &c. Co., 3 Mo. App. 159.

[86] Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 17 L. R. A. 375; Newhall v. Western Zinc Co., 164 Cal. 380, 128 Pac. 1040; Brandom Umpqua Lumber &c. Co., 166 Cal. 322, 136 Pac. 62; Logan v. Western, &c. R. Co., 87 Ga. 533, 13 S. E. 516; City Ins. Co. v. Commercial Bank, 68 Ill. 348; Buck Stove Co. v. Vickers, 80 Kans. 29, 101 Pac. 668; Bank of Louisiana v. Wilson, 19 La. Ann. 1; Merrill v. Suffolk Bank, 31 Maine 57, 50 Am. Dec. 649; Gold v. Clyne, 58 Hun 419, 12 N. Y. S. 531; Dobson v. Simonton, 86 N. Car. 492; Miami, &c. Co. v. Gano, 13 Ohio 269.

[87] National Bank v. Colby, 21 Wall. (U. S.) 609, 22 L. ed. 687; Saltmarsh v. Planters', &c. Bank, 17 Ala. 761; Terry v. Merchants' &c. Bank, 66 Ga. 177; Venable Bros. v. Southern etc. Co., 135 Ga. 508, 69 S. E. 822, 32 L. R. A. (N. S.) 446, and other cases there cited in note; Thornton v. Marginal Freight R. Co., 123 Mass. 32; New York, &c. Co., In re, 33 N. Y. S. 726, 67 N. Y. St. 549; McCulloch v. Norwood, 58 N. Y. 562; Ingraham v. Terry, 11 Humph. (Tenn.) 572; note to May v. State Bank, 2 Rob. 56 (Va.), 40 Am. Dec. 726, 737. But compare Platt v. Archer, 9 Blatchf. (U. S.) 559, Fed. Cas. No. 11213; Lindell v. Benton, 6 Mo. 361; Giles v. Stanton, 86 Tex. 620, 26 S. W. 615.

[88] Kelley &c. Co. v. Howard M. Hooker Co., 178 Fed. 71; Herron v. Vance, 17 Ind. 595; Castles' Admr. v. Acrogen Coal Co., 145 Ky. 591, 140 S. W. 1034; Foster v. Essex Bank, 16 Mass. 245, 8 Am. Dec. 135; Kansas City Hotel Co. v. Sauer, 65 Mo. 279; Stetson v. City Bank, 2 Ohio St. 167; Greenbrier Lumber Co.

In other states receivers or trustees are appointed for this purpose.[89] It has also been held, in a state in which corporations are kept alive by statute for the purpose of suing and being sued, that a corporation which continued to do business, without winding up, after its charter had expired, could be sued in the corporate name for a tort committed by it while carrying on such business;[90] but it has been held in Indiana that stockholders are not bound by a contract made by the officers of a corporation after the repeal or forfeiture of its charter.[91]

§ 705 (613). Disposition of property on dissolution.—Creditors do not lose their rights nor do stockholders lose their interest in the property upon the dissolution of a corporation. The assets of the corporation become a trust fund for the payment of corporate creditors, and the surplus belongs to the stockholders.[92] Debts due the corporation, choses in action,[93] and certain so-called franchises or rights and powers,[94] which may be regarded as property, survive the dissolution, and may be treated

v. Ward, 30 W. Va. 43, 3 S. E. 227; and authorities cited in White's Supp. Thomp. Corp. § 6575.

[89] 5 Thomp. Corp. (2nd ed.), § 6598.

[90] Miller v. Newberg, &c. Co., 31 W. Va. 836, 8 S. E. 600, 13 Am. St. 903.

[91] Wilson v. Tesson, 12 Ind. 285. See also Butler v. Beach, 82 Conn. 417, 74 Atl. 748; United States v. Poe, 120 Md. 89, 87 Atl. 933.

[92] Bacon v. Robertson, 18 How. (U. S.) 480, 486, 15 L. ed. 406; Lum v. Robertson, 6 Wall. (U. S.) 277, 18 L. ed. 743; Lothrop v. Stedman, 42 Conn. 583, 13 Blatchf. (U. S.) 134, Fed. Cas. No. 8519; Montgomery, &c. R. Co. v. Branch, 59 Ala. 139; Commercial Fire Ins. Co. v. Board, 99 Ala. 1, 14 So. 490, 42 Am. St. 1; Heman v. Britton, 88 Mo. 549; People v. National Trust Co., 82 N. Y. 283; Western, &c. R. Co. v. Rollins, 82 N. Car. 523; Shamokin Valley, &c. R. Co. v. Malone, 85 Pa. St. 25. See ante, § 692; also 5 Thomp. Corp. (2nd ed.) § 6587; 8 Thomp. Corp. §§ 6585, 6609, et seq. The authorities above cited show that it is virtually a trust fund for shareholders, after creditors are paid, as well as for the creditors themselves. But see Knott v. Evening Post, 124 Fed. 342.

[93] Mumma v. Potomac Co., 8 Pet. (U. S.) 281, 8 L. ed. 945; New Jersey v. Yard, 95 U. S. 104, 24 L. ed. 352; Read v. Frankfort Bank, 23 Maine 318; Thornton v. Marginal Freight R. Co., 123 Mass. 32.

[94] New Orleans, &c. R. Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. ed. 244; People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. 684, and note; Inter-

and disposed of as other property for the benefit of creditors and shareholders. But the franchise to be a corporation does not survive,[95] and it would seem that all such franchises or powers as are "dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the state," are abrogated by the repeal of the law which granted them, under the reserved power of repeal.[96] So, it has been held that the special privilege of immunity from taxation does not ordinarily survive the dissolution of the corporation.[97] If the legislature has failed to make provision for the collection of debts, the distribution of the assets and the protection of creditors and shareholders, equity will provide the means.[98] After the claims of creditors are satis-

national, &c. R. Co. v. State, 75 Tex. 356, 378, 12 S. W. 685; Hall v. Sullivan R. Co., 1 Brunner's C. C. 613. See also Scotland v. Thomas, 94 U. S. 682, 24 L. ed. 219; Greenwood v. Union Freight Co., 105 U. S. 13, 26 L. ed. 961; Hannibal, &c. R. Co. v. Marion County, 36 Mo. 294.

[95] See Memphis, &c. R. Co. v. Railroad Comrs., 112 U. S. 609, 5 Sup. Ct. 299, 28 L. ed. 837; Willamette Mfg. Co. v. Bank, 119 U. S. 191, 7 Sup. Ct. 187, 30 L. ed. 384; Southern, &c Co. v. Orton, 32 Fed. 457; Coe v. Columbus, &c. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518, and note.

[96] Tomlinson v. Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204; Shields v. Ohio, 95 U. S. 319, 24 L. ed. 357; Railroad Co. v. Maine, 96 U. S. 499, 24 L. ed. 836; Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Erie, &c. R. Co. v. Casey, 26 Pa. St. 287; International, &c. R. Co. v. State, 75 Tex. 356, 378, 12 S. W. 685. See also St. Louis R. Co. v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567, 11 Lewis Am. R. & Corp. 709; Snell v. Chicago, 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; Commonwealth v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Grand Rapids Bridge Co. v. Prange, 35 Mich. 400, 24 Am. Rep. 585.

[97] Morgan v. Louisiana, 93 U. S. 217, 23 L. ed. 860; Railroad Co. v. Georgia, 98 U. S. 359, 25 L. ed. 185; Railroad Co. v. Hamblen, 102 U. S. 273, 26 L. ed. 152; See also Minneapolis, &c. R. Co. v. Gardner, 177 U. S. 332, 20 Sup. Ct. 656, 44 L. ed. 793; Norfolk, &c. R. Co. v. Pendleton 156 U. S. 667, 15 Sup. Ct. 413, 39 L. ed. 574. But see Tomlinson v. Branch, 15 Wall. (U. S.) 460, 21 L. ed. 189; Humphrey v. Pegues, 16 Wall. (U. S.) 244, 21 L. ed. 326. See ante, §§ 380, 381.

[98] Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. ed. 705; Greenwood v. Freight Co., 105 U. S. 13, 26 L. ed. 961; Howe v. Robinson, 20 Fla. 352; Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412; McCoy v.

fied the stockholders are entitled to share in the surplus in proportion to the amount of their respective interests.[99] Common and preferred stockholders share alike,[1] unless otherwise provided by statute or contract. If, however, a dividend has been properly declared out of surplus profits, leaving the capital of the company unimpaired, a shareholder entitled thereto may have it preferred to the claims of creditors, even though he may not have demanded it until after the company has become insolvent.[2]

§ 706 (614). **Rights of creditors upon dissolution.**—As we have already seen, the law protects, as far as possible, the interests of creditors upon the dissolution of a corporation. As a general rule the rights of creditors are such as they have at the time of the dissolution, and cannot be enlarged by subsequent proceedings after the corporate assets have passed into the hands of an assignee or receiver.[3] And shareholders or directors who are also lawful creditors are generally entitled, as such creditors, to share pro rata with the other creditors.[4] Unsecured

Farmer, 65 Mo. 244; Van Glahn v. De Rosset, 81 N. Car. 467; Moore v. Schoppert, 22 W. Va. 282.

[99] Wood v. Dummer, 3 Mason (U. S.) 308, Fed. Cas. No. 17944; Krebs v. Carlisle Bank, 2 Wall. Jr. 33, Fed. Cas. No. 7932; Shorb v. Beaudry, 56 Cal. 446; Dudley v. Price, 10 B. Mon. (Ky.) 84; Avery v. Central Bank, 221 Mo. 71, 119 S. W. 1106; Heath v. Barmore, 50 N. Y. 302; Hartman v. Insurance Co. of Valley of Virginia, 32 Grat. (Va.) 242 (in proportion to their "in-put"); Bridgewater Nav. Co., In re, 3 R. & Corp. L. J. 591; 5 Thomp. Corp. (2nd ed.), § 6588.

[1] Coltraine v. Baltimore &c. Assn., 110 Fed. 281; McGregor v. Home Ins. Co., 33 N. J. Eq. 181; Helliman v. Penna. Elec. &c. Co., 73 N. J. Eq. 269, 67 Atl. 834; London, &c. Co., In re, L. R. 5 Eq. 519.

[2] Le Roy v. Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657. See also Van Dyck v. McQuade, 86 N. Y. 38; Petition of Le Blanc, In re, 14 Hun (N. Y.) 8.

[3] Rosebloom v. Whittaker, 132 Ill. 81, 23 N. E. 339; Dean & Son's Appeal, 98 Pa. St. 101; Clinksales v. Pendleton, &c. Co., 9 S. Car. 318; Marr v. Bank, 4 Coldw. (Tenn.) 471. See also Argues v. Union Sav. Bank, 133 Cal. 139, 65 Pac. 307; Bisbee v. Mt. Battie Mfg. Co., 107 Maine 185, 77 Atl. 778.

[4] Bristol Milling &c. Co. v. Probasco, 64 Ind. 406; In re Pleasant Hill Lumber Co., 126 La. 743, 52 So. 1010; Benedum v. First Citizens Bank, 72 W. Va. 124, 78 S. E. 656.

creditors usually share pro rata, as do creditors of the same class with each other, but those who have taken a valid mortgage or similar security, or have otherwise obtained a lawful priority, will usually have the preference.[5] It is held, however, in a comparatively recent case, that the holders of railroad bonds guaranteed by another corporation are not entitled, upon the insolvency of such corporation, to have a dividend declared in their favor, or to have money retained in court to meet a possible future liability on the guaranty, as against other creditors whose claims are past due, where the railroad company is solvent and the bonds are not due.[6]

[5] Florsheim, &c. Co. v. Wettermark, 10 Tex. Civ. App. 102, 30 S. W. 505. See generally Hitner v. Diamond Steel Co., 176 Fed. 384; Stanwood v. Des Moines Sav. Bank, 178 Fed. 670; Union Nat. Bank v. Lyons, 220 Mo. 538, 119 S. W. 540; 5 Thomp. Corp. (2nd ed.) §§ 6611, 6613.

[6] Gay Mfg. Co. v. Gittings, 53 Fed. 45. The court held that the bondholders had no standing in court; that their claim was not a provable claim as it was not yet due and the liability was not fixed; and that they had no right to share as creditors in the present distribution of assets. Compare Tod v. Kentucky Land Co., 57 Fed. 47; Marbury v. Kentucky, &c. Co., 62 Fed. 335.

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